

# AN INTRODUCTION TO THE HISTORY OF INTEREST ARBITRATION IN THE UNITED STATES

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By Barry Winograd<sup>1</sup>

Ryan Howard, the star first baseman for the Philadelphia Phillies steps to the plate. Crowds wait for the slugger to smash a home run, something he has done with remarkable regularity since entering the big leagues a few years ago. Mr. Howard also hit a mammoth home run when he entered the salary arbitration forum of major league baseball in 2008, after he and the Phillies' owners were unable to agree on how much he should be paid. A salary arbitration panel heard the dispute under a system established by the collective bargaining agreement (CBA) covering the major league baseball clubs and the baseball players' union. After weighing the evidence on the parties' competing final offers, the arbitrators decided that Mr. Howard should be paid a record-setting \$10 million for his next baseball season.<sup>2</sup>

Burrowing beneath the headlines, the story was only in part the sizeable figure that Mr. Howard secured. A bigger story for fans of labor relations (and perhaps baseball, too) was the startling success, again, of an arbitration system designed to decide salaries if owners and players cannot agree. How could such a large salary award be considered an example of a successful system? The answer is that the award was a striking exception to the usual pattern. Over nearly three decades of baseball salary arbitration, only a handful of cases are resolved by arbitrators each year, while several dozen are settled through voluntary agreement between owners and players without going to hearing.<sup>3</sup> Instead of losing control over the outcome by risking the submission of their

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differences to arbitrators, the parties usually find a compromise that works, and the game goes on.<sup>4</sup> As an example of this, earlier in 2010, Tim Lincecum, the star pitcher for the San Francisco Giants, reached a settlement with his team just hours before a salary arbitration hearing was set to begin.<sup>5</sup>

Baseball's salary-setting procedure is a form of "interest arbitration." Parties use interest arbitration to settle differences when an impasse blocks a final agreement over contract terms. Interest arbitration, in effect, is a way to form a contract, either in whole, or in part. Interest arbitration differs from "grievance arbitration," a method of deciding disputes that arise after a collective bargaining agreement (CBA) is in place. Grievance disputes involve the interpretation and application of an agreement. To stick with the baseball example, a union relying on an existing CBA can challenge a player's suspension for misconduct by asking a grievance arbitrator to decide if there was sufficient cause for the discipline.

Interest arbitration is used not only for salary disagreements in baseball, or other sports, but for many labor relations disputes in private and public sector settings throughout the United States and Canada. In such cases, arbitrators typically are called upon to determine more than the wage payment to a single employee; at times, being asked to resolve disputes valued at tens of millions of dollars. If interest arbitration was not used, what would happen? Instead of living with a continued stalemate, the parties might opt for strikes and lockouts as economic weapons to press their will on an adversary.

In terms of motivating forces, interest arbitration works as an alternative because, in preparing for interest arbitration, each side feels

compelled to make offers that are more likely to be acceptable to an arbitrator as the day of reckoning approaches. In effect, the process requires negotiating parties to move closer in bargaining if one side's proposal is to be deemed more reasonable and adopted. If the system is functioning properly, each side will choose a negotiated outcome as a better alternative to the uncertainty of the decision-making outcome in arbitration. Paradoxically, interest arbitration works best when a hearing never takes place.

There has been heightened attention paid to interest arbitration because of the Employee Free Choice Act (EFCA), a legislative proposal to amend the National Labor Relations Act (NLRA) in several important respects.<sup>6</sup> EFCA, once thought to be high on the agenda for the Obama Administration and a Democrat-controlled Congress, has been placed on a side burner as focus on has shifted to other legislative subjects. However, the issue of possible labor law reform lingers as the 2010 mid-term elections approach, particularly if the Democrats retain a sufficient majority to push for passage after the elections.

