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INTRODUCTION

The Rodda Act[1] is the first generally applicable statute to authorize binding arbitration of grievances expressly in public sector labor relations. Cities, counties, special districts and school districts have entered into contracts providing for their interpretation through binding arbitration prior to the adoption of the Rodda Act. However, the California courts have not, to any significant degree, been required to determine issues of arbitrability; that is, what decisions related to a contract are to be made by an arbitrator. Nor have the courts reviewed many awards made by arbitrators in the special circumstances of the public sector.

The central issue in public sector bargaining is *who* makes *what* decisions. A key feature of the Rodda Act is its narrow scope of representation which became the quid pro quo for management support of the bill.[2] There is a heightened public

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1. CAL. GOV'T CODE §§ 3540-3549.3 (West Supp. 1978).

2. *Id.* § 3543.2 scope of representation provides:

> The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200 leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for evaluation of employees, organizational security pursuant to Sections 3548.7 and 3548.8 *and the layoff or probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code.* In addition, the exclusive representative of certification personnel has the right to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent such matters are within the discretion of the public school employer under the law. All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.

Compare San Juan Teachers Ass'n v. San Juan Unified School Dist., 44 Cal. App. 3d 232, 118 Cal. Rptr. 662 (1974).

awareness and concern over *what* is subject to bargaining as evidenced by the statutory provisions requiring public notice of initial proposals.[3] The Public Employees Relations Board (PERB), charged with administering the Rodda Act, has adopted regulations further underscoring this concern.[4] The League of Women Voters and other groups concerned about the impact of bargaining in the school system have actively monitored the application of these provisions. As an example relating to *who* makes certain bargaining decisions, the California Supreme Court has recently declared that absent legislative authorization, a general law city may not delegate salary setting to arbitration.[5]

Although the issue of contract interpretation (*i.e.*, grievance arbitration) is patently different than the question of what goes into the contract (*i.e.*, interest-issue arbitration), the *Bagley* concept[6] has been applied to grievance arbitration.[7] However, the Rodda Act's express authorization settles the threshold delegation issue.

In section 3548.7[8] the Rodda Act references the Code of Civil Procedure sections[9] dealing with enforcement of agreements to arbitrate and of arbitration awards. In *O'Malley v. Wilshire Oil Co.*,[10] a private sector case, the California Supreme Court applied the standards adopted by the United States Supreme Court in the "Steelworkers Trilogy"[11] to the issues of arbitrability and the review of arbitration awards. The "Steelworkers Trilogy" forcefully espouses the notion that the arbitration clause is a substitute for the strike and to be effective arbitrators' decisions must be relatively "final." The Court also observed that the arbitrators' special expertise in the conditions of the "shop" made appropriate the vesting of considerable discretion in the person the parties have chosen to finally interpret the contract.[12]

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3. CAL. GOV'T CODE § 3547 (West Supp. 1978).

4. CAL. ADMIN. CODE tit. 8, §§ 37000-37100 (1977).

5. Bagley v. City of Manhattan Beach, 18 Cal. 3d 22, 553 P.2d 1140, 132 Cal. Rptr. 668 (1976).

6. *Id.* at 24-26, 553 P.2d at 1141-43, 132 Cal. Rptr. at 669-71.

7. San Francisco Firefighters Local 798 v. City and County of San Francisco, 68 Cal. App. 3d 896, 137 Cal. Rptr. 607 (1977).

8. CAL. GOV'T CODE § 3548.7 (West Supp. 1978).

9. CAL. CIV. PROC. CODE §§ 1280-1295 (West Supp. 1978).

10. 59 Cal. 2d 482, 381 P.2d 188, 30 Cal. Rptr. 452 (1963).

11. United Steelworkers of America v. Am. Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

12. 363 U.S. at 582.

While these opinions recognize that arbitration must stem from the agreement of the parties, their principal significance is the court's presumption of a broad intention to arbitrate issues arising under a labor contract. In *United Steelworkers of America v. Warrior & Gulf Naviation Co.*,[13] the Court declared:

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.[14]

It must be understood that the Court is deferring to the arbitrator to decide first what is arbitrable, then, as appropriate, to decide the merits.

