COMMENT AND CORRESPONDENCE

COMPETITION IN THE TELEPHONE INDUSTRY

To the Editors:

I would like to take this opportunity to respond to a note in a recent issue of the University of Notre Dame Law School *Journal of Legislation* entitled "Competition in the Telephone Industry: What Will Congress Permit?" by M. Kathleen Curran.* I am pleased that Ms. Curran and the *Journal* have recognized the importance of the current debate on telecommunications policies. Although Ms. Curran has endeavored to present the position of the telephone companies, the specialized carriers, and the interconnect industry, subsequent developments enable me to provide a more up-to-day summary of the position of the telephone industry in the debate on competition in telecommunications currently taking place in Congress. Furthermore, several incorrect and confusing statements contained in Ms. Curran's note will be addressed.

The debate on the issues raised by the introduction of competition in the telecommunications industry has changed dramatically since the time that Ms. Curran's note was written. The Consumer Communications Reform Act (CCRA), which Ms. Curran discusses at length, and in many respects inaccurately, has accomplished much since its introduction in March, 1976. It placed the issues before Congress, it focused on the industry dilemma, it created public interest and concern, and it set in motion the process for identification of the facts, options and trade-offs necessary to resolve the critical issues facing the telecommunications industry today. It has achieved its intended purpose. Changes almost always occur when bills move through the legislative process, and the Bell System does not expect the CCRA to be passed as originally introduced. Thus, I will concentrate on contemporary issues rather than dwell on misstatements or misapprehensions of a legislative proposal no longer under active consideration.

The current debate in Congress, as Ms. Curran accurately recognizes, concerns competition with the established telephone companies in two distinct areas: (1) the provision of telephone terminal equipment such as telephone sets, automatic telephone answerers and PBX equipment, and (2) the transmission of long distance or intercity communications. This discussion, therefore, will be organized under those two general areas in which competition in the provision of telecommunications service has emerged.

Terminal Equipment

In recent hearings before Congress,[1] there was, as Ms. Curran recognized, universal agreement among witnesses that no natural monopoly exists in the manufacture or supply of telephone terminal equipment. The discussions,

*4 J. Legis. 132 (1977).

1. Panel Discussions on Domestic Common Carrier Policy Issues, House Interstate and Foreign Commerce Subcommittee on Communications (Van Deerlin - D., Cal., Chairman), September 21, 26, 27, 28, 1977.

therefore, focused on protection of service quality and on ways to insure full and fair competition in the supply of equipment.

Historically, regulatory bodies have required telephone companies to provide end-to-end telephone service, including telephone terminal equipment such as telephone sets. Thus, until recently essentially all telephone terminal equipment was provided by telephone companies under terms, conditions and rates regulated by state authorities. In the last decade, the FCC has embarked upon a policy of encouraging competition in the terminal equipment market. However, the idea of indiscriminate attachment to the telephone network of hardware of varying manufacture was universally recognized as unworkable. The FCC has acknowledged the need to protect the network from the physical and technical harms possible under such an open system, in recognition of the fact that such indiscriminate attachment would result in poorer telephone service.

Initially the telephone industry responded to the FCC's encouragement of competition in the terminal equipment area by permitting complete interconnection of customer-provided equipment if the attachment was made through a protective connecting arrangement. Later the telephone companies expanded that concept by permitting certain additional types of equipment to be interconnected to the network without a physical protective connecting arrangement. The FCC has further expanded the types of equipment which can be directly connected to the network in what has become known as its "Registration Program." Under this program customers are allowed to connect terminal equipment, including telephones, directly to the network if that equipment is registered with the FCC as complying with prescribed standards. In hearings before Congress telephone company witnesses restated their opinions with respect to the shortcomings and hazards of the program and outlined suggested changes which they felt should be incorporated into the program to minimize the impact with respect to telephone service for the single line customer. Those suggestions are known as the primary instrument concept.[2]

The adoption of the Registration Program significantly changes the balance in the jurisdictional responsibilities between the FCC and the state public service commissions concerning telephone terminal equipment. In preempting jurisdiction from the states in this area the FCC has substantially enlarged the scope of its control over the provision of telecommunications service.