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engaging in labor law violations, EFCA would authorize interest arbitration if parties cannot resolve contract differences in their first round of negotiations after a union is recognized. EFCA's interest arbitration component has drawn fire from opponents. Their charges range from an argument that arbitration under EFCA would be an unconstitutional deprivation of employer property rights and due process, to the claim that, as a practical matter, it would skew bargaining by giving labor unions substantial and

undeserved leverage when negotiating.<sup>7</sup> Opponents also disagree about whether the use of interest arbitration in several Canadian provinces has succeeded, and whether this experience is valuable precedent for the United States.<sup>8</sup> Proponents of EFCA argue that criticisms of EFCA are not well-founded.<sup>9</sup>

The purpose of this article is not to answer who is right and who is wrong in determining whether interest arbitration should be included as part of EFCA. Instead, this article offers a brief history of interest arbitration as a means of resolving bargaining disputes in this country. Those wishing to go beyond this introduction will not lack for resources. The leading treatise in labor arbitration devotes a dense chapter of nearly 100 pages to the subject, filled with footnotes to hundreds of cases, as well as tables and charts detailing interest arbitration procedures and laws in jurisdictions throughout the country.<sup>10</sup> To delve deeper, the reader also can go to the published proceedings of the National Academy of Arbitrators (NAA), an organization of labor-management arbitrators with nearly 600 members. Since the NAA's founding in 1947, and through 2007, 53 articles and commentaries have been provided on the subject at Academy meetings.<sup>11</sup> Should EFCA pass, the interest arbitration process will be part of a new statutory framework, but it will not be new to those who practice in the field of labor relations.

Interest arbitration was used extensively in the United States during the 20th century as an alternative to strikes; to head them off beforehand or to settle them once underway. An early step in this direction involved Louis Brandeis, then a well-known progressive business attorney in Boston and later a renowned justice on the Supreme Court. In 1910, he was asked to serve as a third party neutral during a protracted strike in the New York apparel industry. His conciliation efforts resulted in a "Protocol of Peace" that provided a dispute-resolution framework for several years.<sup>12</sup> In succeeding decades, interest arbitration was used where union strength was evident, and employers saw a peaceful resolution as a desirable alternative

to strikes, even if it meant giving up a final say over deals to be made.<sup>13</sup>

During the Second World War, the use of interest arbitration was greatly expanded under the auspices of the War Labor Board, which opened its doors in January 1942 and terminated operations in December 1945.<sup>14</sup> In order to maintain war time production with minimal disruption, the War Labor Board afforded unions a means of securing wage adjustments. For its part, a large segment of the labor union movement made no-strike pledges to keep production on track. To settle wage and other contract terms, the War Labor Board over its four year life had a staff of 2,600 employees. More than 20,000 cases were initiated, and 17,650 were decided, many of which involved impasse disputes decided by interest arbitrators. While there were exceptions, particularly the Mine Workers Union led by John L. Lewis, the labor movement as a whole made a political commitment to support the War Labor Board.

Interest arbitration continued to be widely used in U.S. industry after the war, parallel to a great increase in strikes during that same period. Between 1946 and 1949, an analysis of interest arbitration decisions shows 194 published awards.<sup>15</sup> This number dropped substantially in the 1950s and after.<sup>16</sup> This decline coincided with collective bargaining agreements becoming longer in duration, more complicated in the range of subjects addressed, and without provisions for mid-term contract reopeners. With these changes, the risks for the parties became greater when delegating decisions to third parties, and interest arbitration was used less frequently. Published awards issued each year dropped to single-digit levels. Along with this decline, the impact of the Taft-Hartley labor legislation in 1947 was felt with amendments to the original NLRA that curtailed the use of economic weapons, especially secondary boycotts, and that opened the door for employers to sue unions for unauthorized and unlawful strikes.

A review of private sector interest arbitration awards from this mid-century period finds decisions in an array of industrial settings, including

railroads, utilities, transit, communications, and printing. Those who arbitrated the disputes often had worked for the War Labor Board, and are legendary figures in the field of labor arbitration. Among them were Clark Kerr and Robben Fleming, labor relations professors who, in the 1960s, became the presidents of the University of California and the University of Michigan, respectively. Other arbitrators were Willard Wirtz, John Dunlop, and Bill Usery, each later serving as a Secretary of Labor in a presidential administration. Most of the founders of the NAA had experience with War Labor Board disputes. While the present work of NAA members largely involves grievance cases, many continue to preside over interest arbitrations.