In *United Steelworkers of America v. Enterprise Wheel & Can Corp.*,[15] the standard of review of arbitration awards was stated as follows:

> As we there emphasized, the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.[16]

This standard has been applied to mean that an arbitrator's award may not be set aside even if there are errors of law or of fact.[17]

Even in the private sector, courts have had considerable trouble with the broad and final authority vested in arbitrators. While giving lip service to "Steelworkers," the decisions have not always been faithful.[18]

This article presents a limited review of what other jurisdictions have done with arbitration in the public sector. Four major bases of limitation on the power of the arbitrator have

13. 363 U.S. 574 (1960).

14. *Id.* at 582-83.

15. 363 U.S. 593 (1960).

16. *Id.* at 599.

17. *See, e.g.*, Santa Clara-San Benito Chapter of Nat'l Elec. Cont. Ass'n v. Local 332, IBEW, 40 Cal. App. 3d 431, 437, 114 Cal. Rptr. 909, 912 (1974).

18. *See, e.g.*, H.K. Porter Co. v. United Saw, File & Steel Products Workers, 333 F.2d 596 (3d Cir. 1964).

been recognized — non-delegable duties, major public policy, fiscal inability, excess of authority.

NON-DELEGABLE DUTIES

Delegability has been a major issue in "grievance" arbitration as well as in "interest" arbitration. The issue of delegability has arisen most frequently in respect to the school board's authority to determine the qualifications of those to be hired or discharged. The Michigan Supreme Court upheld arbitrability under a contract providing that no teacher could be "disciplined — or deprived of any professional advantage without just cause," despite the presence of a broad reservation of rights clause in the contract.[19] In Illinois, however, hiring and firing has been declared a non-delegable duty of the Board.[20]

New York has held the substantive decision to terminate an employee to be non-delegable, but has subjected to arbitration compliance with contract "procedures" short of the substantive decision itself. There the court upheld an arbitrator's award providing for reinstatement of a non-tenured teacher for a period sufficient to permit evaluation under the contract.[21] Somewhat similarly the Kentucky Court of Appeals refused to overturn a teacher discharge which followed the statute but did not utilize a negotiated grievance procedure.[22]

The Maine Supreme Court refused to address the issue of delegability, a question of statutory construction, and held instead that the contract did not reflect an intention of the parties to subject the issue of renewing a probationary teacher's contract to arbitration. The court arrived at this decision despite contract language that declared that the purpose of the grievance procedure was to effect solutions to problems "affecting the welfare or terms and conditions of employment of teachers."[23] In *Board of Education v. Areman,*[24] the New York Supreme Court extended this notion of conflict with statutory delegation of authority by declaring non-arbitrable a

19. Kaleva-Norman-Dickson School Dist. v. Teachers Ass'n, 393 Mich. 583, 227 N.W.2d 473 (1976).

20. Board of Trustees v. Cook County College Teachers Union, 62 Ill. 2d 470, 343 N.E.2d 473 (1976).

21. Board of Educ. of Bellmore-Merrick Central High School Dist. v. Bellmore-Merrick Teachers Inc., 39 N.Y.2d 167, 383 N.Y.S.2d 292, 347 N.E.2d 603 (1976).

22. Louisville Board of Educ. v. Louisville Education Ass'n, 97 L.R.R.M. 2755 (Ky. Ct. App. Feb. 10, 1978).

23. Chassie v. Directors of School Admin. Dist. No. 36, 356 A.2d 708 (Me. Sup. Jud. Ct. 1976).

negotiated contract provision which limited to specified school officials access to teachers' personnel files. Even though the Board of Education was not among those enumerated as having a right to access, the court noted that that right inhered in the authority of the Board to decide which teachers were qualified.[25]

This concept of the conflict of a non-delegable duty with an agreement to arbitrate was applied in the case of a statute declaring that a school board may grant sabbatical leaves to benefit the school system. The Illinois court vacated an arbitrator's award of leaves to two specific applicants under a contract that declared that a minimum of two such leaves were to be granted each year. The board had refused all such leaves for budgetary reasons.[26]

MAJOR PUBLIC POLICY

Because of New York's fiscal difficulties there have been several cases treating the conflict between public policy expressed in legislation designed to deal with the fiscal emergencies and the arbitrability of rights under collective bargaining agreements.[27] A one year moratorium on sabbatical leaves was declared by statute. Applying that statute, a New York trial court declared that "where a major public policy is involved, as expressed in section 82, the court is of the opinion that the public interest requires that issues of law and of fact as to the application of such legislation should be resolved by a Court rather than an arbitrator."[28]

This concept was applied in other trial court decisions, but in *Associated Teachers of Huntington, Inc. v. School District*[29] the New York Court of Appeals distinguished those cases as involving a leave right which was not enforceable, but discretionary with the board. In *Associated Teachers,* the arbitrator's award was based on the theory that there was an enforceable

24. Board of Educ. v. Areman, 80 Misc. 2d 659, 363 N.Y.S.2d 437 (Sup. Ct. 1975).

25. *Id.* at 662-63, 363 N.Y.S.2d at 440-41.