The primary issue which remains with respect to terminal equipment is the proper balance to preserve high quality service while allowing the consumer freedom of choice. To a great extent, this goal rests on preserving both the integrity of the nationwide network, and on end-to-end responsibility and accountability. The industry sponsored primary instrument concept would go far in preserving high quality service without significantly burdening competition or restricting consumer choice. Under this concept telephone companies would be required to provide and maintain a telephone instrument, as part of basic telephone service, to single line customers.[3] All other telephone terminal equipment could be obtained from any qualified supplier.

2. A comprehensive telephone industry paper on the primary instrument concept was provided to both houses of Congress on August 16, 1977.
3. The objectives of the primary instrument concept are: to make one serving entity responsible and accountable for providing complete basic telephone service for single line voice subscribers; to assure continuity of such telephone service; to facilitate testing, both static and functional; to serve as a reference set to allow the customer independently to diagnose trouble responsibility; to permit and encourage customers to effect prompt repair of malfunctioning equipment without interruption of basic telephone service, and to permit orderly introduction of technological innovations in the telephone network.

Intercity Transmission

The current debate in Congress primarily concerns competition in the provision of intercity communications. Ms. Curran's note incorrectly assumes, and in several instances states, that competition in the intercity or long distance transmission field is limited to private line services making use of new technology and primarily for the transmission of data signals. Thus, Ms. Curran speaks of "lucrative new markets" and "the specialized common carrier, [which] wants to offer business data transmission of non-voice communications, utilizing microwaves or laser beams that operate at much higher frequency than telephone wires," whose offerings "will not compete directly with the basic voice telephone service of the telephone industry." That simply is not the case.[4]

So-called "private line" services do compete in varying degree with basic voice telephone service. That is the nub of the problem. For many customers, private line services are available which are directly substitutable for ordinary long distance service, a fact which was recognized by several participants in recent Congressional testimony.[5] In fact, recent technological advances and regulatory decisions have increased that substitutability to the extent that in the foreseeable future it may not be possible to functionally distinguish between many different types of service.

Moreover, even the limitation of competition to private line service is now under attack. While the FCC's *Specialized Carrier*[6] decision clearly stated that it was not authorizing specialized carriers to provide services in direct competition with the basic public message services such as long distance message toll service (MTS) and wide area telephone service (WATS) offered by the established telephone companies, some specialized carriers have attempted to offer services which are almost identical to MTS and WATS. The legitimacy of these efforts by the specialized carriers to obtain unlimited authority to provide ordinary long distance service on a competitive basis is currently before the United States Supreme Court in a petition for certiorari.[7]

Thus, the intercity competition issue before Congress is not, as Ms. Curran suggests, limited to private line data service or even private line services generally. The problem is whether specialized carriers should be permitted to compete with the established carriers in providing all types of intercity transmission. At stake in this question are several fundamental factors which

4. The Bell System does not oppose multiple supply of truly "specialized" private line services, such as those suggested by Ms. Curran. In 1971, during remarks at AT&T's annual shareholders meeting, then AT&T Chairman H. I. Romnes stated what has consistently been the Bell System's expectations and position with respect to "specialized carriers":

> "[The special position of public trust imposed upon the Bell System] requires that we recognize that not all of communications is 'ours' and that in circumstances where others are ready, willing and able to meet particular needs without impairing the interests of the whole public they ought to have the opportunity to do so. At the same time, whenever policies are proposed – by politicians or by regulators or by would-be competitors – that would impair the usefulness of the network to the public or would add unnecessarily to its costs, our public responsibility requires us to speak out just as vigorously as we know how."

5. Stenographic Transcript of Hearings before the Subcommittee on Communications, House Committee on Interstate and Foreign Commerce, September 21, 26, 27 and 28, 1977 (hereinafter Subcommittee Transcripts): TR 17:50, 88, 140; 18:32-35; 20:11-12, 80-82.

