A Study Of Public Employee Labor Law In The United States

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A STUDY OF PUBLIC EMPLOYEE LABOR LAW
IN THE UNITED STATES

by

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ABSTRACT

This study examined the legal issues of public employee labor relations in the United States. Included in this study is a review of relevant case law as it pertains to collective bargaining in the public sector. In addition to reviewing the case law, this study researched the statutory language of each state for public sector collective bargaining. The study includes a review, analysis, and summary of the state and federal laws for public sector collective bargaining.

The collective bargaining process in the United States is designed to resolve disputes between two parties, the employer and the employee. The resolution of these disputes often depends on the relative bargaining power of each party. The private sector has a collective bargaining process that has been well established since the passage of the National Labor Relations Act in 1935 and the Labor-Management Relations Act of 1947. The federal laws that have been implemented in the last fifty years, to include the Civil Rights Act of 1964, the Equal Employment Opportunity Act of 1972, the American with Disabilities Act of 1990, among others, cover the scope of almost all of the private sector collective bargaining (Oberer, 1994).

The public sector contains 50 different state laws and several federal laws defining the scope of collective bargaining for public employees. The bargaining process in the public sector takes place in the context of the political arena. This political influence, which is unique in each state and at each level of government, provides additional steps to the bargaining process that further differentiate public sector bargaining from private (Valletta, 1985).

This study provides conclusions on certain aspects of public sector collective
bargaining that lead to dispute resolution and contract negotiation to include fact-finding procedures, mediation, arbitration, and strike policies, in the current state of the law. Recommendations are made to public officials, policy makers, and other stakeholders for the future of public employee labor relations in the United States.
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CHAPTER I

INTRODUCTION

Labor relations in the United States have undergone extensive change in the past half-century. Public employee labor relations have seen a tremendous transformation in the last ten years. Following the Second World War, the country went through one of the largest strike waves in history, with many employees unsatisfied with working conditions and wages. People were looking for an improvement in the conditions of the workplace and for fair practices in employment. In the coming years, the government would pass a series of laws that directly affected the employee (Imundo, 1975).

In 1947, Congress passed the Taft-Hartley Act, which restricted union activities and permitted states to pass “right-to-work” laws. In 1963, the Equal Pay Act prohibited wage differences for workers based on sex. In 1964, the Civil Rights Act prohibited discrimination in employment based on race, color, religion, sex or national origin. In 1968, the Age Discrimination in Employment Act made it illegal to discriminate in the hiring or firing of persons between the ages of 40 – 65 on the basis of age (Coleman, 1980).

As labor relations in the private sector progressed, public employees looked for relief in working conditions as well. In 1970, postal workers staged a massive strike that affected the entire U.S. Postal Service. Later that year, Hawaii became the first state to allow its state and local officials the right to strike. In response to the growing interest in public employee unionism, the American Federation of Labor - Congress of Industrial Organizations (AFL-CIO) created a public employees department in 1974. In 1975, more than eighty thousand members of the American Federation of State, County and
Municipal Employees (AFSCME) participated in the first legal large scale strike of public employees (Clark, 1996).

In the last 25 years, labor relations for public employees have been affected by legislation and by political and economic change. In the United States, the principle method for determining overall working conditions in the organized sector of the U.S. economy is collective bargaining, rather than legislation. There are, however, two main pieces of legislation that determine labor relations practice (Oberer, 1994):

1. The National Labor Relations Act of 1935 (NLRA). The NLRA defines the rights of employees to organize and bargain collectively with their employers through representatives of their own choosing. To protect the rights of employees and employers and to prevent labor disputes. Congress defined which practices were considered unfair labor practices.

2. The Labor-Management Reporting and Disclosure Act of 1959 (LMRDA). The LMRDA provides basic standards of democracy and fiscal responsibility in trade unions. The LMRDA establishes: a Bill of Rights for union members; guidelines for the regular election of union officers; requirements for the reporting of administrative practices and annual financial activities by unions. The provisions of the LMRDA were extended to cover all federal employees through the Civil Service Reform Act of 1978.

In the United States, there are more than sixteen million trade union members. In the public sector, although unionization is a relatively recent occurrence, the unionization rate (38%) is significantly higher than in the private sector (9%) (Clark, 1996).

The researcher began with a thorough examination of the historical, political,
economic, and legislative events in public sector labor relations since the early 1970s that led to the current state of affairs in public sector labor relations and collective bargaining in the United States. The researcher proceeded to define and provide a historical and political perspective on the importance of the following terms: binding arbitration, right-to-work laws, no-strike clause, grievance procedures, impasse, organization representatives, public employees, bargaining unit, bargaining agent, and collective bargaining. The researcher detailed public employee labor laws as defined, and in relation to the terms above, in each of the 50 states of the United States. Through this process, the researcher sought to find trends in legislation and policy among the states of the union. How many states have written and tested public employee labor laws? What case law is available from the courts to support these trends? The researcher examined the recent changes in public sector labor relations as they have been affected by the events in private sector labor relations. Whereas the private sector works with a situation of supply and demand in which profits drive the market and the organization’s ability to survive, in the public sector, budgets are decided legislatively. What changes have we seen in the past ten years in public sector labor relations and what path will public sector labor take in the future?

This study provided a qualitative analysis of legal decisions and examined the laws written at the local, state, and federal level in the United States. The researcher scrutinized case law from the United States Supreme Court, United States Circuit Courts, State Supreme Courts and Appellate Courts. Research sources included the United States Constitution, all state constitutions and statutes, and case law as related to public sector labor relations. Based upon the qualitative analysis, the researcher made
recommendations for public school districts and state legislatures to follow in their future legal and management efforts with public employee labor law and employee working conditions.

The study provided a historical and supportive background to the state laws by describing federal laws as they apply to public sector labor relations. The National Labor Relations Board (NLRB) and The Equal Employment Opportunity Commission (EEOC) are two of the main federal agencies responsible for promoting equal and fair labor practice in the United States. The following federal laws provide additional guidance for fair labor practice: Title VII of the Civil Rights Act of 1964; The Equal Pay Act of 1963; The Age Discrimination in Employment Act of 1967; The Rehabilitation Act of 1973, §§ 501 and 505; Title I of the American with Disabilities Act of 1990; and The Civil Rights Act of 1991 (Gould, 1993).

This study examined in detail the changing political and economic processes that affect the public employee labor laws. Collective bargaining and the political process are very well connected in the public sector. There is, within this sector, a specific responsibility to protect the public interest with the recognized sovereign status of the state, and there exists a financial constraint on management which differs greatly from the private sector. Federal employees cannot bargain over the important issues of compensation, with the exception of a few select agencies. Federal workers are further prohibited from striking and other forms of political activity considered illegal (under the Hatch Act) (Imundo, 1975).

Additionally, collective bargaining has been discouraged in the public sector on the basis of the “privilege doctrine.” This doctrine states that the benefits the government
confers on its employees are privileges as opposed to rights. The courts have recently addressed these doctrines of sovereignty and privilege and the barriers to collective bargaining are subsiding in the public sector (Martin, 1977). Although the issues of bargaining in the public sector continue to evolve, and more so in favor of unions, there remains the description of government services as “essential.” Thus, bargaining has been denied when this essentiality of services can be hindered. In recent years, as citizens have adapted to postal strikes, teachers strikes, and other disruptions of service on the public service level, public sector labor bargaining has become more generally accepted by the general public (Martin).

The focus of this study was limited to the laws in place in the 50 states, detailing the rights to collectively bargain and to strike. There is no comprehensive common legal framework within which to work for state and local government employees. State and local labor relations exist through a complex map of common-law doctrines, judicial decrees, executive orders, statutes, and ordinances (Clark, 1996). The labor relations situation for public employees is extremely diverse in each city, county, and state in the United States. Many state and local government employees have resorted to strikes as a way to ensure their respective employers meet their demands. The large majority of governmental jurisdictions prohibit public employees from striking; however, hundreds of public employee strikes have taken place in the last twenty years (Olson, 1986).

Employers continue to resist the idea of legalizing strikes by employees because of the sovereign nature of government and the fundamental necessity of government services. State and local governments have resorted to three basic procedures to press the process of finality: mediation, fact-finding, and arbitration. There continues to be a
strong opposition to compulsory arbitration as it displaces the political responsibility by
deleagating governmental authority to a third party who is not responsible to the electorate
(Ichniowski, 1982).

In 1970, Hawaii and Pennsylvania authorized certain types of public employees to
strike. Ten other states joined in to allow public employees to strike, seven by statute:
Alaska, Illinois, Minnesota, Ohio, Oregon, Vermont, and Wisconsin, and three by
common law: California, Idaho, and Montana (Valletta, 1985). The trend in public
sector bargaining has been toward mutual responsibility for wages, hours, and working
conditions, however the conflict of sovereignty/accountability and bilateral authority is
strongly ideological and imbedded in discussion and disagreement among the parties of
interest (Imundo, 1975).

Purpose

The purpose of this study was to develop a base of information from which
government agencies; state legislatures, public officials, and other stakeholders can create
practical and legal rules, procedures, and policies concerning collective bargaining in the
public sector, for teachers, police and fire officers, and other government employees.
This study examined the laws, statutes, and court decisions that provide a framework for
the development of future constitutionally sound policy and procedure in collective
bargaining in the public sector. This study provided the varying methods of collective
bargaining, in the United States public sector, for analysis and review, in an effort to find
common ground and successful methods for labor dispute resolution.
Research Questions

1. What conclusions and recommendations can be made from the supporting legal research and jurisprudence on the subject of public sector collective bargaining?

2. What significant issues are found in the historical development and litigation of public sector collective bargaining that would lend them to assist in the future advancement of state and federal public labor laws?

3. What are the legal ramifications and limitations, with the state and federal laws as currently written, for public sector collective bargaining?

Background

In the private sector, collective bargaining is maintained by the employer and the employee who is normally represented by a labor organization. The framework of the negotiations for pay and working conditions is preserved by specific federal legislation and further supported by state laws. In the United States, employees in the private sector are well aware of their rights to bargain and to strike if necessary. In the public sector, employers have very often restricted employees from bargaining for wages and benefits. In some areas, for example at the federal level, bargaining for pay has not been allowed. Government employees have been expected by the public to serve in their duties without question and without work slowdown or strike. The significance of the “obligation to serve” in government employment has its roots in the importance of maintaining safety and security for all citizens (Imundo, 1975). Police and fire are considered essential services that should not be interrupted for labor negotiations. From these primary and critical government services continues the discussion to all other government, municipal, state, and federal employees. Water and electricity are regarded by many to be critical
services for the public. Garbage disposal, parks and recreation, schools, and many other
services, all provided by different levels of government and paid for by citizen’s taxes,
have been considered crucial to the public’s health and welfare.

Public employees and their labor organizations have made successful inroads in the
collective bargaining process with their respective employers. Many aspects of the
negotiations process in the public sector are similar to the negotiations strategies and
methods applied in the private sector (Lee, 1987). Grievance procedures and rights
disputes are negotiated in almost identical formats as found in the private sector. Fact-
finding procedures and mediation are also often utilized in the public sector to find
resolution to disputes. The important difference occurs in the public sector when
resolving interest disputes (Gould, 1993). The collective bargaining process in the public
sector does not contain the same economic pressure points as in the private sector.
Government employers and employees are often mired in political maneuvering when
trying to resolve labor disputes. The general public, most often the part with persons
affected by a possible disruption of services, is often involved when it comes to public
employee labor negotiations. The political influence of stakeholders can vary from the
prominent local businessman or councilman to the common taxpaying citizen who is
afraid of losing trash pickup services for the next several weeks or the single mother with
children in school worried about a possible teacher strike.

The economic strategies used by opposing parties in private sector labor disputes
can be brutally difficult, causing severe profit loss for a plant operation, locking out
striking employees and hiring replacements, and even causing permanent business
shutdown, where both the employer and employee lose everything (Ichniowski, 1982).
These very fears and potential dangers to the economic well being of both parties is what often keep negotiations underway. Neither party is in the situation to see the demise of the other, for they both need to be healthy for each other to survive. The employer needs the working bodies to keep his plant operating, and the employees need a place of work, to provide for their families. However, the very negotiations for pay and wages, especially in difficult economic times, are often gut-wrenching and require committed patience and ability to find resolution.

In the public sector, employees and employers are most often without this final step of economic decision. In the absence of this common fear of economic mortality, parties in the public sector have a much more complicated route to dispute resolution (Oberer, 1994). Some state governments rely on fact-finding and mediation efforts with the additional threat of arbitration to decide labor disputes. In general, parties prefer to resolve their own issues with each other rather than seeking final and binding arbitration with a third and neutral party. The common feeling is that one can usually negotiate at least a better agreement than one that is forced through binding arbitration. Unfortunately for some public employees, without the strike as a strategic tool, and absent any kind of binding or legal arbitration, they are often forced to accept final offers by the employer, the local government agency (Olson, 1986).

An improved information base of the issues surrounding public employee collective bargaining at all government levels, municipal, state, and federal, is necessary to better the economic and political working conditions of government employees in the United States (Valletta, 1985). While some states have now allowed public employees to strike, others do not even have statutes written to enforce public employee collective
bargaining. Although a federally mandated set of procedures or laws may not be the solution, it would be most helpful in order to better grasp the complexities of public sector collective bargaining and the needs of both the employers and the employees to have some common ground and common understanding in this very uncommon arena, collective bargaining in the public sector.

Definitions

*Closed Shop* – A location of employment where workers must be members of the union as a condition of their employment. This practice was made unlawful by the *Taft-Hartley Act*.

*Collective Bargaining* – As supported by the *National Labor Relations Act*, is a procedure looking toward the making of collective agreements between employer and the accredited representative of union employees concerning wages, hours, and other conditions of employment, and requires that parties deal with each other with open and fair minds and sincerely endeavor to overcome obstacles existing between them to the end that employment relations are stabilized and any obstruction to the free flow of commerce is prevented.

*Collective Bargaining Agreement* – An agreement between the employer and a labor union which regulates terms and conditions of employment.

*Collective Bargaining Unit* – All of the employees of a single employer unless the employees of a particular department or division have voted otherwise.

*Exclusive Bargaining Agent* – The union that has been recognized and certified as such by the *National Labor Relations Board (NLRB)* as the exclusive representative of employees in a bargaining unit.
**Fair Representation** – The duty of a union to represent fairly all of its members, both in the conduct of collective bargaining and in the enforcement of the resulting agreement, and to serve the interests of all members without hostility or discrimination toward any and to exercise discretion with complete good faith and honesty and to avoid arbitrary conduct.

**Good Faith Bargaining** – The requirement upon the employer and employee organization and obligation to come to the bargaining table with an open mind and sincere desire to reach an agreement.

**Interests Dispute** – A dispute that arises over the terms of the new collective bargaining agreement.

**Labor** – This term is synonymous with “employment” and “job” and refers to work for wages as opposed to work for profits. In the *Clayton Act*, this term is not limited to manual laborers or mechanics but also includes intellectual labor.

**Labor Dispute** – Any controversy between employer and employee concerning the terms, tenure, hours, wages, fringe benefits, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment.

**Negotiate** – The transaction of business or the act of bargaining with another party respecting a transaction of business. To conduct communications or conferences with a view to reaching a settlement or agreement. A conversation in arranging the terms of a contract. To conclude by bargain, treaty, or agreement.

**No Strike Clause** – Provision commonly found in public service labor-management agreements to the effect that the employees will not strike for any reason;
with labor disputes to be resolved by binding arbitration.

*Public Employee* – A worker or employee whose efforts are compensated by a public agency, as in a department or agency of government, which has an official or quasi-official status.