26. Board of Educ. of S. Stickney v. Murphy, 56 Ill. App. 3d 981, 372 N.E.2d 899 (1978).

27. Central School Dist. v. Teachers Ass'n, 67 Misc. 2d 317, 324 N.Y.S.2d 260 (Sup. Ct. 1971); Associated Teachers of Huntington, Inc., v. School Dist., 33 N.Y.2d 229, 351 N.Y.S.2d 670, 306 N.E.2d 791 (1973); Carasiti v. Pilkington, 80 L.R.R.M. 2577 (N.Y. Sup. Ct. 1972).

28. Central School Dist. v. Teachers Ass'n, 67 Misc. 2d 317, 320, 324 N.Y.S.2d 260, 263 (Sup. Ct. 1971).

29. 33 N.Y. 2d 229, 351 N.Y.S.2d 670, 306 N.E.2d 791 (1973).

right under the pre-existing bargaining agreement to the sabbatical leave and that the moratorium act did not override that agreement. The Court of Appeals agreed with this conclusion of the arbitrator but went on to declare that even if the arbitrator was wrong his decision could not be overturned on appeal.[30] The court further noted that the policy expressed in the moratorium act was a limited public policy and did not justify an overruling of the arbitrator's award. Another New York decision did stay the arbitration where granting a salary increase would have violated the President's wage-freeze order.[31]

New York's financial emergency act was called into question in *City of New York v. Firefighters Association Local 94.*[32] It was held to be a declaration of important public interest and a state policy not subject to arbitration. The case arose in the context of a claim by the firefighters that a reduction of manpower by layoff posed a safety hazard. The New York Court of Appeals affirmed an arbitrator's award despite that same financial emergency act on the ground that the award had been confirmed by court judgment two months prior to passage of the Act.[33]

In New Jersey, the Collective Bargaining Act poses a dichotomy between "working conditions" and "major educational policy."[34] Since the selection of candidates for promotion was a matter involving "major educational policy," those issues may not be submitted to arbitration despite contrary language in a bargaining agreement.[35] However, assignment of a teacher load during what had been a free period is a "working condition" and arbitrable.[36]

FISCAL INABILITY

Boston Teachers Union Local 66 v. School Committee[37] is instructive on arbitrability of claimed budget limitations. The

30. *Id.* at 232-33, 351 N.Y.S.2d at 675, 306 N.E.2d at 795.

31. Carasiti v. Pilkington, 80 L.R.R.M. 2577 (N.Y. Sup. Ct. 1972).

32. 93 L.R.R.M. 2511 (N.Y. Sup. Ct. 1976).

33. Patrolman's Benevolent Ass'n v. City of New York, 54 Misc. 2d 407, 28 N.Y.S.2d 593 (1967).

34. The author concedes that the New Jersey cases might be characterized as "delegation" or "scope of representation" cases.

35. Board of Educ. of N. Bergen v. Local 1060, AFT, 141 N.J. Super. 97, 357 A.2d 302 (N.J. Super. Ct. App. Div. 1976).

36. Red Bank Bd. of Educ. v. Warrington, 138 N.J. Super. 564, 351 A.2d 778 (N.J. Super. Ct. 1976).

37. Boston Teachers Union Local 66 v. School Comm. of Boston, 350 N.E.2d 707 (Mass. Sup. Jud. Ct. 1976).

contract provided for limitation on class size and the hiring of substitutes when teachers were absent. The superintendent declared a freeze on hiring substitutes because of budgetary limitations. The court agreed that the fiscal inability of the district to pay would limit the arbitrator's power to order the hiring of substitutes. However, it was established that the salary expense appropriation was sufficient to cover the hiring of substitutes for the balance of the year and the district had not met its burden of showing over-expenditures in other accounts reducing the available money in the salary account. The award requiring the hiring of substitutes for the balance of the school year was upheld.