6. Specialized Common Carrier Services, 29 F.C.C.2d 870, *reconsideration denied*, 31 F.C.C.2d 1106 (1971), *aff'd sub nom.* Washington Utils. & Transp. Comm'n v. F.C.C., 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975).

7. Execunet services currently being offered by MCI Telecommunications Corporation (MCI) was found by the FCC to be an unauthorized message toll service. On appeal, the Court of Appeals held, however, that the FCC did not limit the use of existing facilities to private line services, and therefore MCI could provide MTS or WATS type services over its existing facilities. MCI Telecommunications Corp. v. FCC, 56 F.2d 365 (D.C. Cir. 1977).

have contributed to achieving, and ultimately will affect the preservation of, the national goals[8] of high-quality, low-cost, widely available telephone service in this country: (1) the use of revenues from intercity long distance toll service to help support basic local service and (2) the use of average pricing.

The capability of achieving these goals is directly affected by competition. Change in the emphasis placed on these goals will require substantial trade-offs within the telecommunications market. This dilemma, for the most part, results from economic realities which, in a truly competitive environment, conflict with and would prevent full realization of the agreed upon ultimate social goals. These economic realities were discussed at length by witnesses before Congressional committees, and can be summarized as follows:

1. Extensive substitutability (cross-elasticity) exists among services offered by telephone companies and specialized carriers in intercity markets, especially for business customers.
2. Nationwide cost averaged rate structures for interstate long distance services, which keep the price of service uniform in all geographic areas, and promote universally available and affordable services, cannot be maintained in a competitive environment. Selective competitive entry exacerbates the problem.
3. Economies of scope and scale exist in the provision of telephone services which, if negated or foregone will raise costs of services, and may delay implementation of new technology.
4. System planning and engineering of a technically intergrated network promote high-quality service, economic efficiency and orderly implementation of new technologies all of which could be disrupted by competitive interconnected networks.

In order to understand the full impact of these economic realities on national goals, it is necessary to assess their general effects on the average users of telecommunications services. First, rates for basic local service may rise. Telephone service is priced so that intercity calls contribute to keeping local service rates lower than they otherwise would be. An important element in achieving this result is the process called "Separations" which is prescribed by FCC Rules.

The basic telephone and line from the subscribers premises to the telephone central office are used to make and receive both interstate and intrastate toll calls and local calls. In recognition of this common use of such access facilities, the separations process provides for shifting part of the cost responsibility for these facilities from the subscribers of basic exchange services to the interstate message toll users.[9] Revenues from regular interstate long distance message service[10] were used to help cover in excess of $3.5 billion of joint costs last year.

8. Participants in the Congressional investigations regarding telecommunications policy issues have endorsed these national goals set out as the purpose of the Communications Act of 1934 " . . . to make available, so far as possible, to all the people of the United States a rapid, efficient, nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . ." (Section 1) as valid and appropriate for the future. *See:* Subcommittee Transcripts, TR 17:9-10, 18, 22, 36, 84, 128; 20:12, 49.
9. The separations process is promulgated by the FCC as Part 67 of its Rules. The processes and formulae prescribed by these Rules are the result of an FCC Joint Board proceeding with representatives of state regulatory authorities (NARUC) and the FCC. It is a political compromise which recognizes the public interest benefits of sharing the economies inherent in the joint use of facilities. The shift does not result in a subsidy, but rather is a process for recognition and recovery of the joint and common costs of providing the several services.
10. Revenues from private line services – whether provided by specialized carriers, Bell or independent telephone companies – are not included in the separation process under current FCC Rules.

Competition affects the amount of interstate revenues available to cover a portion of these joint customer line costs. The amount available will be reduced as customer usage shifts from regular long distance service to competitive services and as the telephone companies lower long distance rates in response to competition. The only place telephone companies do not have direct competition is in basic local telephone service. It is axiomatic, therefore, that local telephone rates ultimately will have to rise in order to cover customer line costs.

Current separations rules exacerbate the effect because they limit the ability of telephone companies to price their services competitively. The problem is particularly acute because of two factors: first, the separations process applies only to telephone company services, and second, the allocation process used with respect to those services is based on relative usage of jointly used facilities, even though most of those costs are fixed and not related to the amount of use (*i.e.*, not economically relevant to usage). Because the costs allocated are not directly related to the services used, an arbitrary burden is created; especially for the frequent or heavy user of message toll services.