*Public Employer* – A department or agency of government, which has an official or quasi-official status. Levels of government can be local, state, and federal.

*Private Employee* – A worker or employee whose efforts are compensated by an individual or partnership of individuals that is not official or associated with government or public office.

*Private Employer* – An individual or partnership of individuals that is not official or associated with government or public office.

*Protected Activity* – An action that will not cause an employee to be disciplined or discharged.

*Rights Dispute* – A dispute that involves the interpretation of the collective bargaining agreement.

*Shop Steward* – A union official elected to represent members in a plant or particular department. Duties include collection of dues, recruitment of new members and initial negotiations for settlement of grievances.

*Unfair Labor Practice* – As defined by the *National Labor Relations Act*, a practice for the employer: (1) to interfere with, restrain, or coerce employees in the exercise of their rights to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or
protection; (2) to dominate or interfere with the formulation or administration of any labor organization or contribute financial or other support to it; (3) to discriminate in regard to hire or tenure of employment or any term or condition of employment and to encourage or discourage membership in any labor organization; (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under the Act; (5) to refuse to bargain collectively with the representatives of his employees.

*Union Shop* – A place of where all workers, once employed, must become union members within a specific period of time as a condition of employment. See *Closed Shop.*

*Unprotected Activity* – An action that is prohibited and may cause a cease-and-desist order from the NLRB through an administrative process or through an order from the circuit court of appeals.

*Zipper Clause* – An agreement by both parties to preclude further bargaining during the term of the contract.

**Legal Definitions**

*Action* – A lawsuit brought in a court; a formal complaint within the jurisdiction of a court of law. The legal and formal demand of one’s right from another person or party made and insisted on in a court of justice.

*Administrative Procedure* – Methods and processes before administrative agencies as distinguished from judicial procedure, which applies to courts.

*Administrative Process* – A procedure used before administrative agencies to summon witnesses and determine information.
Affirm – To ratify, uphold, approve, confirm, establish, reassert. In the practice of appellate courts, to declare a judgment, decree, or order that it is valid and right and must stand as rendered.

Appeal – To resort to a superior (appellate) court to review the decision of an inferior (trial) court or administrative agency.

Appellant – The party who takes an appeal from one court or jurisdiction to another.

Appellate Court – A court having jurisdiction of appeal and review; a court to which causes are removable by appeal, certiorari, error or report.

Appellee – The party in a cause against whom an appeal is taken. The party who has an interest adverse to setting aside or reversing the judgment.

Arbitration – A process of dispute resolution in which a neutral third party (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard. The arrangement is attended to avoid the formalities, the delay, and the expense of ordinary litigation.

Binding Arbitration – Arbitration, which is enforceable by the court of law upon its decision.

Case Law – The aggregate of reported cases as forming a body of jurisprudence, or the law of a particular subject as evidenced or formed by the adjudged cases, in distinction to statutes and other sources of law.

Cease-and-Desist Order – An order of an administrative agency or court prohibiting a person or business firm from continuing a particular course of conduct. Ruling issued in an unfair labor practice case requiring the charged party (respondent) to
stop the conduct found illegal and take specified affirmative action designed to remedy the unfair labor practice.

*Certiorari (Writ of)* – A writ of common law origin issued by a superior to an inferior court requiring the latter to produce a certified record of a particular case tried therein. The writ is issued in order that the court issuing the writ may inspect the proceedings and determine whether there have been any irregularities. Most commonly used to refer to the Supreme Court of the United States, which uses this term as a discretionary device to choose the cases it wishes to hear.

*Clause* – A single paragraph or subdivision of a pleading or legal document, such as a contract, constitution, or statute.

*Common Law* – As distinguished from statutory law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs, particularly the ancient unwritten law of England. All the statutory and case law background of England and the American colonies before the American Revolution.

*Complaint* – The original or initial pleading by which an action is commenced. A written statement of the essential facts constituting the offense charged.

*Condition* – A clause in a contract or agreement, which has for its object to suspend, rescind, or modify the principal obligation.

*Declaratory Judgment* – Statutory (*Declaratory Act*) remedy for the determination
of a justifiable controversy where the plaintiff is in doubt as to his legal rights. A binding adjudication of the rights and status of litigants even though no consequential relief is awarded.

**Defendant** – The party against whom relief or recovery is sought in an action or suit.

**Dismissal** – An order or judgment finally disposing of an action, suit, or motion without trial of the issues involved.

**Employee** – A person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed.

**Enjoin** – To require a person, by writ of injunction, to perform, or to abstain or desist from, an act.

**Fact-finding** – An investigation and report to determine the facts concerning a particular event, situation, or dispute.

**Final Offer Arbitration** – Arbitration where the arbitrator must choose the final offer of either one party or the other and is therefore not permitted to compromise.

**Grievance** – A complaint filed by an employee, or by his union representative, regarding working conditions and for resolution of which there is procedural machinery provided in the union contract.

**Holding** – The legal principle to be drawn from the opinion (decision) of the court.

**Impasse** – A situation allowing for no further progress; stalemate in contract negotiations.
**Injunction** – A court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury.

**Jurisdiction** – The power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties. The power of the courts to inquire into facts, apply the law, make decisions, and declare judgment.

**Labor contract** – A contract between employer and employees (union), which governs working conditions, wages, fringe benefits, and grievances.

**Labor-management relations** – Activities, which concern the relationship of employee to employers both union and non-union.

**Labor Organization** – An organization or agency or employee representation committee, group, association, or plan that is engaged, with employee participation, for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment.

**Labor Picketing** – The act of patrolling in motion at or near an employer location, carrying placards with a short communication about the union’s claims.

**Labor Union** – A combination or association of workers organized for the purpose of securing favorable wages, improved labor conditions, better hours of labor, and righting grievances against employers.

**Mediation** – A method of dispute resolution in which a neutral third person, the mediator, helps disputing parties to reach an agreement. The mediator does not have the power to impose a decision on the parties.

**Opinion** – The statement by a judge or court of the decision reached in regard to a
cause tried or argued before them, expounding the law as applied to the case, and
detailing the reasons upon which the judgment is based.

*Plaintiff* – a person, who brings an action to court, complains or sues, or seeks remedial relief for an injury to rights.

*Primary boycott* – An action by a union by which it tries to induce people not to use, handle, transport or purchase goods of an employer with which the union has a grievance.

*Remand* – The act of an appellate court when it sends a case back to the trial court and orders the trial court to conduct limited new hearings or an entirely new trial, or to take some further action.

*Respondent* – In appellate practice, the party who contends against an appeal, against whom the appeal is taken, or the appellee.

*Reverse* – To overthrow, vacate, set aside, annul. To reverse a judgment, sentence or decree of a lower court by an appellate court.

*Secondary boycott* – The refusal to work for, purchase from or handle products of secondary employer with whom the union has no dispute, with object of forcing such employer to stop doing business with primary employer with whom union has a dispute.

*Secondary Strike* – A strike against firms which supply goods and materials to the firm with which there is a primary dispute.

*Strike* – The act of quitting work by a body of workers for the purpose of coercing their employer to accede to some demand they have made upon him, and which he has refused.

*Strikebreaker* – An individual who takes the place of workman who has left his
work in an effort to force the striking employee to agree to demands of employer.

*Ultra vires* – An act performed without any authority to act on subject.

*Wages* – A compensation given to a hired person for his services based on the time worked or output of production.

Limitations of the Study

1. The importance and pertinence of the court cases utilized in this study were limited by their accessibility and availability as a resource through the legal research database *Lexis-Nexis*.

2. The accuracy of information as presented in the court cases was dependent on the legal research database *Lexis-Nexis*.

3. The ability to access the most up-to-date state and federal statutes was dependent on state and federal statute publications.

4. The applicability of state statutes and Federal District Court cases was limited by the borders of their representative states. Federal laws, Circuit Court of Appeals, and Supreme Court decisions provided legal precedence throughout the United States.

Assumptions of the Study

1. It was assumed that collective bargaining and dispute resolution procedures are relevant and current legal issues for public sector employees in the United States, from teachers and school board members to police, fire, and utilities officers and their respective government agencies.

2. It was assumed that teachers, school district and site administrators, school board members, university staff and professors, state legislatures, government agencies,
and the general public would benefit from current and up-to-date knowledge of the legal status of public sector collective bargaining in the United States.

3. It was assumed that the individual parties named above would be better equipped, with a broad and detailed information base on public sector collective bargaining, to manage new government policy, legal changes in state and federal statutes, and new court decisions and better able to plan for the future success of public sector employment.

Significance of the Study

Collective bargaining in the public sector is in a state of change throughout the United States. There is no single policy, federal statute, or executive order that dictates the complete negotiations process for public employees. Policy varies from state to state with some states bereft of any collective bargaining law at all. Some states utilize mediation and fact-finding methods with or without arbitration. In some instances, arbitration is mandatory while in others it is voluntary. Strikes are prohibited by almost all states, but have been recently allowed in several. The discussion on the state of public sector collective bargaining continues throughout the United States, from school board meetings to city council meetings to government agency policy meetings.

The collective bargaining process, although not supported by state statute in all fifty states, is sanctioned by court decisions, attorney general opinions, local ordinances and executive orders. There continues to be much debate about the best course of action for future legislation for the public sector. The dialogue has become a political one as different sides of the political spectrum become involved in the future of government employee rights. Conservative party influence and support of elected officials tends to
lead in the direction of refusal of many of the rights long ago granted to private employees. The right to bargain collectively for wages and benefits has been a right of private employees for most of the past century. The right to strike is also a well-established right of private employees that is often successfully used to drive labor disputes to final resolution.

These rights that have been a part of private sector labor negotiations for many years find resistance in the public sector. There are those parties who feel that government sovereignty is inviolable and that to strike against the very government that protects you is an unacceptable and reprehensible option. In addition, to allow government to be saddled by the arm-twisting techniques of strikes, lockouts, and shutdowns would be contrary to the foundations of our system of government. The political process cannot be influenced by the economic needs of its employees. These are the feelings of a substantial number of individuals directly involved in the public employment process, while others have argued simply that times have changed. The economic well being of our government is interconnected with private industry in a multitude of areas of business, manufacturing, production, technology, and research. The financial fluctuations of the private sector have great influence on what occurs with the government. A simple course in macroeconomics can justify and demonstrate the connectedness of private and public sector economic activity.

For most employees working in government jobs, a merit based system of recognition and promotion existed rather than the seniority and experience based system supported by most collective bargaining agreements. In addition, government employees were simply not permitted to debate their wages and benefits. As the situation in public
sector employment changed and employees gained greater leverage in determining their own working conditions, some agreements went to the more traditional seniority based system of recognition found in the private sector. However, the merit-based approach has made a comeback in recent years in the private sector and will continue to play a role in determining worker pay. The matter is more complicated in the public sector than in the private sector where production and profit provide more measurable events to determine pay in a merit based system. The work done in many parts of the public sector are service-based jobs such as police, fire, and education where there is no product to measure. Recent efforts in qualitative research, measurement, and assessment have provided more options for these employees in a merit-based system of employment.

Employees need to be aware of the changes occurring in their areas of work. The notion of collective bargaining has evolved from a simple model of employer versus employee for the greatest wage hike possible or strike. Working conditions have improved dramatically across the country in all areas of expertise, from technology to agriculture to service-related jobs to education. Employees, employers, legislatures, political advocates, contract negotiators and community members must gain a broader and deeper knowledge of the historical and constitutional background of the issues surrounding public sector collective bargaining. These issues affect a large portion of the working population and in addition since they involve government services they have great importance to a majority of the population at large. The knowledge gained and implemented will serve as a starting point for the development of new policies and procedures that are prepared to serve the rights of employees and employers.

There exists a general lack of knowledge and misinformation throughout the
ranks of public sector employees. This situation is worsened by the inconsistency of policy from state to state. The federal laws do not ameliorate this set of circumstances in the different municipalities, cities, and local governments, as they address the rules for federal employees. The complexity and variation of public sector collective bargaining rules is often reduced to rumor and rhetoric as different political parties provide their input.

This study will examine and provide the legal information base that is drawn from the principles and interpretation of the constitutional law as developed by our judicial review system. This study will further clarify and decipher the legal issues as they relate to public sector collective bargaining.

Government agencies, school boards, and other city and municipal services must have an awareness of the current law regarding public sector collective bargaining. The jurisprudence and the historical review of public sector collective bargaining will be provided in his study and its importance accentuated for all stakeholders. The future of public employment and its success depends on an acceptance to understand and analyze the process and history through which public sector collective bargaining has traveled and to prepare and predict the road ahead.

The significance of this study is to provide a clear understanding of the current state of the law, to review the path already taken, and to determine which course to map for the future of public sector employment. In addition, it would be most prudent to find a way to create a standard of consistency among states, at all levels of government. The analysis of the state and federal statutes and court decisions will provide a knowledge base from which to plan for future legislative decision-making and judicial action. This
study is significant in its review and analysis of state and federal laws and court
precedent for public sector collective bargaining to better prepare the formulation of
policy and procedure that will affect a large percentage of the working population. This
study is further significant in its recommendations and conclusions, based upon the
current and historical jurisprudence of public sector collective bargaining, to assist in the
improvement of working conditions for public sector employees in the United States.

Research Methodology

The initial research in this study involved the investigation of the legal issues
surrounding the topic of collective bargaining in the United States. In the course of this
research, it was determined that further study of the historical background of collective
bargaining was necessary for a thorough understanding of the subject. Primary and
secondary legal sources were researched.

In this study, the methodology consisted of legal research of related case law,
state and federal statutory language, administrative rules, and executive orders. Federal
statutory provisions provided the information base for collective bargaining in the United
States, but once the study proceeded to the area of specific research of collective
bargaining in the public sector, it was necessary to research state statutes and case law.
Primary sources included state and federal constitutional language, state and federal
statutory language, and state and federal court decisions. These primary sources of
information were identified through the research of secondary sources such as law
journals, public labor law journals, legal encyclopedias, and annotated statutes.

In addition to the law and labor law journals that were researched, the legal
resource service Lexis-Nexis was the source of state and federal court decisions. The
legal dictionary, *Black’s Law Dictionary* was utilized for legal definitions. The legal encyclopedias, *Corpus Juris Secundum* and *American Jurisprudence 2d*, assisted in finding and investigating the law for public sector collective bargaining. Further legal research was conducted and cases investigated in *American Law Reports*, *West’s Federal Practice Digest*, and the *United States Code Service Lawyer’s Edition*.

The review and analysis of the law as provided by these legal research sources supported this study and its efforts to assess the significance of current and historical changes in public sector collective bargaining. The methodology of this study also reported on the examination of all state statutory language as it applies to public sector collective bargaining. This research reviewed the state and federal court decisions as they relate to these statutes at the state level. Federal statutes were included in the study and their application in the law was reviewed. In order to provide the most current and pertinent legal research, this study included communication with state attorneys general and state department of education officials.

**Organization of the Study**

This study was divided into four separate and distinct sections. Chapter I identified the topic of public sector collective bargaining as relevant for study and review. This chapter discussed the importance of public sector collective bargaining and identified the key participants in any future changes of the law. In addition this part of the study presented the need for a historical review of the case law and federal and state laws as they developed in the United States.

A formal literature review of the historical and legal basis for the current public sector labor law as written was presented in Chapter II. The study investigated state and
federal court decisions and state and federal laws as they developed through the twentieth century and currently stand and apply to public labor relations. This section further provided analysis and examination of the court decisions from a historical and legal perspective as they applied to public sector labor relations during the economic, political, and demographic changes of the United States in the last one hundred years.