EXCESS OF AUTHORITY

In an Illinois decision where the arbitrator relied on a statute outside the contract for his decision, the award was overturned.[38] Where the remedy which the arbitrator applied went beyond the authority of the public agency, the Massachusetts Supreme Court struck that part of the award.[39]

PRESUMED INTENT TO ARBITRATE

One of the earlier New York cases at the trial court level rejected the "Steelworkers" nearly conclusive presumption of intention to have issues decided by the arbitrator in public sector grievances.[40] This decision was not followed in other cases,[41] and one New York appellate case suggests a contrary direction.[42]

In a more recent decision, *Acting Superintendent v. Fac-*

38. Board of Educ. v. Champaign Educ. Ass'n, 15 Ill. App. 3d 335, 304 N.E.2d 138 (1973).

39. Boston Teachers Union Local 66 v. School Comm. of Boston, 350 N.E.2d 707 (Mass. Sup. Jud. Ct. 1976). Contrast this result with Justice Douglas' declaration in *Enterprise Wheel, supra* note 11, at 597:

> He, (the arbitrator) is to bring his informed judgement to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency.

40. Lehman v. Bd. of Educ., 66 Misc. 2d 996, 323 N.Y.S.2d 283 (Sup. Ct. 1971).

41. *See, e.g.*, Carasiti v. Pilkington, 80 L.R.R.M. 2577 (N.Y. Sup. Ct. 1972).

42. Associated Teachers of Huntington, Inc. v. School Dist., 67 Misc. 2d 317, 324 N.Y.S.2d 260 (Sup. Ct. 1971).

ulty Association,[43] the New York Court of Appeals rejected approaching arbitrability in the public sector with a presumption in its favor,[44] and declared instead that to find arbitrability in the public sector the "agreement to arbitrate must be express, direct and unequivocable as to issues or disputes to be submitted to arbitration."[45] The court's rationale is rooted in the fact that many of the responsibilities of public agencies are non-delegable. Accordingly, it cannot be inferred as a practical matter that the parties to a public sector collective bargaining agreement have intended to adopt the "broadest permissible arbitration clauses."[46] A similar result was reached in *Police and Fireman's Retirement Board v. Sullivan,*[47] where a pension plan specifically referred to in the contract was held not arbitrable. The Connecticut Supreme Court gave lip service to the "Steelworkers Trilogy," but the result would seem to fit more comfortably with the test applied in *Acting Superintendent v. Faculty Association.*[48]

In considering the most recent tests applied in New York to determine arbitrability and to vacate an award, it must be remembered that so long as the argument is preserved when proceeding into arbitration, the issue of arbitrability can be renewed before a court upon a petition to vacate the award. The California statute makes the order to arbitrate non-appealable.[49] Thus, preserving the issue would be the appropriate procedure if a stay is denied and an order to arbitrate issues.

CONCLUSION

It is inappropriate to draw any firm conclusions from this review. However, public concern is being strongly manifested in California about public institutions and their accountability. This concern is certain to influence the courts on this issue.

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43. 42 N.Y.2d 509, 399 N.Y.S.2d 189, 369 N.E.2d 746 (1977).

44. The federal test was stated in United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960): "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."

45. 42 N.Y.2d at 511, 369 N.E.2d at 747, 399 N.Y.S.2d at 193.

46. *Id.* at 514, 369 N.E.2d at 749-50, 399 N.Y.S.2d at 193.

47. Police and Fireman's Retirement Bd. v. Sullivan, 173 Conn. 1, 376 A.2d 399 (1977).

48. Acting Superintendent v. Faculty Ass'n, 42 N.Y.2d 509, 369 N.E.2d 746, 399 N.Y.S.2d 189 (1977).

49. *See* 6 B. WITKIN, CALIFORNIA PROCEDURE *Appeal* § 56, at 4070 (2d ed. 1971).

The dynamics of the process of decision on either arbitrability or court review of arbitration awards will continually apply pressure to expand the areas subject to arbitration. *Presuming an intention to arbitrate* will vest too much authority in the arbitration process and impair confidence in public institutions. Certainly, the "Steelworkers Trilogy" should not be applied to the public sector without some modification.