Since there is substantial substitutability (cross-elasticity) among interstate services, significant shifts of demand from message toll services occur. As competition in private line services forces rates toward direct costs, the substitution becomes greater, since the disparity between rates for competitively supplied services and toll calls widens. The result is predicatable and inevitable: where a service bears an artificial burden, either the burden will have to be removed or the burdened service will lose most of its business.

Thus the dilemma: incompatible social and economic goals. Full competition in intercity services will severely limit the ability of message toll services to support the social goal of universally affordable basic service. A change in the separation procedure which would include all intercity carriers and services would tend to reduce the cross-elastic impact between toll services and private line services. While such change would help effectuate current social policy, that alone is not a solution to the dilemma raised by multiple supply of intercity services. It would create problems of how to determine an equitable and economically relevant burden on competitive services provided by competitive carriers using different rate structures, and entirely fails to address the problem of the impact of selective route competition upon uniform averaged rates, as discussed below. Any modifications of the separations process must ultimately determine whether it remains in the public interest to use revenues from interstate services to help keep basic telephone rates lower than they otherwise would be; if so, to what extent should which services provided by which carriers to which customers be arbitrarily burdened in order to meet that objective; and, then, whether such results are economically realistic and attainable in an environment of full and fair competition or whether they are attainable only under regulatory concepts inconsistent with free competition.

A second dilemma (between economic and social goals) as a result of multiple supply of intercity services arises because nationwide averaged rates cannot be maintained in a truly competitive environment.

Telephone companies are required by the FCC to provide service to all customers and locations within their franchised areas. Further, telephone companies are required to price interstate toll services on the basis of nationwide averaged costs (*i.e.*, the telephone customer pays the same rate for interstate calls of the same distance regardless of the geographical location of the telephones engaged, the route transversed or the underlying specific costs of providing the service).[11] However, there is a great disparity between actual route costs and averaged costs since average costs include some routes where specific costs are higher than the average and others where they are lower. Actual route costs between the largest metropolitan centers are sometimes less than $1.00 per circuit mile, while the costs to remote towns and villages may exceed $200.00 per circuit mile.

Traffic between the 32 major metropolitan areas now accounts for half the interstate revenues from businesses. Specialized common carriers are presently allowed selectively to serve only the routes of their choice. Their primary offerings have been to business customers located along routes between major metropolitan centers. So long as specialized common carriers continue in this fashion, the nationwide averaged rate schedule provides them a protective umbrella. They can "skim the cream" on the higher demand lower cost routes and leave the low density higher cost routes to be served by the carriers of last resort – the telephone companies. As that occurs, the disparity widens between averaged costs and acutal costs on high density routes, thus enlarging the protective umbrella.

The ability to maintain the present system of averaged rates under current conditions is seriously in question. Likewise, requiring telephone companies to provide equal service to everyone while allowing competing carriers to choose to ignore high cost routes prevents full and fair competition. The current form of rate averaging, which makes long distance calling widely available at affordable rates, is inconsistent with fair competition. There is a basic incompatibility between true competition and universal service at affordable rates to all subscribers.

If rate deaveraging occurs, as it inevitably must under conditions of selective competition, the result will be higher rates for some customers and lower rates for others. Higher rates will generally fall on those business subscribers who are not in major metropolitan centers, and on those who are only occasional users of long distance services – primarily residential customers. The chief beneficiaries of deaveraged rates will be the large users in major metropolitan centers, primarily those business customers with needs for bulk or continuous services.

A third area of dilemma where economic realities clash with social goals is industry structure and the economies and efficiencies associated with an integrated nationwide network. Intercity services provided over a unitary network exhibit efficiencies associated with system planning and common use of facilities together with significant economies of scale and scope.