Chapter III presented the information on all state statutes that addresses public sector collective bargaining, dispute resolution, and rules regarding strikes. This section of the study examined all legally applicable state statutes and related court cases for public sector collective bargaining and labor relations. Analysis of court decisions and statutes is included where appropriate and supportive of the study.

Chapter IV summarized the study and provided recommendations and conclusions for review by all interested parties: school board officials, government agency leaders, local and state government officials, and other community members. This chapter recapitulated the historical and legal review from Chapter II and provided additional analysis and consideration of the law as it applied to public sector collective bargaining. In addition, this chapter provided information to be considered by policy makers and stakeholders on the current public sector labor law and to utilize this data as a resource when formulating future rules and procedures in the arena of public sector labor relations at all levels of government.
CHAPTER II
REVIEW OF THE LITERATURE

The Common Law and Early Cases

The beginnings of what is now termed “labor relations” in the United States can be traced back almost two hundred years to a case known as the Philadelphia Cordwainers’ Case (Commonwealth v. Pullis, 1806).

This case is an excellent point of departure for any study of the political, economic, and social factors involved in the development of labor law into its current form (Oberer, 1994). In order to complete an up to date study of public employee labor law in the United States, a detailed review of the history of labor law in general must first be accomplished. The importance of public sector labor relations has only recently developed in the last thirty years as a separate political arena and its previous history is more dependent on the legal and political course of private sector labor relations.

In this early labor case, the issues of striking and conspiracy were already in play. Philadelphia shoe manufacturers were challenged with providing a local shoe product at an agreed upon rate and one for export at a reduced rate to compete with British production. As the export market grew unexpectedly, the shoe manufacturers found themselves at a loss for profit and demanded all shoes be sold at the original agreed upon rate. The “masters” who bought and sold the shoes from the “journeymen” refused to honor the request. A strike ensued and the leaders were arrested on conspiracy charges. The strike ended in failure and the prices returned to the old rates.

The larger issue here arises from the strain between the American Federalists and
their support for the English common law which stated that for workmen to attempt to raise wages was “criminal” and the Jeffersonian Republicans who supported a system of “individual freedom and a minimum of law and government” (Commons, 1910). In the Mayor’s Court of Philadelphia, the prosecution and defense argued the tenets of freedom of collective action and the realities of the journeymen societies’ compulsion of membership for all shoemakers, otherwise known as closed shop. According to court testimony, anyone who attempted to “scab” as a journeyman or master would be either beaten or threatened. The court considered whether the journeymen’s combined actions were harmful to the general public and stated that it would be “impossible to do business if journeymen could arbitrarily jump their wages” (Commons, 1910). With a jury, the court found the defendants “guilty of a combination to raise wages” and each journeyman was fined eight dollars.

The English common law viewed the journeymen’s behavior as conspiracy and criminal. The Republicans’ arguments of freedom and equality of right for the individual made the case not only more interesting but also more important for the time and was the beginning of the history of American labor law, after common law. For the first time in a court of law in the United States, the needs of the individual were being compared with the needs of the public. At the time, the court clearly stated that any action that is solely for the benefit of one and to injure another is considered unlawful. From this one decision, based on principle, unions of the time were legally condemned.

Commonwealth v. Hunt (1842)

Almost forty years later, in Commonwealth v. Hunt (1842), a similar group of shoemakers combined to form a society of workers and attempted to control prices. They
further agreed not to work for any person who employed any journeyman that was not a member of their society, essentially maintaining a closed shop as in Pullis (1806). The defendants were charged with conspiracy and the court considered the merits of such a society. The court stated that such a society could be used for “honorable and useful purposes” to assist workers in times of need, sickness, and distress or for purposes of “oppression and injustice.” Contrary to the results of Pullis, in Hunt, the court stated that societies and associations were perfectly legal as long as there were no secret or pernicious goals planned by the organized groups of individuals. The court further stated that if the associations acted to cause hardship to another by reducing profits through work stoppages and strikes, these actions were not necessarily unlawful as long as the specific actions were not directly criminal in nature. Justice Shaw’s focus on the “purpose” and the “means” in determining the lawfulness of the concerted union activity set a precedent in labor law for years to come and was evident in later court cases, statutes, and administrative decisions. The questions: (1) What did they do? and (2) Why did they do it? were measured against the social acceptability of the action committed (Oberer, 1994).

In the time of Pullis to Hunt, workers were viewed by employers as conspirators to raise wages and as a detriment to free trade between companies. According to the individuals who ran the companies, workers deterred good business practice and cut into profit by their union activities. With the decision in Hunt, the closed shop was permitted and the court changed course from the Pullis doctrine of union activity equals criminal conspiracy. A labor union was free to take certain action in order to pressure economic benefit for its workers but any intentional infliction of harm upon the employer was now
considered a tort and unlawful unless proved to be justified by a legitimate purpose. This meant that a union on strike could be held liable for damages for losses by the employer unless the self-interest of the union (workers) justified the action. The question for the courts after *Pullis* and *Hunt* was to determine a judicial balance among the competing economic interests of workers, employers, and the public.

The period following the *Hunt* case and after the Civil War allowed judges a considerable amount of freedom to decide cases as appropriate for each situation. Courts attempted to find the balance of interest among all parties and to determine what actions can be considered justifiable and lawful. However, businesses still held the upper hand and had considerable political influence. Unions were still viewed by companies as a nuisance and an impediment to profit making practices. English common law, which dictated that workers who organized to raise their own wages were guilty of criminal conspiracy, was not far from the minds of the politicians and influential corporate bosses who ran the country. The United States was growing as a young country, trying to compete with the economic powerhouses of Europe. The rights of workers were yet to become a real factor in American labor law.

**The Sherman Antitrust Act of 1890**

The *Sherman Antitrust Act of 1890, ch. 647, § 1, 26 Stat. 209,* further complicated matters for the unions, providing statutory language that “unlawful conspiracies” would be brought to the courts.

Every person who shall make any contract or engage in any combination or conspiracy hereby declared illegal shall be deemed guilty of a felony… *(The Sherman Act of 1890, § 1)*

Union activity and pressure was sometimes considered to violate the *Sherman*
Act. Although the government’s intention was to prevent large trusts from dominating American business and to break up large monopolies, to promote competition and effective price control, unions did not benefit from this government action.

In 1896, the Supreme Court of Massachusetts decided against union actions and granted an injunction to prevent picketing and patrolling of company property. These activities were determined to interfere with the freedom of contract and the right to employ individuals at a price agreeable to all parties.

Vegelahn v. Guntner (1896)

In *Vegelahn v. Guntner* (1896), the defendants were found to have been “willfully and maliciously” patrolling the streets in front of the employer’s premises and blocking the entrance and threatening persons attempting to enter to work in their places. Although the defendants claimed that they were simply trying to secure better wages, the court stated that their actions had been unlawful.

A combination to do injurious acts expressly directed to another, by way of intimidation or constraint, is outside of allowable competition, and is unlawful (*Vegelahn*, 1896).

Justice Oliver Wendell Holmes dissented from this decision. Holmes did not feel that the courts should decide this matter and were not designed to devise policy without instruction from the legislature. Holmes further suggested that union activity was competition and should be considered lawful if not criminal by threat of force or by act of force. Although the injunction was imposed and the patrolling stopped, Justice Holmes’ words about future union activity and the realities of an industrialized nation were poignant.

It is plain from the slightest consideration of practical affairs, or the most superficial reading of industrial history, that free competition means combination,
and that the organization of the world, now going on so fast, means an ever increasing might and scope of combination. It seems to me futile to set our faces against this tendency (Vegelahn, 1896).

The U.S. Supreme Court dealt directly with the application of the Sherman Act in two important cases.

Loewe v. Lawlor (1908)

In Loewe v. Lawlor (1908), the Danbury Hatters’ case, a combination of workers, members of a labor organization, took action to prevent the free trade and commerce of their employer through the use of a boycott. The employer Dietrich Loewe, a hat manufacturer, refused to recognize the union. The employees went on strike. Loewe resumed work with a scab crew and the employees organized an interstate boycott. The case was originally brought to the Circuit Court for the District of Connecticut under § 7 of the Sherman Act. The plaintiff claimed damages for economic injuries inflicted by the defendant by a “combination and conspiracy” of action that was unlawful under the Sherman Act. The case then proceeded to the Circuit Court of Appeals for the Second Circuit on a writ of error. The question was whether the plaintiffs could maintain action against the defendants under § 7 of the Sherman Act. The case went to the Supreme Court to have the “whole record and cause sent up for its consideration” and ended with a decision by the Court to grant an injunction against the union activity for preventing free trade and commerce as delineated in the Sherman Act.

Congress made no distinction between classes. It provided that every contract, combination or conspiracy in restraint of trade was illegal. Labor unions are not exempt from the comprehensive provisions of the Sherman Act against combinations in restraint of trade (Loewe, 1908).

Lawlor v. Loewe (1915)

Seven years later in Lawlor v. Loewe (1915), the Court again decided in favor of
Loewe by upholding a lower federal court allowing him to collect damages.

In *Gompers v. Bucks Stove and Range Company* (1911), the Court upheld an injunction order against the American Federation of Labor (AFL), an organization composed of voluntary associations of labor unions. The AFL approached the company as to the hours of labor of its workers. The controversy ended up in a boycott of the company. The AFL publication The American Federationist printed the company as an “unfair” employer. The Court forced the AFL to remove the Bucks Stove Company from its “unfair list” and to cease the boycott. The Danbury Hatters’ case and the Bucks Stove and Range Company decision took away the unions’ strategy of using the secondary boycott to pressure employers to recognize unions for collective bargaining and to operate closed shops.

**Yellow-Dog Contracts and The Erdman Act of 1898**

During this time period, many employers engaged in yellow-dog contracts, an agreement where an employee promises, as a condition of employment, not to be a union member or to become one during the course of employment. The *Erdman Act of 1898*, *ch. 370, 30 Stat. 424*, attempted to prevent this practice and provided that it is unlawful to require an employee to enter in an agreement not to become or remain a union member, or to discriminate against an employee because of union membership.

In *Adair v. United States* (1908), the Court declared § 10 of the *Erdman Act*, which specifically dealt with the employment of union workers, to be unconstitutional.
It is not within the power of Congress to make it a criminal offense against the United States to discharge an employee simply because of his membership in a labor organization; and the provision to that effect in § 10 of the act of June 1, 1898, 30 Stat. 424, concerning interstate carriers is an invasion of personal liberty, as well as of the right of property, guaranteed by the Fifth Amendment to the Constitution of the United States, and is therefore unenforceable as repugnant to the declaration of that amendment that no person shall be deprived of liberty or property without due process of law. It is not within the functions of government to compel any person in the course of his business, and against his will, either to employ, or be employed by another. An employer has the same right to prescribe terms on which he will employ one to labor as an employee has to prescribe those on which he will sell his labor, and any legislation which disturbs this equality is an arbitrary and unjustifiable interference with liberty of contract.

Coppage v. State of Kansas (1915)

Furthermore, in *Coppage v. State of Kansas (1915)*, the “yellow dog contract,” at issue again, was determined to be a lawful option for the voluntary employee and employer. A Kansas law had banned the practice of these agreements, which barred employees from joining labor unions. Coppage, an employer, had terminated an employee for refusing to sign a “yellow dog contract.” Coppage was charged and convicted of violating the Kansas law. Coppage appealed to the Supreme Court. The question was whether the Kansas statute violated freedom of contract as protected by the Due Process Clause of the Fourteenth Amendment. The Court determined that although the employer and employee do not have the constitutional right to insert any stipulation into a labor contract, they do have the right to accept or refuse any given employment. The Kansas law was found to be arbitrary and to interfere with the normal exercise of personal liberty and property rights.

To ask a man to agree, in advance, to refrain from affiliation with the union while retaining a certain position of employment, is not to ask him to give up any part of his constitutional freedom. He is free to decline the employment on those terms, just as the employer may decline to offer employment (*Coppage, 1915*).

The Clayton Antitrust Act of 1914

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The Clayton Antitrust Act of 1914, ch. 323, § 7, 38 Stat. 731, was passed and designed to give relief to labor unions and to strengthen the antitrust provisions of the Sherman Act of 1890. Labor unions were excluded from the language forbidding combinations in the restraint of trade. Previous to the Clayton Act, unions had been labeled as a nuisance to business, often found guilty of preventing free trade and commerce, and even held liable for civil damages as a result of loss of profit for their respective companies. Strikes, picketing, and boycotts were not permitted. The Clayton Act provided the labor unions some breathing room and allowed them to exercise their economic influence through more direct action. The following two sections of the Act addressed union behavior specifically:

§ 6: The labor of a human being is not a commodity or article of commerce. Labor organizations cannot be held to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

§ 20: Restraining orders will not be granted by any court in cases between employer and employee, involving a dispute concerning terms or conditions of employment.

Duplex Printing Press Company v. Deering (1921)

In Duplex Printing Press Company v. Deering (1921), the Supreme Court stated that the distinction between a primary and secondary boycott was material to the question of whether union conduct was protected under the Clayton Act. The Duplex Company refused to operate a closed shop. The company also continued to operate a ten-hour workday at reduced wages. The union called a primary strike, which was unsuccessful. After the primary strike failed, the union organized a secondary national strike with the national labor organization with which it was affiliated. The company manufacturer’s clients were warned by the union with threats of loss and of sympathetic
strikes in other unrelated trades. These other businesses were further threatened not to purchase, sell, or transport the Duplex Companies presses for any purpose. All of these actions interfered with interstate trade of the manufacturer and caused great loss to its business. The Court interpreted the *Clayton Act of 1914*:

§ 6 of the *Clayton Act* assumes that the normal objects of such organizations (labor unions) are legitimate, but contains nothing to exempt them or their members from accountability when they depart from objects that are normal and legitimate and engage in an actual combination or conspiracy in restraint of trade.

§ 20 of the *Clayton Act* which provides that injunctions shall not be granted in any case between an employer and employee growing out of a dispute concerning the terms and conditions of employment, unless necessary to prevent irreparable injury does not use the words “employers and employee” in a general class sense or treat all members of a labor organization as parties to a dispute which proximately affects but a few of them (*Duplex Printing*, 1921).

The Court held that the union’s activities constituted a secondary boycott aimed at compelling third parties and strangers not to do business with the struck employer and were not protected under the *Clayton Act*. The Court further stated that union attempts to exert pressure on companies other than their own violated antitrust law.

The Railway Labor Act of 1926

The *Railway Labor Act of 1926, ch 347, 44 Stat. 577*, was passed to apply for interstate railroads and their related businesses, requiring employers to bargain collectively and prohibiting discrimination against unions. The *Act* provided for mediation, voluntary arbitration, and fact-finding boards and was intended to promote stability in labor-management relations in the railroad industry.

The Norris-LaGuardia Act of 1932

The *Norris-LaGuardia Act of 1932, ch. 90, § 1, 47 Stat. 70*, was set up to free unions from the *Sherman Act* and also to nullify the basis of decision in the *Duplex*
case. The government intended to preserve the traditional boundaries of injunctions and
to prevent restraining orders from being given without a proper hearing and finding of
fact. The Act made it quite clear that the tide had turn in favor of labor unions and their
rights to impact the decisions regarding the employment conditions of their members.

§ 101. No court of the United States, as herein defined, shall have jurisdiction to
issue any restraining order or temporary or permanent injunction in a case
involving or growing out of a labor dispute, except in a strict conformity with the
provisions of this Act [29 USCS §§ 101 et seq.]

The National Labor Relations Act (NLRA) of 1935

449, created a national administrative agency, the National Labor Relations Board
(NLRB), to conduct representation elections to determine whether a union could represent
employees as the exclusive bargaining representative and to determine whether certain
unfair labor practice violations had been engaged in by the employer.