A major shift in interest arbitration took place with the upsurge in public sector labor union organizing beginning in the 1960s.<sup>17</sup> Over the past few decades, many state and local governments have approved interest arbitration procedures as a means of preserving public service without interruption by strikes, slowdowns, or other concerted activity. In particular, interest arbitration has been adopted to resolve police and firefighter bargaining impasses. Interest arbitration also has been widely used in public education. In some jurisdictions, interest arbitration has been blended with mediation to create "med-arb" procedures.

After many years of use, some settled principles have developed that govern interest arbitration in the United States. In the private sector, interest arbitration cannot be pursued as a mandatory subject of bargaining to the point of impasse.<sup>18</sup> Once agreed upon, the duty to participate in interest arbitration proceedings continues past the expiration of a collective bargaining agreement, but it cannot be self-perpetuating as part of an interest award for a successor agreement.<sup>19</sup> Interest arbitration is enforceable under Section 301 of the Labor-Management Relations Act, a feature of the Taft-Hartley amendments to the NLRA, and is owed deference on judicial review similar to that which governs grievance arbitration decisions.<sup>20</sup>

In the public sector, interest arbitration typically is not a voluntary process, but more often

is compelled by statute or local ordinance. In that respect, absent a state constitutional or statutory prohibition, interest arbitration has survived challenges that it is an unlawful delegation of governmental authority. In California, for example, interest arbitration cannot be imposed by state law on local municipalities that possess independent chartered status under the state's constitution, and can only be used with local legislative or voter approval.<sup>21</sup> For federal sector employees, interest arbitration is within the province of an agency dedicated to carrying out that function, the Federal Service Impasses Panel.<sup>22</sup>

An analysis of interest arbitration decisions demonstrates that certain standards are relied upon that extend across the private and public domains.<sup>23</sup> As a result, interest arbitration can be viewed as an extension of the bargaining process. By applying standards developed over decades of interest arbitration practice, arbitrators are not working in the dark, or without a rational framework for resolving the parties' disagreements. Rather, arbitrators come to the task near to the end of the process, after many rounds of bargaining, and usually with a back-drop of positions being narrowed over time.

In deciding cases, arbitrators examine such factors as the value of an overall wage and benefit package; comparable wages and working conditions, internally and externally; geographic differentials; an employer's ability to pay; the cost of living index; skill and training needs; hiring and retention markets; employee turnover; prevailing practices in the workplace; and, changes in circumstances justifying a departure from what was acceptable in the past.<sup>24</sup> On issues such as these, if one of the parties is seeking a dramatic modification of the status quo, the arbitrator probably will assign the burden of persuasion to the party that is proposing the major change. By the end of a hearing, as the parties move closer in their bargaining positions on specific issues, they may be inclined to settle the matter themselves, rather than transfer control to a third person. Ultimately, a multi-faceted approach to impasse resolution is utilized because it approximates a collective bargaining outcome

with trade-offs and concessions to accommodate different interests.

To render decisions, interest arbitration usually falls into one of three designs.<sup>25</sup> One approach permits an arbitrator to exercise discretion as to each issue in dispute. A second method, widely used, directs an arbitrator to select a final offer provided by each party on each issue in dispute. A third requires the arbitrator to adopt one complete package of proposals over another. There also are variations crossing the lines of these ap-

proaches; for example, when an arbitrator has discretion within the range of the final proposals presented by the parties on each issue.

As noted, there has been extensive discussion and debate about interest arbitration historically, just as there is today. Interest arbitration is a type of dispute resolution that, in the final analysis, is controlled by the parties. If EFCA passes, however, we will face a new chapter for interest arbitration. How much the pathways yet to be taken resemble those of the past remains to be seen. ■

## ENDNOTES

<sup>1</sup> A preliminary draft of this article was prepared for a conference of the American Bar Association's dispute resolution section in April 2010.