The nationwide network is engineered on the basis of economic trade-offs. Fragmentation of end-to-end service would undermine full system planning and produce economic incentives to minimize individual supplier costs to the detriment of total system control and quality. In a competitive environment there is incentive to shift expenses and responsibility to other suppliers. To the extent that shift causes economic inefficiencies, total costs rise; to the extent it causes suboptimal engineering, service quality and costs suffer. Further, the customers' ability to assess responsibility, require accountability and obtain relief are limited.

11. Dept. of Pub. Serv. of Wash. v. Pacific Tel. & Tel. Co. et al., 8 F.C.C. 342 (1941). *See also: Comments of AT&T*, F.C.C. Docket No. 18920, pp. 65-70 (Oct. 1, 1970).

A final dilemma is the extent to which true competition is even possible in the current environment. Any artificial maintenance of multiple supply through statutory or regulatory segmentation of markets or handicapping of suppliers would produce a cartel arrangement and undercut the basis for competition. The result must be an increase in the overall cost of telecommunications services without the beneifits associated with full and fair competition.

True competition cannot exist in an enviroment which exhibits natural monopoly characteristics, except in peripheral areas where other efficiencies may outweigh the economies inherent in meeting concentrated demand. There are specialized and value-added services which may well have a place in the provision of intercity services, but indications are that the extent of multiple supply which now exists cannot be maintained if economic pricing is allowed to reflect the true economies and efficiencies inherent in the integrated switched network.

Arguments of full and fair competition based on fully distributed costs and the professed need for inefficient separate subsidiaries which would prevent realization of the full economic efficiencies highlights the concerns of the proponents for "competition" in its present form. Accounting principles and allocation methodologies which are not economically relevant to pricing decisions in an unregulated competitive world only obscure the issue.

Clearly, until Congress either prescribes competition based on sound economic principles or acknowledges the natural monopoly characteristics of intercity services and defines the appropriate boundaries of regulation, the controversy will continue at the expense of the ratepayer. Costs of regulatory proceedings will increase, delays will persist and a cartel arrangement with market sharing will emerge. The concept of competition is not readily reconciliable with the concept of regulation. In a competitive environment entrepreneurs are free to decide what markets to enter or exit, when to inject new capital and what prices to charge. This is not the case under regulation. An attempt to merge these two economic concepts, which are to some extent incompatible, is likely to deprive the public of the full benefits of either competition or regulation.

Conclusion

To further focus on the CCRA only steps backward. Although numerous problems remain which will require social and economic trade-offs, and although considerable disagreement exists over how the trade-offs should be balanced, the Congressional investigation on telecommunications policy has provided the forum and the framework which has identified and substantially narrowed the issues.

The hearings and panel discussions before Congress have produced nearly universal consensus that competition with multiple supply of equipment and services is desirable to the extent it does not significantly impair the standards used to measure the public interest: high quality, universally available, reasonably priced service.

These standards provide the guidelines and framework within which the complex process of deciding interrelated problems can be reduced to one of balancing trade-offs. They require those with diverse and conflicting interests to focus on a common denominator – achievement of the ultimate public interest goals. From major decisions which affect the entire industry structure to procedural modifications which effectuate that policy, these policy goals should be the foundation of future telecommunication policy.

In response to that end, the telephone industry has advanced the primary instrument concept for terminal equipment supply, and its task force recommendations[12] for resolution of the intercity services dilemma. Both proposals attempt to accommodate competition, consistent with the basic public interest standards contained in the Communications Act. Whether Congress and our regulators will agree that those proposals strike the appropriate balance is yet to be determined; however, there is little doubt that progress toward resolution of the issues is continuing.