The constitutional basis for the NLRA is the commerce clause of the United
States Constitution, Article I, § 8. The basis for the law as written is that statutory
regulation of labor and management is necessary to prevent industrial conflict that would
disrupt interstate commerce. In 1935 the NLRA was called the Wagner Act. The
language has now changed from “preventing any action” by the labor unions to disrupt
commerce and trade to “managing” labor and management relations. The right of the
labor unions to represent their members had developed into a priority for the
industrialized United States.

§ 1 [§ 151]. Protection by law of the right of employees to organize and
bargain collectively safeguards commerce from injury, impairment, or
interruption, and promotes the flow of commerce by removing certain
recognized sources of industrial strife and unrest, by encouraging practices
fundamental to the friendly adjustment of industrial disputes arising out of
differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

§ 7 [§ 157]. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining.

The NLRB became the “expert agency” in dealing with the regulation of labor disputes. The Wagner Act allowed employees to be protected in their free choice to protest working conditions they found unfair. They were now permitted to organize into unions and to select their own representatives. In addition, management was required to bargain in “good faith” with the bargaining unit that represented a majority of the workers. The main focus of the NLRB was on the development of a body of case law that would govern the majority of the factors in the relationship between labor and management. The enforcement of the NLRB’s orders was obtained through the circuit courts of appeals. The cases appeared and were decided soon after the enactment of the NLRA.

NLRB v. Jones and Laughlin Steel Corporation (1937)

In NLRB v. Jones and Laughlin Steel Corporation (1937), the Court accepted the constitutional theory that Congress was to regulate labor relations in order to avoid any interference with the shipment of goods across state lines.

Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce, is within the regulatory power of Congress, under the commerce clause…therefore Congress has constitutional authority, for the protection of interstate commerce, to safeguard the right of the employees to self-organization and free choice of their representatives for collective bargaining (Jones, 1937).

In Jones, the NLRB found that the respondent had violated the Act by engaging in
unfair labor practices affecting commerce. The employer was taking discriminatory and coercive action by discharging specific employees who were members of the union. The employer further interfered with the employees’ self-organization through coercion and intimidation. The NLRB ordered the corporation to cease and desist the behavior and to reinstate the fired employees. The corporation failed to comply, and the NLRB was forced to petition to the Circuit Court of Appeals to enforce the order. The court denied the petition but certiorari was granted. The Supreme Court reversed the order and remanded the case for further proceedings, concluding that the NLRB was within its competency and that the Act was valid as applied.

The NLRA defined an appropriate bargaining unit as a grouping of employees recognized by the employer, agreed upon by the parties in the case, or designated by the NLRB for the purpose of representation and collective bargaining. The purpose of this bargaining unit is to ensure that employees have the fullest freedom in the exercise of the rights as guaranteed by the NLRA. The determination of the bargaining unit is of intense interest to both management and the labor organization as it is the building block of the structure of labor relations.

§ 2 [§ 152]. The term “labor organization” means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

After an appropriate bargaining unit has been determined, the NLRB holds representative elections. If the union wins a majority, and no objections exist concerning the procedures and processes as connected with the election, the union is certified by the NLRB as the exclusive representative of the employees bargaining unit.
§ 9 [§ 159]. Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

The Board and the courts used the following to determine what constituted an appropriate unit: (a) whether the employees were under common supervision; (b) whether the employer’s bookkeeping relating to the employee concerns, wages, and other benefits was organized on a plant, multi-plant, or multi-company basis; (c) whether the employees had contact with one another, do they clock in/out at the same location; (d) the similarity in type of work performed; (e) similarities in wages, hours, and working conditions; (f) the desires of the employees.

The Taft-Hartley amendments would later make it clear that the NLRB cannot declare an appropriate unit by considering the worker’s wishes alone, (Labor Management Relations Act, 29 U.S.C. § 149 (b) (5) et seq. 1976).

The subject of collective bargaining is divided into three categories: (a) mandatory subjects: rates of pay and wages, pensions, health benefits and insurance plans, and fringe and supplementary benefits; (b) hours of employment; length of workday and work shifts; (c) other terms and conditions of employment: discharge and discipline, grievance procedures, work assignments, work rules, duration of collective bargaining agreement, and safety rules.

§ 8(d) [§ 158]. Obligation to bargain collectively. To bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to: wages, hours, and other terms and conditions of employment.

The NLRB held that disparagement of labor unions by the employee was considered an unfair labor practice.
In 1941, the U.S. Supreme Court tried to protect free speech for the employer in the case of *NLRB v. Virginia Electric and Power Company (1941)*. The courts intended to support the *NLRB* and its findings and not to undermine the agency by changing its decisions at will.

A court is precluded by the command of § 10 (e) of the *National Labor Relations Act* that “the findings of the Board as to the facts, if supported by evidence, shall be conclusive,” from substituting its own views as to the facts for those of the *National Labor Relations Board*, but it is not bound to accept findings which are not free from ambiguity and doubt (*Virginia*, 1941).

Although the *NLRB* in its early stages of existence was challenged in the courts, the very nature of the *NLRA* protected the Board’s authority and allowed it to become a useful and respected organization in labor relations. The *NLRB* continued to be challenged in the courts, but as its body of legal precedence grew, the likelihood of it being wrongly undermined diminished. In *Virginia*, we see one of the first indications of the Court’s willingness to provide protection to the employer. In this case, the employer has been accused of coercion and unfair labor practices, attempting to prevent company employees from openly planning and discussing union activity. The employer in this case had published a company bulletin stating its relatively anti-union stance and encouraging its employees to seek resolution to any issues of wages and benefits without the assistance of an “outside” union. In this case, the *NLRB* had determined that the company had committed unfair labor practices within the meaning of § 8 (1), (2) and (3) of the *Act* and had ordered the company to cease and desist from its unfair labor practices. The U.S. Supreme Court reversed and remanded this decision. The Court stated that the bulletin printed by the company and other additional spoken utterances by
company representatives had not amounted to “coercion”.

The bulletin and the speeches set forth the right of the employees to do as they please without fear of retaliation of the company. Whether there are sufficient findings and evidence of interference, restraint, coercion, and domination, without reference to the bulletin and the speeches, or whether the whole course of conduct, evidenced in part by the utterances, was aimed at achieving objectives forbidden by the Act, are questions for the Board to decide upon the evidence (Virginia, 1941).

The pattern had been set with this one of many cases during the early days of the NLRA. The courts were not willing to take away the authority of this new and very important agency. In addition, by reversing and remanding this decision with specific instructions for the Board, the U.S. Supreme Court demonstrated the importance of the process of fact-finding and review of the evidence without fear of “ambiguity and doubt”.

In Virginia, the employer has demonstrated his right to speak out on the issues related to labor relations. The employer had to be wary of coercion, but this case helped to define the right to speak on the issues as they related to collective bargaining.

As the NLRB continued to build a base case law and decisions, with the support of the courts, the unions also became more successful in promoting their efforts. The unions pressed for the unwilling employers to be subject to arbitration when a dispute over the meaning of a collective bargaining agreement was at issue.

Textile Workers’ Union v. Lincoln Mills, (1957)

In Textile Workers’ Union v. Lincoln Mills, (1957), an action was brought by a labor union in the United States District Court of Alabama over the arbitration provisions of a collective bargaining contract. The District Court concluded that it had jurisdiction and ordered the employer to comply with the arbitration provisions. The case was appealed to the United States Court of Appeals for the Fifth Circuit and reversed on the
grounds that although the District Court had jurisdiction to review the lawsuit it lacked the authority in federal and state law to grant relief.

The Labor Management Relations Act of 1947

On certiorari, the United States Supreme Court reversed the Appeals Court decision, holding that § 301 of The Labor Management Relations Act of 1947 provides that:

suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce may be brought in any District Court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties and authorizes the federal courts to fashion a body of federal law for the enforcement of collective bargaining agreements (Textile Workers, 1957).


In United Steelworkers v. American Manufacturing Co., (1960), a union which had entered into a collective bargaining contract with an agreement for arbitration of all grievances attempted to force arbitration on an issue involving an employee who had left his job because of injury and later sought compensation benefits and was entitled to return to his job by virtue of seniority described in the collective bargaining agreement. The United States District Court of Tennessee refused to compel arbitration, holding that the employee having accepted the settlement when he left his job was prevented from claiming seniority or other employment rights. The United State Court of Appeals for the Sixth Circuit affirmed this decision on the grounds that the grievance of which arbitration was sought was frivolous and not subject to arbitration. On certiorari, the United States Supreme Court reversed the judgment, holding that the lower courts had erred in weighing the merits of the grievance and the equities of the employee’s claim, in view of the fact that the arbitration clause called for the submission of all grievances to arbitration
not only those a court would deem meritorious.

Under § 301 of the *Labor Management Relations Act of 1947*, the function of the court is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract, and the court has no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim (*United Steelworkers*, 1960).

NLRB v. United Food and Commercial Workers Union, Local 23, (1987)

In *NLRB v. United Food and Commercial Workers Union, Local 23, (1987)*, a union, which sought to represent the employees of a grocery store, filed charges with the *NLRB* alleging that the storeowners and another union had committed unfair labor practices. The union provided evidence that the second union did not represent an uncoerced majority of the employees. The Regional Director of the *NLRB* investigated the situation. An attempt was made to negotiate a settlement but failed. The Regional Director filed a formal complaint against the second union, however before hearings began, the Regional Director reached an informal settlement with the owners and the second union, which barred any further collaborations but did not require them to admit any unlawful practices. The first union refused to accept this decision and filed a complaint with the General Counsel of the *NLRB*, as allowed by agency regulations. The General Counsel found no need for an evidentiary hearing and sustained the Regional Director’s decision. The first union petitioned for review of the case by the United States Court of Appeals for the Third Circuit. The court held that it had jurisdiction and that the complaint should not have been dismissed without an evidentiary hearing and granted a petition for review, vacated the informal settlement, and remanded the matter to the *NLRB* with instructions to reinstate the complaints. On certiorari, the United States
Supreme Court reversed and remanded with instructions to dismiss the case. In a
unanimous view of the court, it was held that a decision of the NLRB’s General Counsel
to dismiss an unfair labor practice complaint before hearings begin, pursuant to an
informal settlement in which the charging party refused to join,

(1) is not subject to judicial review under the NLRA since it is a reasonable
construction of the NLRA to find that settlement and dismissal decisions are
prosecutorial functions, so that regulations allowing the General Counsel to make
such decisions without review by the NLRB are consistent with the NLRA’s policy
of separating prosecutorial and adjudicatory functions (United Food &
Commercial Workers, 1987).

The NLRB is the “expert agency” and the courts are not to step in without
the Board’s interpretation of the case at hand. The courts upheld this general view of the
Board’s authority to ensure a “uniform federal” interpretation of the law. In certain
instances the States assumed some limited jurisdiction where actions involved a clear
breach of collective bargaining agreement, libel or harm suffered under statutes designed
to protect an individual’s emotional injury, violence, or threat to peaceful order.

International Union, United Automobile, Aircraft and Agricultural Implement Workers of
America (UAW-CIO) v. Russell, (1958)

In International Union, United Automobile, Aircraft and Agricultural Implement
Workers of America (UAW-CIO) v. Russell, (1958), the issue was whether a state court
had jurisdiction to entertain an action by an employee, who had worked in an industry
affecting interstate commerce, against a union and its agent, for interference with the
employee’s lawful occupation. The complaint by the employee alleged that he was
forced to lose time from his work and to lose earnings which he and others would have
received had they not been prevented from going to and from the plant. Russell claimed
compensatory damages for his loss of earnings and for mental anguish and punitive
damages in the amount of $50,000. The union filed a plea to the jurisdiction. They claimed that the NLRB had jurisdiction of the controversy to the exclusion of the state court. The principal issue of law is whether the state court had jurisdiction to entertain Russell’s complaint or whether that jurisdiction had been pre-empted by Congress and vested exclusively in the NLRB. On certiorari, the Supreme Court found that the employee’s right to recover, in the state courts, all damages caused to him could not fairly be said to be pre-empted without clearer declaration of congressional policy. Russell could not collect duplicate compensation for lost pay from the state courts and the Board. Notwithstanding that under 10 (c) of the NLRA, 29 USC 160 (c), the NLRB may award back pay to an employee who has suffered a wage loss as a consequence of union conduct which is an unfair labor practice, and that, under 8 (b) (1) (A) of the Act (29 USC 158 (b) (1) (A), it is an unfair labor practice for a union to deny a worker access to a plant during an economic strike, the Act does not pre-empt the jurisdiction of a state court to award all damages, including punitive damages to the employee.


In Allis-Chalmers Corporation v. Lueck, (1985), an employee brought in a state court a tort action against his employer and its insurer, alleging bad faith in the handling of his claim under a disability plan included in the collective bargaining agreement and seeking damages. The employee did not exhaust the grievance procedure established in the collective bargaining agreement prior to bringing action in the court. The Wisconsin Supreme Court ruled that the claim did not arise under 301 of the Labor Management Relations Act (29 USCS 185) but that the claim here was a tort claim of bad-faith and not a bad-faith breach-of-contract claim. On certiorari, the Supreme Court reversed. The
Court held that when resolution of a state-law claim is substantially dependent upon analysis of the terms of a collective bargaining agreement, the claim must either be treated as a 301 claim or dismissed as pre-empted by federal labor-contract law. In the present case, the complaint should have been dismissed for failure to make use of the grievance procedure established in the collective bargaining agreement or dismissed as pre-empted by 301. The Supreme Court determined that the state courts are not deprived of jurisdiction where arbitration clauses in labor contracts are at issue, however, the federal labor law of contract pre-empts tort law based upon a violation of the collective agreement if resolution of the claim is dependent upon the meaning of the collective bargaining agreement.


In *National Labor Relations Board v. Truitt Manufacturing Company, (1956)*, an employer who was bargaining with a union representing its employees with respect to a wage increase, claimed that it was financially unable to support the pay increase. The employer refused to provide documentation detailing the financial status of the company. The *NLRB* found the employer’s refusal to furnish such information as in violation of the *NLRA*’s requirement to bargain in good faith and ordered the employer to supply the union with information to substantiate the employer’s position as to its economic inability to pay the recognized wage increase. The Court of Appeals refused to enforce the *Board*’s order.

The U.S. Supreme Court reversed the ruling of the court, stating that in agreement with the *NLRB*, an employer’s refusal to attempt to substantiate a claim of inability to pay increased wages may support a finding of a failure to bargain in good faith. Good-faith
bargaining, for purposes of the amended *NLRA* requires that claims made by either bargainer should be honest claims and supported by the ability to provide necessary records or documentation.

It is sufficient if the information is made available in a manner not as burdensome or time-consuming as to impede the process of bargaining (*Truitt Manufacturing Company*, 1956).

In the NLRB’s view, the factor determining whether a management decision is subject to mandatory bargaining is the essence of the decision itself. If the change is in the nature or direction of the business, then it is outside the constraints of mandatory bargaining. If the essence of the decision is simply labor costs, then management is to follow the criterion of mandatory bargaining. It is a duty of the employer to provide to the union financial and accounting information to substantiate its claim that the company is incapable of paying a wage increase requested by the union.


In *Lincoln Federal Labor Union v. Northwestern Iron and Metal Company*, (1948), the U.S. Supreme Court reviewed a North Carolina statute and a Nebraska constitutional amendment that provided that no one be denied an opportunity to obtain or retain employment because he is or is not a member of a labor organization, and prohibited employers from entering into contracts or agreements obligating themselves to exclude person from employment because they are or are not labor union members.