<sup>2</sup> An Associated Press report of Mr. Howard's settlement in February 2008 can be found at: <http://sportsillustrated.cnn.com/2008/baseball/mlb/02/21/howard.arbitration/>.

<sup>3</sup> According to statistics compiled by the Major League Baseball Players Association, between 1974 and 2009, 90 percent of arbitration cases settle without a hearing. In those that went forward to a decision, players prevailed in 207 cases, and the club owners in 280. See: <http://mlbplayers.mlb.com/pa/info/faq.jsp#arbitration>.

<sup>4</sup> The dynamics of salary arbitration in baseball (and hockey) can be found in "Major League Baseball and the National Hockey League Face Off: Contrasting Styles of Sports Arbitration," in Proceedings of the 61st Annual Meeting, National Academy of Arbitrators 211 (2008). In a program moderated by Margaret Brogan, an arbitrator for both sports, advocates and arbitrators contrasted the two systems, including the comparative strengths and weaknesses of "final offer" arbitration in baseball, and "discretion within final offers" used in hockey.

<sup>5</sup> The settlement, for \$23 million for two seasons, was reported in USA Today in February 2010 at: [http://www.usatoday.com/sports/baseball/nl/giants/2010-02-12-lincecum-contract\\_N.htm](http://www.usatoday.com/sports/baseball/nl/giants/2010-02-12-lincecum-contract_N.htm).

<sup>6</sup> Employee Free Choice Act of 2009, Senate Bill 560.

<sup>7</sup> See, e.g., Epstein, *The Case Against the Employee Free Choice Act* (Hoover Inst. Pr. 2009); Epstein, "The Employee Free Choice Act is Unconstitutional," *Wall Street Journal*, December 19, 2008; Hurtgen and Irving, "Don't Let Government Dictate Labor Contracts," *Wall Street Journal*, March 13, 2009.

<sup>8</sup> Contrasting views are considered in a special edition of *Just Labour*, a Canadian academic publication. In Volume 15 of that journal, issued in November 2009, a series of articles consider research on the subject: <http://www.justlabour.yorku.ca/index.php?page=toc&volume=15>. Also see: *Labor Law Reform and the Role of Delay in Union Organizing: Empirical Evidence from Canada*, 61 *Indus. & Lab. Rel. Rev.* 32 (2007).

<sup>9</sup> A comprehensive treatment of the EFCA's interest arbitration provision is Fisk and Pulver, *First Contract Arbitration and Employee Free Choice*, 70 *La. L. Rev.* 47 (2009). For a reported state

court decision upholding the constitutionality of interest arbitration legislation for first contract disputes involving private employers in California agriculture, who are not covered by the NLRA, see *Hess Collection Winery v. Agricultural Labor Relations Bd.*, 140 Cal. App.4th 1584 (2006). Since the EFCA would amend the NLRA, a Supreme Court decision issued in 1947 and touching on the subject would be inapplicable. In *Amalgamated Ass'n of Street Employees v. Wisconsin Employment Relations Board*, 340 U.S. 383 (1951), the Supreme Court applied the federal preemption doctrine favoring the NLRA by striking down a state labor law that barred strikes by public utility workers and that required interest arbitration to resolve bargaining disputes.

<sup>10</sup> Elkouri and Elkouri, *How Arbitration Works* (6th ed.), pp. 1347-1444.

<sup>11</sup> A list of the articles can be found at: <http://naarb.org/proceedings/index.asp>.

<sup>12</sup> Paper, Brandeis, pp. 137-141; also see Gruenberg, Najita, and Nolan, *The National Academy of Arbitrators: Fifty Years of Work*, p. 9.