John F. Preston, Jr.
Associate General Counsel
American Telephone and Telegraph Company

New York, December 20, 1977

12. On December 1, 1977, the telephone industry submitted to Congress a proposal for structuring the provision of telecommunications services in this country. This proposal, which attempts to reconcile the desire to maintain lower rates for basic residential and rural telephone customers with the desire to widen the availability of customer choice of telecommunications services and suppliers, recommends placement of telecommunications services into various categories where they will be subject to differing regulatory, ratemaking, accounting, and financial practices and policies suitable to each category. Basically, four categories are envisioned:

1. Regular local and long distance public communications service would continue to be provided by the regulated telephone industry. Long distance rates would continue to be averaged nationwide to keep costs to rural areas down; long distance revenues would continue to help keep the cost of basic local service down.
2. Special communications networks connecting various locations of a customer – such as the various plants or offices of a large company – would be provided by a regulated telephone company, a specialized carrier, or by the customer. These special networks could be connected to services in the nationwide public network, but only at customer locations such as an office switchboard. There would be a charge for the capability of connecting to public network services and that charge would go towards helping keep down the cost of local service.
3. A separate category would provide for private communications systems that are not connectable to public network services. Such systems could be provided by a regulated telephone company, a specialized carrier, or by the customer.
4. Certain terminal equipment and systems, such as switchboards and phones at customer locations and mobile radio, would continue to have direct access to nationwide network services.

The recommendation calls for a transitional period during which present services which do not fit into the new framework would gradually be phased out or reconfigured to bring them under one of the four categories.

Under this proposal, competing networks would be able to continue to offer a wider variety of services designed to meet specialized needs. Even though nontelephone company carriers would, however, have an increasing share of intercity business, the erosion of support for lower residential and rural rates would be slower than under the present trend.

COLLECTIVE BARGAINING BY INDIANA'S PUBLIC EMPLOYEES

To the Editors:

Prof. Rodolpho Sandoval's recent article in the *Journal of Legislation** was a thoughtful and thorough review of proposed public employee collective bargaining legislation in Indiana's General Assembly and reflected tenacious research. The emphasis in the article was on the fate of Senate Bill 61 which was, in effect, a reenactment of House Bill 1298 (Public Law 254), passed by the 1975 Session, and ruled unconstitutional by a Benton County Circuit Court. Senate Bill 61 was authored by Senator Robert Fair and myself, with Senator William Christy, chairman of the Senate's Labor and Pensions Committee, as co-author.

House Bill 1298 was the first comprehensive collective bargaining bill for public employees passed by the General Assembly. It was approved by a vote of 69-26 in the House and a 35-15 vote in the Senate. House co-sponsors were Representatives J. P. Harris and J. G. Harris; Senate co-authors were Senator Fair and myself.

Public Law 217, passed during the 1973 Session, granted the right of collective bargaining to a specific group of public employees; namely, to full-time certified public school teachers, although the scope of bargaining was restricted to "salary wages, hours and salary and wage-related fringe benefits".

Impasse resolution under this Public Law 217 is limited to non-binding fact finding and mediation only; there are no provisions for mandatory arbitration of impasses. By contrast, House Bill 1298 and Senate Bill 61 provided for unlimited scope of bargaining and impasse resolution as discussed in Professor Sandoval's well-documented article.

Senate Bill 61 was drafted to meet the constitutional objections raised by the Benton County Circuit Court. On second reading in the Senate, 19 amendments were offered and four motions prevailed, three by voice vote. A motion of Senator Joseph Harrison prevailed on a roll call vote. This motion changed the employee representation election process by requiring a secret ballot, mandating the words "no" or "neither" appear on the ballot, and stipulating the exclusive representative be selected by a *majority* of all the employees *eligible* to vote in the "most appropriate" unit. The roll call ended in a tie of 23-23, the Lt. Governor breaking the deadlock. A motion containing several technical changes, offered by Senator Fair, was approved by voice vote. The one offered by Senator Merton Stanley precluded the parties from ratifying a contract calling for expenditures of funds in excess of monies legally available to a local unit of government, or requiring a reduction or elimination of other governmental services. This amendment prohibited an employee organization from bargaining for a settlement resulting in a deficit budget and also required the exclusive representative to notify a unit of government of its intent to bargain for salaries and related benefits 120 days prior to budget consideration. Senator Stanley's amendment was more restrictive than that included in House Bill 1298 as it prohibited negotiating the transfer of other available funds to pay for increased wages and fringe benefits. The amendment adopted was

*Rodolpho Sandoval, *Public Employees' Right to Collective Bargaining: The Need for Legislative Action in Indiana*, 4 J. Legis. 39 (1977).

offered by Senator Joseph Bruggenschmidt and required all meetings of either party and all bargaining sessions be opened to the public, the so-called sunshine amendment.