The U.S. Supreme Court held that the state laws described did not violate the guaranties of free speech, peaceable assembly and petition, or the contract clause, or equal protection and due process clauses of the Federal Constitution. The Court held that the constitutional right of workers to assemble and to discuss and formulate plans for
furthering their own self-interest in jobs cannot be construed as a constitutional guaranty that none shall get and hold these jobs except those who will join in the assembly or will agree to abide by the assembly’s plans.

The laws in North Carolina and Nebraska were found not to violate rights guaranteed to employers, unions, or members of unions by the Constitution of the United States.

These state laws do not abridge the freedom of speech and the right of unions and their members to peaceably assemble, and to petition the Government for a redress of grievances, which are guaranteed by the 1st Amendment and made applicable to the States by the Fourteenth Amendment.

Nor do they conflict with Article I, § 10, of the Constitution, insofar as they impair the obligation of contracts made prior to their enactment (Northwestern Iron and Metal Company, 1948).

The Social Security Act of 1935

During the early days of the NLRA, Congress passed other laws in an attempt to better working conditions in the United States. The first of these laws was the Social Security Act of 1935, ch. 372, § 1, 49 Stat. 449. The law was written in support of labor unions’ efforts to organize and bargain collectively.

§ 151. Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest.

Franklin Roosevelt was president during this time and immediately following the Great Depression. The general public in the United States was skeptical of social insurance. The American people were known for their independent and pioneer spirit and were wary of programs that appeared to bear the signs of socialism and communism. Roosevelt was determined to pass legislation that provided insurance programs for
unemployment and old age. The law was passed in 1935 and amended and expanded in 1939. Roosevelt, in his presidency, although distracted from domestic affairs by the seriousness of World War II, continued to support the expansion of social security benefits to include disability benefits and medical benefits for the elderly. The United States still does not have a national health insurance program for the general population.

The Fair Labor Standards Act of 1938

A few years later, the *Fair Labor Standards Act of 1938*, ch. 676, § 3, 52 Stat. 1060, was passed into law. The *Act* was written to provide for the establishment of fair labor standards in employments in and affecting interstate commerce. Three main clauses are included in the law: (a) minimum wages; (b) maximum hours; and (c) child labor provisions.

§ 6. Every employer shall pay to each of his employees who in any workweek are engaged in commerce or in the production of goods for commerce wages at the following rates.

§ 7. No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

§ 12. No producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods there from any oppressive child labor has been employed.

The Taft-Hartley Act of 1947

The *Taft-Hartley Act of 1947*, ch. 120, § 1, 61 Stat. 136, was passed by The U.S. Congress otherwise called the *Labor-Management Relations Act*, as an amendment to the *National Labor Relations Act* of 1935. The *Act* prohibited secondary boycotts, outlawed the closed shop, and permitted union shops only after a vote of a
majority of the employees.

§ 1. It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

The Taft-Hartley Act was written in an effort to equalize the ground rules which until then had been believed to have worked against employers. This Act declared it an unfair labor practice for a union to accomplish the following:

(a) restrain or coerce employees in the exercise of their rights to organization and collective bargaining; (b) restrain or coerce employees in their selection of its representatives for the purpose of collective bargaining or adjustment of grievances; (c) cause an employer to discriminate against an employee; (d) refuse to bargain in good faith; (e) participate, induce, or encourage employees to strike; (f) force an employer to recognize or bargain with a labor organization; (g) force employers to assign specific work to employees belonging to a particular labor organization; (h) cause an employer to pay for services that are not performed, prohibiting “featherbedding”; (i) engage in secondary boycott.

In addition, the Taft-Hartley Act outlawed all strikes by government employees. Strikers working in government jobs were to be immediately discharged and made ineligible for reemployment by the federal government for three years. The Act also enlarged the NLRB from three members to five.

The right to organize and bargain collectively was not extended to managerial employees. The Taft-Hartley Act did not allow managers to be included in a bargaining unit. In two cases, the U.S. Supreme Court upheld and supported this decision and legislation.

NLRB v. Bell Aerospace Company, Division of Textron, Inc. (1974)
In *NLRB v. Bell Aerospace Company, Division of Textron, Inc.* (1974), a labor union petitioned for a representation election to determine whether the union would be certified as the bargaining representative of buyers in a purchasing and procurement department of an employer’s plant. The *NLRB* held that the buyers constituted an appropriate unit and directed the election, which resulted in the *Board’s* certification of the union as the exclusive bargaining representative of the buyers. The employer requested that the *Board* reconsider this decision but the *Board* denied the motion on the grounds that the employer had not shown that union organization of its buyers would create a conflict of interest in labor relations. The employer however refused to bargain. The *Board* found the employer guilty of an unfair labor practice and issued an order compelling the employer to bargain with the union. The U.S. Court of Appeals of the Second Circuit denied the *Board’s* enforcement of this order on the grounds that

(1) it was not certain that the *Board’s* decision rested on a factual determination that the buyers were not true “managerial employees” but on an erroneous holding that the *Board* was free to regard all managerial employees as covered by the *Act* unless duties met the conflict of interest touchstone; and (2) the *Board* was required to proceed by rulemaking rather than by adjudication in determining the status of buyers as “managerial employees” (*Bell Aerospace Company, 1974*).

On certiorari the United State Supreme Court affirmed the judgment of the Court of Appeals in part and reversed in part, and the cause was remanded to the Court of Appeals with directions to remand to the *Board* to permit it to apply the proper legal standard in determining the status of the buyers. It was held that

(1) all “managerial employees” are exempt from the amended *National Labor Relations Act*; and (2) the *Board* properly exercised its discretion in proceeding by adjudication rather than by rulemaking in determining the status of the buyers as “managerial employees” (*Bell Aerospace Company, 1974*).

*NLRB v. Yeshiva University* (1980)
In *NLRB v. Yeshiva University* (1980), a union filed a representation petition with the NLRB seeking certification as the bargaining agent for the full-time faculty members of certain schools in a private university. The university opposed the petition on the grounds that all faculty members were managerial or supervisory personnel and thus not “employees” within coverage of the NLRA. At hearings before a Board appointed hearing officer, it was determined that the faculty were professional employees entitled to the protection of the NLRA and the Board granted the union’s petition and ordered an election. The university refused to bargain. In a subsequent unfair labor practice proceeding, the Board ordered the university to bargain with the union representing the university faculty. The university continued to refuse and the Board sought enforcement of its order in the United States Court of Appeals of the Second Circuit. The Court of Appeals denied the Board’s petition, finding that the faculty were in fact “managerial employees” and not covered under the NLRA. On certiorari the United States Supreme Court affirmed and held that the university faculty members were “managerial employees” and excluded from coverage of the NLRA and were not entitled to the benefits of collective bargaining under the Act.

The university faculty members (1) determined what courses would be offered, when they would be scheduled, and to whom they would be taught; (2) debated and determined teaching methods, grading policies, and matriculation standards; (3) effectively decided which students would be admitted, retained, and graduated; and (4) decided the size of the student body, the tuition to be charged, and the location of the university schools (*Yeshiva*, 1979).

The Labor-Management Reporting and Disclosure Act (LMRDA)

The *Labor-Management Reporting and Disclosure Act (LMRDA)*, also known as the *Landrum-Griffin Act of 1959*, 73 Stat. 525, 542, 545, was passed by Congress and
provided for the regulation of labor union internal affairs, including the control of union funds. The *LMRDA* provided for union democracy and fiduciary responsibility. The *LMRDA* was originally designed to eliminate corruption and racketeering in unions and was later enlarged to include a “bill of rights” for union members, safeguards for union finances, and mandated reports on union administration. The emphasis on this legislation was to eradicate corrupt union activity and other misconduct found in some labor organizations and to encourage democratic processes among all union members. The *LMRDA* provided for the following provisions to prevent unfair labor practices by employers:

§ 158 (a). It shall be an unfair labor practice for an employer: (a) to interfere with, restrain, or coerce employees; (b) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; (c) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; (d) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act; (e) to refuse to bargain collectively with the representatives of his employees.

The *LMRDA* further stipulated the following provisions for labor organizations:

§ 158 (b). It shall be an unfair labor practice for a labor organization or its agents: (a) to restrain or coerce employees in the exercise of the rights guaranteed; (b) to cause or attempt to cause an employer to discriminate against an employee; (c) to refuse to bargain collectively with an employer; (d) to engage in or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in a strike or a refusal in the course of his employment to use, manufacture, process, transport, or handle or work on any goods, articles, materials or commodities or to perform any services; (e) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees.

Unions and employers continued to monitor unfair labor practices. A common problem for employers was controlling the practice of “union security clauses” that required workers to pay dues and initiation fees as a condition of employment. This form...
of union security agreement was referred to as a “union shop” which was different than a “closed shop” which required that workers become union members before being hired and which was outlawed by the Taft-Hartley amendments.

Local 357 Teamsters v. National Labor Relations Board (1961)

In *Local 357 Teamsters v. National Labor Relations Board* (1961), an association of motor truck operators entered into a collective bargaining agreement with the Brotherhood of Teamsters and several local unions which required the operators to employ casual or temporary employees “on a seniority basis” through a hiring hall operated by one of the unions, “irrespective of whether such employee is or is not a member of the Union.” A union member obtained casual employment with an operator independently of the union and the hiring hall and was later discharged when the union complained. Upon charges made by him against the union and the employer, the *National Labor Relations Board* found the hiring-hall provision to be unlawful per se and that the employee’s discharge at the union’s request constituted a violation by the employer of § 8 (a) (1) and § 8 (a) (3) and a violation by the union of § 8 (b) (2) and § 8 (b) (1) (A) of the *National Labor Relations Act*. The board ordered the employer and the union to cease giving effect to the hiring-hall agreement and directed them to reimburse all casual employees for fees and dues paid by them to the union. Upon review, the Court of Appeals for the District of Columbia Circuit set aside the order requiring a general reimbursement of dues and fees, but upheld the board in ruling that the hiring-hall agreement was illegal. On certiorari, the U.S. Supreme Court affirmed the judgment. The *National Labor Relations Board* and the courts did not find hiring halls as such illegal, but merely certain practices under them. The *Board* and the court found that the
manner in which the hiring halls operated created in effect a closed shop in violation of the law.

The courts continued to struggle with the responsibility to balance between the collective interest of the workers over the individual employee’s advantages once the majority of employees in an appropriate unit have designated the union as their bargaining representative.

J.I. Case Company v. National Labor Relations Board (1944)

In *J.I. Case Company v. National Labor Relations Board (1944)*, the petitioner, J.I. Case Company, had offered each employee an individual contract of employment for one year at a time. The contracts were uniform and fair. The Company agreed to pay a specified rate and the employees agreed to accept the working provisions. This system of employment continued for several years. During this time, a union petitioned the Board for certification as the exclusive bargaining representative of the production and maintenance employees. The Company urged the individual contracts as a bar to representation proceedings. The Board directed an election which was won by the union. The union then asked the Company to bargain. The Company refused stating that it could not deal with the union in any matter which would affect the individual contracts while they were in effect. The Board held that the Company had refused to bargain collectively, in violation of § 8 (5) of the *National Labor Relations Act* and that the contracts had been used to impede employees in the exercise of rights guaranteed by § 7 of the Act. The Company had engaged in unfair labor practices, as defined by § 8 (1) of the Act. The Board ordered the Company to cease and desist from giving the individual contracts. The Circuit Court of Appeals granted an order of enforcement. On certiorari,
the U.S. Supreme Court affirmed the decision and specified the following changes to the 
Board’s cease and desist order:

(a) Give separate written notice to each employee who signed an individual 
contract of employment or any modification, continuation, extension, or renewal 
thereof, or any similar form of contract for any period subsequent to the date of 
the Decree, that such contract will not in any manner be enforced or attempted to 
be enforced to forestall collective bargaining or deter self-organization, that the 
employee is not required or expected by virtue of such contract to deal with 
respondent individually in respect to rates of pay, wages, hours of employment, or 
other conditions of employment (J.I. Case Company, 1944).

Individual contracts of employment cannot be utilized by an employer as a basis for 
precluding negotiations with the union on the same subject matter. These contracts may 
not be availed of to defeat or delay the procedures prescribed by the National Labor 
Relations Act looking to collective bargaining.

Organizational picketing became an important issue that was dealt with by both 
unions and employers. Amendments passed by Congress in 1959 attempted to regulate 
organizational picketing in certain key respects.

§ 158 (b) (7). to picket or cause to be picketed, or threaten to picket or cause to be 
picketed, any employer where an object thereof is forcing or requiring an 
employer to recognize or bargain with a labor organization as the representative 
of his employees, or forcing or requiring the employees of an employer to accept 
or select such labor organization as their collective bargaining representative, 
unless such labor organization is currently certified as the representative of such 
employees [29 USC § 158 (b) (7).]

Picketing and strikes were thought by many fearful employers to cause irreparable 
harm to business. The National Labor Relations Board and the courts took the position 
that area wage standard picketing was not prohibited by the National Labor Relations 
Act. There have been numerous cases in regards to the legality of picketing and different 
 kinds of picketing.

National Labor Relations Board v. Drivers, Chauffeurs, Helpers, Local Union No. 639,
In National Labor Relations Board v. Drivers, Chauffeurs, Helpers, Local Union No. 639, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (1960), a union, which no longer represented a majority of the employees, took part in peaceful picketing, called by the employer “recognitional picketing” and was accused of attempting to restrain and coerce the employees in the exercise of § 7 and participating in unfair labor practice under § 8 (b)(1)(A) of the National Labor Relations Act, as amended by the Taft-Hartley Act. § 7 provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protections, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in § 8 (a)(3) (Drivers, Chauffeurs, Helpers, Local Union 639, 1960).

The Board entered a cease and desist order which the United States Court of Appeals for the District of Columbia Circuit set aside, holding that § 8 (b)(1)(A) was inapplicable to peaceful picketing, whether it was organizational or recognitional in nature. On certiorari, the United States Supreme Court affirmed the judgment, holding that § 8 (b)(1)(A) is a grant of power to the Board limited to authority to proceed against union tactics involving violence, intimidation, and reprisal or threats thereof, that is, conduct involving more than the general pressures upon employees which are implicit in economic strikes against employers.

National Labor Relations Board v. Local Union No. 103, International Association of Bridge, Structural & Ornamental Iron Workers, AFL-CIO (1977)
In National Labor Relations Board v. Local Union No. 103, International Association of Bridge, Structural & Ornamental Iron Workers, AFL-CIO (1977), the National Labor Relations Board held that the union had committed an unfair labor practice in violation of § 8 (b)(7)(C) of the Act (29 USCS 158 (b)(7)(C)), which prohibits recognitional picketing by a union that is not the certified representative of the employees and that has not filed a petition for a representation election within 30 days from the commencement of picketing. Upon the union’s petition for review of the Board’s order, the U.S. Court of Appeals for the District of Columbia reversed. On certiorari, the U.S. Supreme Court reversed. The Court held that it was an unfair labor practice within the meaning of § 8 (b)(7)(C) of the National Labor Relations Act for an uncertified union not representing a majority of the employees to engage in extended picketing to enforce a “pre-hire” agreement which the employer validly executed under § 8(f) of the Act, since the object of such picketing was to attain recognition as the employees’ bargaining representative.

§ 8 (b)(7) provides:

It shall be an unfair labor practice for a labor organization or its agents to picket or cause to be picketed or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees [29 USCS § 158 (b)(7)].

The issue of picketing by individuals was a problem for employers as it caused a disruption to the normal flow of daily business. However, picketing was also considered by some a simple action of expression that should be protected by the First Amendment.