<sup>13</sup> A survey of the historical development of interest arbitration can be found in Stieber, "Arbitration and the Expanding Role of Neutrals," in Proceedings of the 23rd Annual Meeting, National Academy of Arbitrators 71 (1970). Also see LaRue, *An Historical Overview of Interest Arbitration*, 42 *Arb. J.*, No. 4 (1987); Loewenberg, "Interest Arbitration: Past, Present, and Future," in Stern and Najita, *Labor Arbitration Under Fire*, pp. 111-117; Nolan and Abrams, *American Labor Arbitration: The Early Years*, 35 *U. Fla. L. Rev.* 373 (1983). The extensive use of interest arbitration in two major industries, before and after the Second World War, is considered in Platt, "Arbitration of Interest Disputes in the Local Transit and Newspaper Publishing Industries," in Proceedings of the 26th Annual Meeting, National Academy of Arbitrators 8 (1973).

<sup>14</sup> See, generally: [www.answers.com/topic/national-war-labor-board-world-war-ii](http://www.answers.com/topic/national-war-labor-board-world-war-ii).

<sup>15</sup> Bernstein, *Arbitration of Wage Disputes* (1954), cited in Stieber, "Arbitration and the Expanding Role of Neutrals," supra, at pp. 77-79.

<sup>16</sup> This declining trend in the use of interest arbitration also is examined in Handsaker, "Arbitration and Contract Disputes," in Proceedings of the 13th Annual Meeting, National Academy of Arbitrators 78, 80-81 (1960).

<sup>17</sup> This transition is reviewed by one of the pioneering figures for public sector labor relations, Arvid Anderson, who oversaw developments in Wisconsin and New York. See Anderson, "Lessons from Interest Arbitration in the Public Sector: The Experiences of Four Jurisdictions," in Proceedings of the 27th Annual Meeting, National Academy of Arbitrators 59 (1974).

<sup>18</sup> Connecticut State Conference Board, *Amalgamated Transit Union*, 339 NLRB 760 (2003); *Laidlaw Transit, Inc.*, 323 NLRB 867 (1997); *Sheet Metal Workers Local 59 (Employers Assn.)*, 227 NLRB 520 (1976).

<sup>19</sup> *Local Union No. 666, IBEW v. Stokes Elec. Serv.*, 225 F.3d 415 (4th Cir. 2000); *Local 581, IBEW v. Southeastern Mich. Chapter, Nat'l Elec. Contractors Assn.*, 43 F.3d 1026 (6th Cir. 1995); *Globe Newspaper Co. v. Int'l Ass'n of Machinists*, Local 264, 648 F.Supp. 193 (D. Mass. 2009). A proposal to extend interest arbitration to bargaining impasses in the airline industry under the Railway Labor Act was introduced in 2001 by Republican Senators Trent Lott and John McCain, but the proposal was not enacted. See *Airline Labor Dispute Resolution Act of 2001*, Senate Bill 1327. Although the legislation was not approved, interest arbitration is used by private agreement between several airline carriers and unions. See Harris, "Interest Arbitration in the Airline Industry: One Arbitrator's Perspective," Proceedings of the 55th Annual Meeting, National Academy of Arbitrators 155 (2002).

<sup>20</sup> *Stokes Elec. Serv.*, supra; *Local Union 257, IBEW v. Sebastian Elec.*, 121 F.3d 1180 (8th cir. 1997).

<sup>21</sup> *County of Riverside v. Superior Court*, 30 Cal. 4th 278 (2003).

<sup>22</sup> 5 U.S.C. Section 7119.

<sup>23</sup> One long-time interest arbitrator, Arnold Zack, has offered an overview of how established approaches and standards could be applied under the EFCA. See: <http://lerablog.org/2009/03/15/first-contract-arbitration-issues-and-design/>.

<sup>24</sup> As an example of a more recent, recurring issue, interest arbitration awards can respond to substantial increases in health care costs, a subject considered in Clark, "Interest Arbitration: Something Old, Something New," in Proceedings of the 60th Annual Meeting, National Academy of Arbitrators 330 (2007).

<sup>25</sup> Bornstein, Gosline and Greenbaum, *Labor and Employment Arbitration* (2nd ed.), Sec. 1.02[3].