Senate Bill 61 was approved on roll call #123 by a vote of 28-22, primarily along party lines, with 25 Democrats and 3 Republicans voting for it and 19 Republicans and 3 Democrats opposed. Two years previously, House Bill 1298 was approved by a Senate vote of 24 Democrats and 11 Republicans, with only 1 Democrat and 14 Republicans opposed. This shift in Senate Republican votes, in my opinion, reflected a general change in public attitude against collective bargaining for public employees. This attitude has been hardened in recent months by threatened work stoppage and similar activities by public employees throughout the State.

Senate Bill 61 was referred to the House on February 8, 1977, with Representatives Gregory Server and J. G. Harris named as co-sponsors. On March 28, Rep. Server withdrew from sponsorship and Representatives Thomas Coleman and Robert Alderman were added as co-sponsors. This bill was assigned to the House Labor Committee, chaired by Rep. Paul Burkley, on February 28. No action was taken by this committee and the bill never reached the House floor.

In my judgment, efforts to resurrect Senate Bill 61 during the short 1978 Session will fail and could prove counter-productive. Based on what I perceive to be a widespread public attitude, any bill that is acceptable to both Houses this session will be restrictive and repressive. Consequently, I question if the subject matter should be considered in 1978. However, if a bill is introduced, it should start in the House for obvious reasons.

In his conclusion, Professor Sandoval questioned why House Bill 1298 was enacted with provisions precluding judicial review of certain administrative determinations; namely, bargaining unit determination by the Indiana Education Employment Relations Board and certification of employee representation based on a majority vote in a board-ordered election. When it passed the House, House Bill 1298 did not prevent court appeals of these board decisions.

The bill was rewritten in the Senate Labor Committee, chaired by then-State Senator John Shawley. In a recent conversation with Chairman Shawley, he stated the pasted-up version approved by his committee did allow for Court review of all board decisions. However, again according to Shawley, when it was reprinted and presented for second reading amendments, the words "not" were added to sub-sections (d) and (g) under Section 8, the section covering the prevention of unfair labor practices. These small, three-letter words altered the bill substantially, making it vulnerable on constitutional grounds.

Section 8 (g) precluded court review of unit determination with respect to questions of fact *only* if those questions of fact were "supported by substantial evidence on the record considered as a whole". Section 8 (d) prevented Court review of the board's determination that "an employee organization has been chosen by a majority of the employees in an appropriate unit." No one in the Senate raised objections to these specific changes; perhaps because so many changes were made in House Bill 1298, they were overlooked.

I was not involved in the rewrite of the bill in the Senate Labor Committee. In preparing to present the bill on second reading, however, I noted the sub-sections which prevented court review. At the time, I considered them insignificant, rationalizing them on the basis of expediting implementation of the bill's intent by avoiding prolonged court battles. Further, if problems did result, I thought the general severability provision in the Indiana Code (IC 1-1-1-8) which allowed a Court to invalidate sections of a law without affecting the constitutionality of the entire law, would apply. Consequently, I did not question the proposed restrictions on the judiciary; in retrospect, it was an obvious error in judgment.

House members concurred, by voice vote, with the changes made in House Bill 1298 to avoid sending the bill to conference committee and risk losing it in the press of other legislative matters near the end of the Session.

I believe Senate Bill 61 was an innovative approach to collective bargaining in the public sector. It legalized the right of public employees to organize and bargain collectively over wages, hours and terms and conditions of employment; contained a stringent provision against deficit financing; reenforced a no-strike provision with an action at law by a public employer and automatic revocation of dues deduction privileges for one year; set forth unfair labor practices by the public employers and employee organizations; established methods for selection and recognizing exclusive employee representation, and provided methods for resolving impasses.

Under the bill, either party, or the board, could declare an impasse. Either party could request the appointment of a mediator, or the board could appoint one on its own volition. If the mediator was unable to affect a settlement, either party could request their differences be submitted to fact finding with recommendations. Those recommendations were to be advisory only, unless within five days after giving or receiving the written request, either party notified the other that it desired the recommendations to be binding.