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Thornhill v. Alabama (1940)

In *Thornhill v. Alabama (1940)*, the petitioner, Byron Thornhill was convicted in the state of Alabama for violation of § 3448 of the State Code of 1923.

§ 3448. Loitering or picketing forbidden. Any person or persons, who, without a just cause or legal excuse, go near to or loiter about the premises or place of business of any other person, firm, corporation, or association of people, engaged in lawful business, for the purpose, or with the intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons, firm, corporation, or association, or who picket the works or place of business...for the purpose of hindering, delaying, or interfering with or injuring any lawful business...shall be guilty of a misdemeanor.

The petitioner was charged and convicted and sentenced to imprisonment. Upon appeal to the Circuit Court, a trial de novo sentenced the petitioner to further imprisonment. The case was affirmed on appeal to the Court of Appeals. The State of Alabama, by its Solicitor, complained that the petitioner picketed the works or place of business of another person, firm, corporation, or association of people, the Brown Wood Preserving Company, Inc., a corporation, for the purpose of hindering, delaying, or interfering with or injuring the lawful business or enterprise of the company.

On certiorari, the U.S. Supreme Court determined that the range of activities proscribed by § 3448, whether characterized by picketing or loitering, embraced nearly every practicable, effective means whereby the employees may enlighten the public on the nature and causes of a labor dispute. The safeguarding of these means is essential to the securing of an informed and educated public opinion with respect to a matter which is of public concern. The U.S. Supreme Court held that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in § 3448.

The danger of breach of the peace or serious invasion of rights of property or
privacy at the scene of a labor dispute is not sufficiently imminent in all cases to warrant the legislature in determining that such a place is not appropriate for the range of activities outlawed in § 3448 (Thornhill, 1949).

The U.S. Supreme Court reversed the decision.

International Brotherhood of Teamsters, Local 695 v. Vogt (1957)

The issue and legality of picketing continued to be presented to the courts for action. In *International Brotherhood of Teamsters, Local 695 v. Vogt (1957)*, U.S. Supreme Court considered the limits imposed by the Fourteenth Amendment on the power of a State to enjoin picketing. The petitioner unions sought unsuccessfully to induce some of the respondent’s employees to join the unions and began to picket the entrance to the respondent’s place of business with signs reading, “The men of this job are not 100% affiliated with the A.F.L.” As a result, drivers of several trucking companies refused to deliver and haul goods to and from the respondent’s plant, causing substantial damage to the respondent. The company sought an injunction to restrain the picketing. In trial court, it was held that by virtue of Wisconsin Statute § 103.535, prohibiting picketing in the absence of a “labor dispute,” the petitioners must be enjoined from maintaining any pickets near respondent’s place of business and from inducing others to decline to transport goods to and from the respondent’s business. On appeal, the Wisconsin Supreme Court reversed, holding § 103.535 unconstitutional, on the ground that picketing could not constitutionally be enjoined merely because of the absence of a “labor dispute.” On reargument, the court withdrew its original decision and held that the picketing was for an “unlawful purpose,” since Wisconsin Statute § 111.06 (2)(b) made it an unfair labor practice for an employee individually or in a group to coerce, intimidate or induce any employer to interfere with any of his employees in the enjoyment of their legal rights … or to engage in any practice with regard
to his employees which would constitute an unfair labor practice if undertaken by him on his own initiative [Wisconsin Statute § 111.06 (2)(b)].

On certiorari, the U.S. Supreme Court affirmed, determining that the policy of Wisconsin enforced by the prohibition of this picketing was a valid one. On dissent, Justice Douglas wrote,

here, where there is no rioting, no mass picketing, no violence, no disorder, no fisticuffs, no coercion, nothing but speech, the principles announced in *Thornhill* should give the advocacy of one side of a dispute First Amendment protection. I would adhere to the principle announced in *Thornhill*, and I would return to the test that this form of expression can be regulated or prohibited only to the extent that it forms an essential part of a course of conduct which the State can regulate or prohibit (International Brotherhood of Teamsters, 1957).


The U.S. Supreme Court continued to review cases on picketing. In *International Longshoremen’s Association, AFL-CIO v. Allied International, Inc. (1982)*, the president of the International Longshoremen’s Association ordered ILA members to stop handling cargoes arriving from or destined for the Soviet Union. As a result of the boycott, Allied company’s shipments were completely disrupted. Allied brought action in the United States District Court for the District of Massachusetts and claimed that the boycott violated the prohibition against secondary boycotts in § 8(b)(4) of the *National Labor Relations Act*, 29 USC § 158(b)(4). Allied sued for damages under § 303 of the *Labor Management Relations Act*, as amended, 29 USC § 187, which created a private damages remedy for victims of secondary boycotts. Allied also filed an unfair labor practice charge with the *NLRB* under § 10(b) of the *NLRA*, 29 USC § 160(b). Allied also alleged that the ILA boycott violated the Sherman Act, 15 USC § 1, and amounted to interference with Allied’s business relationships in violation of admiralty law. The Court of Appeals affirmed the District Court’s dismissal of these specific claims. The Court of Appeals
reversed the dismissal of Allied’s other complaints and remanded for further proceedings. The court found that the effects of the ILA boycott were “in commerce” within the meaning of the NLRA and that the ILA boycott was within § 8(b)(4)’s prohibition of secondary boycotts, despite its political purpose, and that resort to such behavior was not protected activity under the First Amendment. The NLRB reached the conclusion that the ILA’s refusal to unload Allied’s shipments was “in commerce” and amounted to a secondary boycott. The Board issued a cease-and-desist order to the union requiring it to unload Allied’s shipments. On certiorari the U.S. Supreme Court determined the coverage of the secondary boycott provisions of the NLRA. The terms “commerce” and “affecting commerce” are defined in 29 USC § 152(6) and (7), as amended by the LMRA, as follows:

(6) The term ‘commerce’ means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia…

(7) The term ‘affecting commerce’ means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

The Court found that the ILA’s activity was “in commerce” and within the scope of the NLRA. The Court further stated that the ILA boycott was a national boycott affecting ports throughout the United States. If the effects of the boycott were not “in commerce,” the complaining parties such as Allied could seek relief in state courts.

The secondary boycott provisions in § 8(b)(4)(B) prohibit a union from inducing employees to refuse to handle goods with the object of forcing any person to cease doing business with any other person. The statutory prohibition applies to the undisputed facts of this case. The ILA has no dispute with Allied, Waterman, or Clark. It does not seek any labor objective from these employers. Its sole complaint is with the foreign and military policy of the Soviet Union. The certain
effect of this action is to impose a heavy burden on neutral employers. The secondary boycott provisions were designed to prevent such burdens (*Allied International, Inc., 1982*).

The Court concluded by stating that it would not create an exception to the statute on the basis of the argument that “political” boycotts are exempt from the secondary boycott provision. The distinction between labor and political objectives would be difficult to discern. The Court further stated that

In the absence of any limiting language in the statute or legislative history, there is no reason to conclude that Congress intended such a potentially expansive exception to a statutory provision purposefully drafted in broadest terms (*Allied International, Inc., 1982*).

National Association for the Advancement of Colored People v. Claiborne Hardware Company (1982)

In *National Association for the Advancement of Colored People v. Claiborne Hardware Company (1982)*, the U.S. Supreme Court further defined the boycott.

The term “concerted action” encompasses unlawful conspiracies and constitutionally protected assemblies. Evidence that persuasive rhetoric, determination to remedy past injustices, and a host of voluntary decisions by free citizens were the critical factors in the boycott’s success presented the Court with the question whether the state court’s judgment was consistent with the Constitution of the United States (*Claiborne, 1982*).

The Mississippi state courts concluded that the boycotts included elements of force, violence, and threats and rendered these actions unlawful, regardless of whether the actions of boycott were primary, secondary, economical, political, social or other. The court rejected the petitioners’ reliance on the First Amendment.

The agreed use of illegal force, violence, and threats against the peace to achieve a goal makes the present state of facts a conspiracy. There is no instance where it has been adjudicated that free speech guaranteed by the First Amendment includes in its protection the right to commit crime (*Claiborne, 1982*).
The Mississippi Supreme Court found that the petitioners had agreed to use force, violence and “threats” to effectuate the boycott. On certiorari, the U.S. Supreme Court clarified that the First Amendment does not protect violence.

Violence has no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of advocacy. Although the extent and significance of the violence in this case are vigorously disputed by the parties, there is no question that acts of violence occurred. No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence. When such conduct occurs in the context of constitutionally protected activity, however, precision of regulation is demanded. The presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages \((\text{Claiborne, 1982})\).

However, the U.S. Supreme Court further elaborated by clarifying its position on individuals’ rights to act with others for a common cause. The Court referred to the “purpose” of the boycott and the “ultimate objectives” of the petitioners. The Court was unwilling to protect behavior that was “violent” and thus “illegal.” The Court did not see speeches, marches, and threats of social ostracism as a basis for a legal damages award.

The taint of violence colored the conduct of some of the petitioners. They may be held responsible for their violent deeds. However, the burden of demonstrating that this behavior colored the entire collective effort is not satisfied by the evidence that violence occurred or that violence contributed to the success of the boycott. The findings in this case are constitutionally insufficient to support a judgment that all petitioners are liable for all losses in the boycott \((\text{Claiborne, 1982})\).

The U.S. Supreme Court reversed the judgment and remanded the case for further proceedings.

\text{National Labor Relations Board v. Gissel Packing Company (1969)}

In \text{National Labor Relations Board v. Gissel Packing Company (1969)}, the U.S. Supreme Court dealt with the issue of an employer’s duty under the \text{National Labor}
Relations Act to recognize a union that bases its claim to representative status solely on the possession of union authorization cards, and the steps an employer is permitted to take and the scope and content of statements that an employer may make in legitimately resisting card-based union recognition. The specific question was whether the duty to bargain can arise without a Board election under the Act. In this case, the unions had obtained a majority of employees through union authorization cards without misrepresentation or coercion. The employer questioned the reliability of this majority obtained through an alternate route to election. In addition, the union claimed that the employer had committed unfair labor practices that undermined the union’s majority and made a fair election impossible. The union also claimed that the employer had made specific statements to the employees that fell outside the protection of First Amendment rights and § 8 (c) of the Act. These statements made by the employer included promises of better jobs and higher pay if the employees “broke the union” and eventual discharge of those employees that did not cooperate with the employer’s demands to stop the union activity. The Board had found that

(1) the union had obtained valid authorization cards from a majority of the employees in the bargaining unit and was thus entitled to represent the employees for collective bargaining purposes and (2) the employer’s refusal to bargain with the union in violation of § 8 (a)(5) was motivated not by a “good faith” doubt of the union’s majority status but by a desire to gain time to dissipate the union’s status completely (Gissel, 1969).

The Board entered a cease-and-desist order and ordered the employer to bargain on request. On appeal, the Court of Appeals of the Fourth Circuit found that the cards themselves were too inherently unreliable that their use gave an employer virtually an automatic, good faith claim that that a secret election was necessary. The employer
would not be ordered to bargain unless

(1) there was no question about a union’s majority status, either through an employer’s recognition of the card validity or an employer’s own poll status or (2) the employer’s §§ 8 (a)(1) and (3) unfair labor practices were so extensive and pervasive that a bargaining order was the only possible remedy irrespective of the card status (Gissel, 1969).

On certiorari, the U.S. Supreme Court reversed judgment of the decision of the Court of Appeals of the Fourth Circuit where they declined enforcement of the Board’s orders to bargain and remanded the case with directions to remand to the Board for further proceedings to determine:

(1) the specifics of the employer’s violations of § 8 (c) (29 U.S.C. § 158 (c)) on First Amendment rights that expression of any views, argument, or opinion shall not be evidence of an unfair labor practice as long as such expression contains no threat of reprisal or force or promise of benefit in violation of § 8 (a)(1).

(2) The Board’s use of the bargaining order in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede election processes (Gissel, 1969).

The National Labor Relations Act has two purposes. The statute is concerned with protecting trade unions and their members against anti-union actions. The NLRA also attempts to promote collective bargaining where parties should have the widest latitude in bargaining tactics, pressure, and economic weaponry. If the NLRB and the courts over-regulate bargaining tactics, they will reduce the substance of the collective bargaining process and ultimately reduce the value and meaning of the collective bargaining agreement. There is a need to preserve free trade unions but also a need to maintain the openness of collective bargaining tactics and strategy.


In National Labor Relations Board v. Insurance Agents’ International Union,
AFL-CIO (1960), the employer argued that the “slowdown” was an unfair labor practice, specifically an unlawful refusal to bargain and a tactic that precluded discussion. This case presented an important issue of the scope of the NRLB’s authority under § 8 (b)(3) of the NLRA which provides that “it shall be an unfair labor practice for a labor organization or its agents to refuse to bargain collectively with an employer, provided it is the representative of his employees.” The question that was considered here by the Court was whether the Board may find that a union, which confers with an employer with the desire of reaching agreement on contract terms, has nevertheless refused to bargain collectively and in good faith, thus violating the provision, solely and simply because during the negotiations it seeks to put economic pressure on the employer to yield to its bargaining demands by initiating on-the-job conduct which interferes with the carrying on of the employer’s business. A complaint of violation of § 8 (b)(3) was issued and hearings began before the collective bargaining was concluded. The Board entered a cease-and-desist order and the Court of Appeals for the District of Columbia Circuit set aside the Board’s order. The union’s tactics involved activities by the member agents such as these:

- refusal for a time to solicit new business, and refusal to comply with the company’s reporting procedure; refusal to participate in the company’s “May Policyholders’ Month Campaign”; reporting late at district offices the days the agents were scheduled to attend them, and refusing to perform customary duties at the offices, instead engaging in “sit-in-mornings”, and then leaving as a group at noon; absenting themselves from special business conferences arranged by the company; picketing and distributing leaflets outside various offices of the company; distributing leaflets each day to policyholders and others and soliciting policyholders’ signatures on petitions directed to the company; and presenting the signed policyholders’ petitions to the company at its home office while simultaneously engaging in mass demonstrations there (Insurance Agents International, 1959).

The U.S. Supreme Court stated that the policy of Congress when it passed the
NLRA had been to impose a mutual duty upon both parties to “confer in good faith” with a desire to reach agreement, in order to promote an over-all design of achieving industrial peace. The Court stated that

the presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. The present statutory stage of national labor relations policy, the two factors – necessity for good faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one’s terms – exist side by side (Insurance Agents International, 1959).

On certiorari, the U.S. Supreme Court set aside the order of the Board and affirmed the decision of the Court of Appeals. The Court stated that the Board was not the arbiter of what sort of economic weapons were to be used and that the Board was not set up to introduce some kind of “balanced” bargaining power between parties. The Court further stated that the Board was not to tread on the substantive aspects of the bargaining process in this manner.


The behavior of the unions continued to be reviewed by the courts. Some actions were considered protected; they would not cause employees to be disciplined or discharged. Other actions were called unprotected or prohibited and could be cause for the NLRB to obtain a cease-and-desist order through an administrative process or through an order from the circuit court of appeals. The Supreme Court held that walkouts were generally protected activity. In National Labor Relations Board v. Washington Aluminum Company (1962), the Court of Appeals for the Fourth Circuit refused to enforce an order of the National Labor Relations Board directing the Washington Aluminum Company to reinstate and make whole seven employees whom the company
had discharged for leaving their work in the machine shop without permission on claims that the shop was too cold to work in. The Board found that the conduct of the employees was a concerted activity to protest the company’s failure to supply adequate heat in its machine shop and that such conduct is protected under the provision of § 7 of the National Labor Relations Act which guarantees that “employees shall have the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.” The discharge of these workers by the company amounted to an unfair labor practice under § 8 (a)(1) of the Act, which forbids employers “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in § 7.” Acting under the authority of § 10 of the Act, which provides that when an employer has been guilty of an unfair labor practice the Board can “take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.” The Board ordered the company to reinstate the discharged workers to their previous positions.