If the impasse remained after fact finding, and neither party requested the recommendations be binding, mandatory arbitration could be requested by either party. Arbitration was to be conducted by a three-member panel selected by the parties, arbitration costs being shared equally. Each party was required to submit to the Board a final and an alternate offer. The panel was restricted to selecting "the most reasonable, in its judgment, of the final offers submitted by the parties." The content of these final offers could not contain issues that were not present at the time of the impasse. To my knowledge, this approach to mandatory arbitration in the public sector was unique and Indiana would have pioneered a new concept in impasse settlement.

Throughout his administration, Governor Otis Bowen has supported extending collective bargaining rights to public employees, providing any legislation contain a stringent no-strike clause, prevent deficit financing, and preclude bargaining over funds previously appropriated. Senate Bill 61 met these conditions. It was unfortunate the language changes, either intentional or unintentional, by an individual or individuals unknown, created a constitutional issue and prevented public employees from attaining the right to collectively bargain in Indiana.

In summary, legislators in both Houses who were supportive of public employee collective bargaining either missed, misinterpreted, were mistaken or made incorrect assumptions about the amended language, resulting in the unconstitutionality of House Bill 1298. In my opinion, their collective action was inadvertent, not intentional.

Robert D. Garton
State Senator, State of Indiana
Chairman, Minority Caucus

Indianapolis, December 21, 1977

To the Editors:

I have read and examined the Journal of Legislation article by Professor Rodolpho Sandoval regarding public employees' right to collective bargaining in Indiana.* The article is both complete and accurate as it pertains to the contents of P. L. 254 of the Acts of 1975.

In 1977, I introduced Senate Bill 61 which eliminated the preclusion of judicial review and also contained a severability clause to insure that the main features of the bill would survive should a section of the bill be struck down. The bill passed the Democrat-controlled Senate but died in the Republican-controlled House of Representatives.

In 1978, the same bill will once again be introduced in the Senate. I feel confident that the bill will pass the Senate, but once again the prospects of passage in the House are probably not good.

I certainly share Professor Sandoval's feeling that the public employees of Indiana need and deserve the right to bargain collectively and that they should have had the right for the last two years.

Robert J. Fair
President Pro Tem
The Senate, State of Indiana

Indianapolis, January 6, 1978

*Rodolpho Sandoval, *Public Employees' Right to Collective Bargaining: The Need for Legislative Action in Indiana*, 4 J. Legis. 39 (1977).

SOCIAL LEGISLATION

To the Editors:

I would like to comment on your brief review by Terry A. Crone of *Social Legislation*, the second unit of the Labor Law Group coursebook series published by BNA Books.*

Mr. Crone is absolutely right in his concluding comment: much of this material "would be difficult to appreciate without a preexisting substantive law background in this area." A novice teacher who uses the book for the first time is likely to find it very tough going, since many of the statutes treated are complex and slippery, but not well known. A student attempting to master the material on his or her own with minimal class attendance would, I think, court disaster.

My intention in preparing these materials was to provide both a small sampling of cases for teachers who wished to include some of this material in an introductory labor law course and also an organizing framework for those wishing to teach a more extensive course, with the expectation that those teaching the more extensive course would want to use their own supplementary materials – often a substantial body of local workers compensation law precedent, for example. I also knew that much of what was included would probably be out of date very soon, since so many of the statutes involved are only now

*4 J. Legis. 181 (1977).

being fleshed out by judicial decision. In my own course, I currently use a supplement which runs more than one hundred pages (a copy of which I would be happy to send to any instructor using the book).

The most telling criticism of the book is the charge that the note material is too thin. On the whole, I think Mr. Crone is right in that statement. If a further edition is prepared, more notes should be included. The present balance is an indication of my own style of presentation, and would not be comfortable for all teachers. However, I remain convinced that students read cases with much more care and if pressed by size constraints to choose between text or case, I will again prefer the latter.

I would be delighted to receive suggestions from any current users.

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