§ 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in § 8 (a)(3) [29 USCS § 157].

The Court of Appeals took a different position and stated that the workers “summarily left their place of employment” without affording the company “an opportunity to avoid the work stoppage by granting a concession to a demand” and the walkout did not amount to a concerted activity protected by § 7 of the Act.

The U.S. Supreme Court found the behavior of the seven workers could not be
classified as “indefensible.” Their behavior did not demonstrate a complete show of disloyalty to the workers’ employer. On certiorari, the Court held that the Board had correctly interpreted and applied the Act to the circumstances of the case and it was an error by the Court of Appeals to refuse to enforce its order. The judgment was reversed and the cause remanded to the Court of Appeals with directions to enforce the order in its entirety.

The U.S. Supreme Court continued to examine cases on the dynamics and specifics of the strike. Section 13 of the NLRA stated that nothing in the NLRA was intended to interfere with the right to strike.

§ 13. [§ 163]. Right to strike preserved. Nothing in this Act, except as specifically provided herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right [29 USCS § 163].

United Steelworkers of America v. United States (1959)

The right to strike met some limitations. Taft-Hartley amendments prohibited strikes during emergencies affecting national security and health. In United Steelworkers of America v. United States (1959), the Attorney General of the United States obtained in the District Court for the Western District of Pennsylvania an injunction, under 29 USC § 178, against the continuation of an industry-wide strike in the basic steel industry. The injunction was based upon a finding that the continuance of the strike would imperil the national health or safety. The Court of Appeals of the Third Circuit affirmed. On certiorari, the U.S. Supreme Court affirmed.


The rights of employers were reviewed. What may the employer do to utilize economic weaponry to protect its bargaining position? In response to the strike, the
employers found the lockout to be quite effective. In *American Ship Building Company v. National Labor Relations Board* (1965), the American Ship Building Company looked for review of a decision of the United States Court of Appeals for the District of Columbia Circuit enforcing an order of the NLRB which found that the company had committed an unfair labor practice under §§ 8 (a)(1) and (3) of the NLRA. The question was whether an employer commits an unfair labor practice under the conditions of the Act when he temporarily lays off or “locks out” his employees during a labor dispute to bring economic pressure in support of his bargaining position. The trial examiner of the NLRB found that the employer was reasonably apprehensive of a strike at some point and that the employer’s primary purpose in locking out its employees was to avert peculiarly harmful economic consequences which would occur on it and its customers if a strike were called either while a ship was in the yard during the shipping season or later when the yard was fully occupied. The examiner concluded that the employer was:

- economically justified and motivated in laying off its employees when it did, and that the fact that its judgment was partially colored by its intention to break the impasse which existed is immaterial in the peculiar and special circumstances of this case. The employer did not violate § 8 (a)(1) and (3) of the Act (*American Ship Building*, 1965).

A three-to-two majority of the Board rejected the examiner’s conclusion that the employer could reasonably anticipate a strike.

The Board held that absent special circumstances an employer may not during bargaining negotiations either threaten to lock out or lock out his employees in aid of his bargaining position. Such conduct infringes upon the collective bargaining rights of employees in violation of § 8 (a)(1) and the lockout with its consequent layoff amounted to discrimination within the meaning of § 8 (a)(3). The Board also held that such conduct subjects the union and the employees it represents to unwarranted and illegal pressure and creates an atmosphere in which free opportunity for negotiation stipulated in § 8 (a)(5) does not exist (*American Ship Building*, 1965).
On certiorari, the U.S. Supreme Court did not find any fair construction of the provisions relied on by the Board in this case that would support an unfair labor practice claim. The Court held that the employer did not violate § 8 (a)(1) or (a)(3) when, after a bargaining impasse was reached, he temporarily shut down the plant and laid off his employees for the sole purpose of bringing economic pressure to bear in support of his legitimate bargaining position.

National Labor Relations Board v. Brown (1965)

The courts were further challenged to better define the rights of employers and the lockout. The U.S. Supreme Court spoke of the lockout and strike as “correlative” in terms of statutory usage. Employers were utilizing the lockout to avert serious economic harm caused by union action, most particularly the union strike. In the multi-employer lockout situation, temporary replacements were utilized to keep production going. In National Labor Relations Board v. Brown (1965), the union caused a strike to occur at one of the many stores in a multiemployer retail store group. The employer continued business with temporary replacements and locked out all employees represented by the union. The NLRB held that the non-struck employers were guilty of unfair labor practices under § 8 (a)(1) and (3) of the NLRA. The United States Court of Appeals for the Tenth Circuit refused to enforce the Board’s order. On certiorari, the U.S. Supreme Court considered the lockout. The Court stated the following:

The continued operations of respondents and their use of temporary replacements does not imply hostile motivation any more than the lockout itself. Nor do we see how they are inherently more destructive of employee rights. The compelling inference is that this was all part and parcel of respondent’s defensive measure to preserve the multiemployer group in the face of the strike (Brown, 1965).

The Court further commented on the behavior of the employer:
When the resulting harm to employee rights is comparatively slight, and a substantial and legitimate business end is served, the employers’ conduct is prima facie lawful. The finding of an unfair labor practice under § 8 (a)(3) requires a showing of improper subjective intent. There is no assertion by union or the Board that the respondents were motivated by antiunion animus (Brown, 1965).

The U.S. Supreme Court affirmed the decision of the U.S. Court of Appeals.

National Labor Relations Board v. American National Insurance Company (1952)

In addition to considering the legalities of the strike and lockout, the courts were compelled to review the requirements of “good faith bargaining.” The National Labor Relations Board determined in some instances the specific proposals that became relevant to decide whether a party had bargained in good faith. The Board considered in most cases whether a demand by either party was designed to frustrate agreement on a collective bargaining contract. The Supreme Court permitted, within limits, for parties in collective bargaining to “take their gloves off” and to exert whatever economic pressure possible. The obvious concern was always the possibility that either side would completely subvert the collective bargaining process. In National Labor Relations Board v. American National Insurance Company (1952), the employer rejected the representative union’s request for a provision in the collective bargaining agreement for unlimited arbitration. The employer instead proposed a “management functions” clause listing matters such as promotions, discipline and work scheduling as the responsibility of management and excluding these matters from arbitration. The National Labor Relations Board stepped in and field a complaint against the employer based on the union’s charge that the company had refused to bargain as required by the NLRA. During negotiations the Board’s Trial Examiner conducted hearings on the union’s complaint. The Board and the Trial Examiner agreed that the employer had not bargained in good faith. The Board
rejected the Examiner’s views that the employer had a right to bargain for “management functions.” “The respondent’s action in bargaining for inclusion of any such clause of management functions constituted a demonstrated bad faith and per se violations of § 8 (a)(5) and (1)” (*American National, 1952*). On respondent’s petition for review, the Court of Appeals for the Fifth Circuit held that the Act “did not preclude an employer from bargaining for inclusion of a management functions clause in a labor agreement” (*American National, 1952*). On certiorari, the U.S. Supreme Court affirmed the decision of the Court of Appeals and held that the duty to bargain collectively “could not be enforced by prohibiting all employers in every industry from bargaining for management functions clauses” (*American National, 1952*). The Court also accepted the finding of the lower court that the employer had bargained in good faith for the management functions.

**National Labor Relations Board v. Wooster Division of Borg-Warner Corporation (1958)**

The U.S. Supreme Court continued to review the balance of economic and strategic bargaining power between unions and employers. The Court determined that there are three categories of subject matter that could be raised by the representatives of the union or the employer at the bargaining table: mandatory, non-mandatory, and illegal subjects of bargaining. In *National Labor Relations Board v. Wooster Division of Borg-Warner Corporation (1958)*, the employer insisted that its collective bargaining contract include

1. a “ballot” clause calling for a pre-strike secret vote of the employees as to the employer’s last offer, and
2. a “recognition” clause which excluded, as a party to the contract, the International Union which had been certified by the NLRB, as the employees’ exclusive bargaining agent and substituted for the agent’s local uncertified affiliate (*Wooster Division of Borg-Warner, 1958*).

The NLRB held that the employer’s insistence upon either clause amounted to a
refusal to bargain, in violation of § 8 (a)(5) of the NLRA. The question here posed is whether the stipulations of these clauses comes within the scope of mandatory collective bargaining as defined in § 8 (d) of the Act. The United States Court of Appeals for the Sixth Circuit set aside the Board’s order relating to the “ballot” cause but upheld the Board’s decision as to the “recognition” clause. On certiorari, the U.S. Supreme Court affirmed the judgment of the lower court and respected the “recognition” clause but reversed the court’s judgment with respect to the “ballot” clause. The Court stated that “neither clause related to a matter which, under the NLRA, is a subject of mandatory bargaining and that it is unlawful to insist upon the inclusion of clauses relating to matters which are not mandatory in collective bargaining” (Wooster Division of Borg-Warner, 1958). Until an impasse is reached, the employer may not unilaterally change conditions of employment, as this would preclude or limit negotiations about unresolved items and would thus be inconsistent with the concept of good faith bargaining. Both sides have an obligation to bargain to impasse. In order for an issue to be mandatory, it must bear a direct, significant relationship to terms and conditions of employment.

National Labor Relations Board v. International Van Lines (1972)

In National Labor Relations Board v. International Van Lines (1972), the respondent, a moving and storage company, had originally consented to a representation election for a local union seeking authorization with the company employees and later withdrew its support. The union organized a campaign to strike the employer and picketing commenced at the respondent’s place of business. When the employees refused to cross the picket line, the employer notified them that they would be replaced. Some of the employees sought reinstatement and even made unconditional offers to
return to work. The employer refused their reinstatement and claimed it had hired permanent replacements. The Board determined that the labor picketing was activity protected under § 7 of the NLRA and concluded that the discharges of the striking employees “discriminated against lawful union activity and were unfair labor practices under §§ 8 (a)(1) and 8 (a)(3) of the Act” (International Van Lines, 1972). The Board held that the employees to be unfair labor practice strikers and ordered their unconditional reinstatement with back pay. On appeal to the U.S. Court of Appeals for the Ninth Circuit, it was held that the labor picketing was a lawful economic strike and the discharges were unfair labor practices. The court upheld the Board’s overall decision but reversed the reinstatement of pay part of the ruling. The court held there to be an important distinction between the economic-striker-reinstatement rule and the unfair-labor-practice-striker-reinstatement rule. On certiorari, the U.S. Supreme Court held that the “unconditional reinstatement of the discharged employees was proper for the simple reason that they were victims of a plain unfair labor practice by their employer” (International Van Lines, 1972). The Court further stated that to hold that the employee’s rights to reinstatement arising from the discriminatory discharges were somehow forfeited merely because they continued for a time to engage in their lawful strike after the unfair labor practice had been committed would undercut the remedial powers of the NLRB with respect to § 8 violations and subvert the protection of § 7 of the Act (International Van Lines, 1972).

The judgment of the Court of Appeals was reversed and the workers were reinstated with back pay. The significance of unlawful refusal to bargain is not only that the Board would probably issue a cease-and-desist order aimed at remedying the bargaining behavior, but rather that a strike resulting from illegal bargaining would be an unfair-labor-practice strike and would mean that in contrast to economic strikers who
may be replaced, these workers would be entitled to reinstatement and back pay.

The unions and the employers made great efforts to come to terms with these issues of what was legal and what was not legal in terms of labor negotiations. The unions claimed that they needed the strike to hold their ground economically and strategically to ensure a fair contract. The employers complained about loss of business revenue and customers and asked the courts to allow the lockout and to hire permanent replacements. The U.S. Supreme Court held that an employer was obliged to bargain with a lawfully recognized union that was seeking new affiliation without taking a vote among the nonunion employees as well as the union members in the bargaining unit. The courts divided the issues by three main parameters: mandatory, non-mandatory, and illegal. There were three governing considerations for the courts when determining that a subject was mandatory. The first was whether the subject matter was within the “literal definition” of “conditions of employment.” The second consideration was whether industrial peace was likely to be promoted through the negotiation of the issue. The third was whether the Court stated that the practice in the industry was important. Collective bargaining between employer and worker took place on a number of levels in various arenas and at different times during the contract period. In general, the “zipper clause” was an agreement by both parties to preclude further bargaining during the term of the contract. If the zipper clause contained clear and unmistakable language to that effect, the result would be that neither party could force the other party to bargain, during the term of the contract, about matters encompassed by the clause. In two separate cases, *Financial Institution Employees* and *Metropolitan Edison Company*, the Court defined these issues.
In *National Labor Relations Board v. Financial Institution Employees of America, Local 1182 (1986)*, the employees authority to determine which union would appropriately represent them was challenged by the employer. The NLRB had certified an independent union as the collective bargaining representative of a bargaining unit but the union later voted to affiliate with an international union. The union petitioned the Board to amend the certification. The Board granted the amendment, but the employer refused to bargain with the union. The Board held that the employer was in violation of §§ 8 (a)(1) and 8 (a)(5) of the NLRA. The Board later reconsidered its decision and held that because nonunion employees had not been allowed to vote in the affiliation election, “the election did not meet minimal due process standards and that, therefore, the affiliation with the union was invalid” (*Financial Institution Employees of America, 1986*). The United States Court of Appeals for the Ninth Circuit held that the Board’s ruling was irrational and inconsistent with the NLRA, because

(1) it intruded upon the union’s internal affairs, (2) it was inconsistent with the strong national policy of maintaining stability in bargaining representatives, and (3) the interests of nonunion employees were adequately protected under existing procedures, and the Board’s reasoning did not support its rule (*Financial Institution Employees of America, 1986*).

On certiorari, the United States Supreme Court affirmed and remanded the case. The Court held that the NLRB had exceeded its authority under the NLRA in requiring that nonunion employees be allowed to vote for affiliation before it would order the employer to bargain with the affiliated union.

*Metropolitan Edison Company v. National Labor Relations Board (1983)*
In *Metropolitan Edison Company v. National Labor Relations Board* (1983), the union participated in unlawful work stoppages, despite a no-strike clause in the collective bargaining agreement. On each of these strikes, the employer disciplined the union officials more severely than the other participants by suspending them for more days. The union filed an unfair labor practice charge and an administrative law judge concluded that “selective discipline of union officials violated § 8 (a)(1) and § 8 (a)(3) of the *National Labor Relations Act*” (*Metropolitan Edison Company*, 1983). The NLRB affirmed the administrative law judge’s conclusions and findings, and the United States Court of Appeals for the Third Circuit enforced the Board’s order. On certiorari, the U.S. Supreme Court affirmed and held that the imposition of more severe sanctions on union officials than on other employees for participating in unlawful work stoppages violated § 8 (a)(3) of the *NLRA*.

*Local 60, United Brotherhood of Carpenters and Joiners of America v. National Labor Relations Board* (1961)

The courts continued to review the authority of the Board and U.S. Supreme Court held that the *NLRA* was designed to perform a remedial function and that punitive sanctions were not to be imposed for violations. The employee was often at a severe disadvantage as the appeal process could take years to resolve, leaving the employee financially and emotionally exhausted. The remedies determined by the courts were compensation for the workers or employers. In *Local 60, United Brotherhood of Carpenters and Joiners of America v. National Labor Relations Board* (1961), the Board found that the employer had violated § 8 (b)(1)(A) and § 8 (b)(2) of the *NLRA* in maintaining and enforcing an agreement which established a closed-shop preferential hiring condition of employment. The Board stated that
because the dues, non-membership dues, assessments, and work permit fees were collected under an illegal contract as the price employees paid in order to obtain or retain their jobs, it would not effectuate the policies of the Act to permit retention of the payments which have been unlawfully exacted from the employees (United Brotherhood of Carpenters and Joiners of America, 1961).

The Court of Appeals for the Seventh Circuit upheld the Board’s decision. On certiorari, the petitioners only challenged the Board’s order on the refund provision. The U.S. Supreme Court held that there was no evidence that the union membership, fees, or dues were coerced. The Court further stated that “the Board’s power to command affirmative action is remedial, not punitive and as a means of removing or avoiding the consequences of violation” (United Brotherhood of Carpenters and Joiners of America, 1961). The Court reversed the lower court’s decision.

The Civil Service Reform Act of 1978

The Civil Service Reform Act of 1978 provided that in cases where the employer had unlawfully refused to bargain for an initial contract, employees would be awarded compensation for the delay in bargaining. The workers would receive an amount based on the average wage settlements negotiated by workers at plants where collective bargaining had proceeded lawfully, and would receive wages and fringe benefits retroactively from the time of the unlawful refusal to bargain until bargaining began.

The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper (The Civil Service Reform Act, 1978).
Employers and workers looked for the best methods to gain strategic economic ground for their own interests. The employers ran businesses and wanted profits. The workers were in search of the best wages and conditions of employment. The fact remained that the desires of the two parties were often at odds with each other. The methods they used to gain ground often were categorized by the other party as “unfair labor practices.”

No-strike violations were exactly the kind of practice that employers considered “unfair.” Injunctions were generally permitted for violations of no-strike clauses where the underlying grievance was arbitrable. Damages were obtained against unions for no-strike-violations, but these actions in courts were normally stayed pending the arbitration of the issue.

Boys Markets, Inc. v. Retail Clerks Union, Local 770 (1970)

In Boys Markets, Inc. v. Retail Clerks Union, Local 770 (1970), an employer and a union had made a collective bargaining agreement which contained a no-strike clause and a provision for binding arbitration. The union later called a strike rather than submitting the grievance dispute to arbitration. The United District Court for the Central District of California granted injunctive relief against the strike. The Court of Appeals for the Ninth Circuit reversed, holding that the Sinclair decision in the U.S. Supreme Court provided that injunctive relief from the District Court was precluded by the anti-injunction provisions of the Norris-LaGuardia Act.

On certiorari, the U. S. Supreme Court reversed the judgment of the Court of Appeals and remanded the case with directions to affirm the District Court’s order. The Sinclair decision was overruled and it was held that
the anti-injunction provisions of the Norris-LaGuardia Act did not preclude a Federal District Court from enjoining a strike in breach of a no-strike obligation under a collective bargaining agreement containing provisions, enforceable under § 301 (a) of the Labor Management Relations Act, for binding arbitration of the grievance dispute concerning which the strike was called (Boys Market, 1970).

Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flour (1962)

In Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flour (1962), an employer brought action against a union for damages for businesses losses caused by a strike called by the union over a dispute of the discharge of an employee. The employer and union had a collective bargaining agreement between the parties providing that any difference should be submitted to arbitration and that the decision of the arbitrators should be final and binding. The Washington State Supreme Court held that the strike was a violation of the contract and entered a judgment in favor of the employer. On certiorari, the U.S. Supreme Court affirmed, holding that the “Washington State Supreme Court was not deprived of jurisdiction over the present litigation by § 301 (a) of the Labor Management Relations Act and the strike was a violation of the contract, in view of the compulsory arbitration clause” (Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America, 1962).


In a similar case, Drake Bakeries Incorporated v. Local 50, American Bakery & Confectionery Workers International, AFL-CIO (1962), a bakery company brought action in the United States District Court against a union for instigating a strike in violation of the no-strike clause contained in the collective bargaining contract between the parties. On certiorari, the U.S. Supreme Court affirmed the lower court’s decision to grant a stay
of the action pending completion of arbitration, holding that the employer’s claim was an arbitrable matter under contract.

The courts supported arbitration as a means to resolve conflict and in fact preferred it to the strike, lockout, or other methods of “economic warfare.” The NLRB facilitated the arbitration process by carefully using its own jurisdiction and by not reversing arbitrators’ awards where the arbitration proceedings were fair, where the issues raised before the Board were already raised to the arbitrator, where the award was not “repugnant” to the public policy of the Board and the NLRA, and where the unfair labor practice issue had been addressed by the arbitrator.

The duty of fair representation under which a union as the exclusive bargaining agent has an obligation to deal fairly on behalf of all of a bargaining unit’s employees (union and nonunion) is indicated in the NLRA’s grant of authority to the union to negotiate on behalf of all workers. The failure of a union to meet its duty of fair representation constituted a violation of federal labor law and an unfair labor practice. A union owes employees a duty to represent them adequately as well as honestly and in good faith.

**Steele v. Louisville & Nashville Railroad Company (1944)**

In *Steele v. Louisville & Nashville Railroad Company (1944)*, the question was whether a labor organization had the duty to represent all the employees without discrimination and if the courts had jurisdiction to protect the minority of workers from the violation of this obligation. The petitioner, an African-American employee, along with his fellow African-American employees, was excluded from union membership by constitution. All protests and appeals of the petitioner, and his fellow African-American
workers, addressed to the employer and the union were ignored. The Supreme Court of Alabama took jurisdiction of the cause but held on the merits that petitioner’s complaint stated no cause of action. On certiorari, the U.S. Supreme Court stated that

unless the labor union representing a craft owes some duty to represent non-union members of the craft, at least to the extent of not discriminating against them as such in the contracts which it makes as their representative, the minority would be left with no means of protecting their interests or, indeed, their right to earn a livelihood by pursuing the occupation in which they are employed. While the majority of the craft chooses the bargaining representative, when chosen it represents, as the Act by its terms makes plain, the craft or class, and not the majority. The fair interpretation of the statutory language is that the organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represents (Steele, 1944).

The U.S. Supreme Court concluded that the duty which is imposed on a union representative of a craft to represent the interests of all its members stands “on no different footing and that the Railway Act contemplates resort to the usual judicial remedies” (Steele, 1944) of injunction and award of damages when appropriate for breach of duty.

If the collective bargaining agreement does not authorize the individual to take a grievance to arbitration, then the union maintains control of the grievance and determines whether to initiate arbitration. The courts held that an individual does not have the “absolute right” to initiate arbitration proceedings. The individual can question the union’s failure to process a grievance if its actions toward an employee in the bargaining unit were “arbitrary, discriminatory, or in bad faith.”

Vaca, v. Sipes, Administrator (1967)

In Vaca, v. Sipes, Administrator (1967), an employee sued the defendant union in Circuit Court, alleging that he had been discharged from his employment in violation of
the collective bargaining contract between his employer and the union, and that the union had arbitrarily refused to take his grievance to arbitration. The jury awarded a verdict for compensatory and punitive damages to the employee. The judge set aside the verdict and entered a judgment for the union, stating that the suit involved strictly an unfair labor practice which was within the “exclusive jurisdiction of the NLRB” (Vaca, 1967). The Kansas City Court of Appeals affirmed the decision, however, the Supreme Court of Missouri reversed, holding that the NLRB did not have exclusive jurisdiction and the employee could properly recover damages from the union. On certiorari, the U.S. Supreme Court reversed. It was held that

1) the state court had jurisdiction in the instant case, 2) the evidence failed to establish that the union had acted arbitrarily or in bad faith so as to have breached its duty of fair representation, and 3) the union could not properly be held liable for damages attributable solely to the employer’s allegedly wrongful discharge (Vaca, 1967).

The enforcement of the finality provision where the arbitrator has erred is conditioned upon the union’s having satisfied its statutory duty fairly to represent the employee in connection with the arbitration proceedings.

Hines v. Anchor Motor Freight, Incorporated (1976)

In Hines v. Anchor Motor Freight, Incorporated (1976), several employees took action under § 301 of the Labor Management Relations Act, alleging that the employer made charges of dishonesty against the employees and discharged them, based on false evidence. The employees claimed that the employer had acted without just cause and in breach of the collective bargaining agreement. A discovery deposition indicated that the charges were in fact false but the court upheld the previous judgment on the grounds that

1) under the terms of the collective bargaining agreement, the decision of the arbitration committee was final and binding on the parties, and (2) there was no
showing of breach of duty by the union (Hines, 1976).

The Court of Appeals affirmed the lower court’s decision based on the finality provision of the bargaining agreement since there was no evidence of misconduct by the employer.

On certiorari, the U.S. Supreme Court reversed the decision, holding that the plaintiffs were entitled to an appropriate remedy against the employer as well as the union if the plaintiffs proved erroneous discharges in violation of the bargaining agreement and the union’s breach of duty tainting the arbitration decision.

National Labor Relations Board v. Boeing Company (1973)

In National Labor Relations Board v. Boeing Company (1973), a union levied fines on several of its members for “strikebreaking.” The union filed suit in state court to collect these fines, and the employer then filed charges against the union stating that it had violated § 8 (b)(1)(A) of the NLRA. The NLRB ruled that the union had violated § 8 (b)(1)(A) by imposing “disciplinary fines” on employees for acts committed after the employees had resigned from the union but not for acts committed before they resigned from the union. The United States Court of Appeal for the District of Columbia Circuit remanded the case to the NLRB with directions to consider questions relating to the reasonableness of the fines. On certiorari, the U.S. Supreme Court reversed, stating that, “§ 8 (b)(1)(A) of the NLRA has nothing to say about the reasonableness of union disciplinary fines not affecting the employer-employee relationship and not otherwise prohibited by the Act” (Boeing, 1973).

Finnegan v. Leu (1982)

In Finnegan v. Leu (1982), appointed business agents were discharged by a new
union president. The business agents brought suit in the United States District Court for the Northern District of Ohio alleging that they were terminated in violation of the Labor Management Reporting and Disclosure Act, § § 101 (a)(1) and 101 (a)(2), guaranteeing equal voting rights and rights of speech and assembly to every member of a labor organization. The District granted summary judgment in favor of the union president, holding that the Labor Management Reporting and Disclosure Act did not protect union employees from discharge as long as their rights as a union member are not affected. The United States Court of Appeals for the Sixth Circuit affirmed. The U.S. Supreme Court affirmed, holding that the appointed union business agents had failed to establish a violation of the Labor Management Reporting and Disclosure Act arising from their discharge, since Title I of the Act does not restrict freedom of an elected union leader to choose a staff whose views are compatible with his own and not within § 609 of the Act which referred only to retaliatory actions affecting union members’ rights and status as a member of the union (Finnegan, 1982).

Equal Employment Opportunity and Civil Rights

State laws that were clearly designed to evade constitutional responsibility to end segregation and racial discrimination were eventually struck down in federal courts but these courts suits delayed the progress towards integration and overall fair treatment.

The Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 forbade discrimination in employment by employers, employment agencies, or labor unions on the basis of race, color, sex, religion, or national origin, in any term, condition, or privilege of employment.

§ 2000 (e)(2). It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex,
or national origin.

Title VII established the Equal Employment Opportunity Commission (EEOC) as the administrative agency to implement this Act. The EEOC was given the power to enforce the law in court and covered these areas: (1) all private employers of fifteen or more persons; (2) all educational institutions; (3) private and public employment agencies; (4) labor unions with fifteen or more members; and (5) joint labor-management committees.

The Equal Pay Act of 1963

The Equal Pay Act of 1963 prohibited discrimination because of sex in the payment of wages, for equal work on jobs that require skill, effort and responsibility and are performed under similar conditions. Employers are specifically prohibited from reducing the wage rate of any employee to equalize pay between the sexes.

§ 206 (d). No employer shall discriminate between employees on the basis of sex by paying wages to employees at a rate less than the rate at which he pays wages to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility and performed under similar working conditions.

The Age Discrimination in Employment Act (ADEA) of 1967

The Age Discrimination in Employment Act (ADEA) of 1967 prohibited employers, employment agencies, and labor unions from discriminating on the basis of age against people between the ages of 40 and 65 in hiring, dismissal, promotion and other aspects of employment.

§ 623. It shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age.
The Rehabilitation Act of 1973

The Rehabilitation Act of 1973 applied to federal contractors and required them to take affirmative action to employ and promote qualified handicapped persons. Employers were required to provide employment and make accommodations for handicapped workers unless they imposed undue hardship on the employer. Any person claiming discrimination on account of a handicap must demonstrate an impairment that substantially limits major life activities.

§ 793. If any individual with a disability believes any contractor has failed or refused to comply with the provisions of a contract with the United States, relating to employment of individuals with disabilities, such individual may file a complaint with the Department of Labor. The Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto.

The American with Disabilities Act of 1990

The American with Disabilities Act of 1990 extended the rights of disabled persons to those with physical or mental impairment that substantially limited one or more of the major activities of life. Employers were required to make “reasonable accommodations” for the disabled.

§ 126. No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

The Civil Rights Act of 1991

The Civil Rights Act of 1991 amended the Civil Rights Act of 1964 and provided for jury trials in cases of intentional discrimination, with plaintiffs prevailing receiving
possible compensatory and punitive damages. The courts applied the standard of “strict scrutiny” to all government programs of preferences based on racial and ethnic classifications for employment, education, governmental contracting, and other governmental activities.

§ 1981. The purposes of this Act are to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace and to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under Title VII of the Civil Rights Act of 1964.

The Public Sector

The Civil Service Reform Act of 1978 (CSRA)

The Civil Service Reform Act of 1978 (CSRA) placed into statutory form already existing provisions from various executive orders, thereby removing the possibility of changes made by subsequent administrations. Title VII of the CSRA adopted many of the concepts of the Taft-Hartley Act, providing a pattern of labor relations in the federal government, which was similar to the private sector.

§ 7116. It shall be an unfair labor practice for an agency (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter [5 USCS §§ 7101 et seq.]; (2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment.

The Federal Labor Relations Authority (FLRA)

The CSRA created the Federal Labor Relations Authority (FLRA), provided for exclusive recognition of labor unions that represented a majority of the bargaining unit, guaranteed the rights of federal government employees to join unions of their choice, prohibited strikes, slowdowns, and work stoppages, defined negotiable issues, and consolidated bargaining units.
Federal Labor Relations Authority v. Aberdeen Proving Ground, Department of the Army (1982)

In Federal Labor Relations Authority v. Aberdeen Proving Ground, Department of the Army (1982), a union filed an unfair labor practice charge with the FLRA over the government’s decision to consider a specific day administrative leave rather than forced annual leave. An administrative law judge ruled in favor of the proving ground, stating that the union’s proposal was “not negotiable because the FLRA had not determined under § 7117 of the CSRA that the regulation at issue was not justified by a compelling need” (Aberdeen, 1982). The United States Court of Appeals for the Fourth Circuit held that § 7117 provided the sole procedure for determining whether there was a compelling need and reversed the FLRA decision. On certiorari, the U.S. Supreme Court affirmed. The Court held that § 7117 provided the exclusive procedure for determining whether there was a compelling need for a federal regulation, the FLRA may not make a compelling need determination in connection with an unfair labor practice proceeding, and a federal agency has no duty to bargain as to matters governed by an agency regulation, where there has been no prior determination by the FLRA that no compelling need existed for the regulation (Aberdeen, 1982).

Public employees had the right to join a union as protected by the right of freedom of association under the First Amendment. The U.S. Supreme Court balanced the right of employees against the government’s interest in regulating speech and conduct of government employees. The right of public employees to bargain collectively, let alone to strike, is not protected by the Constitution.

United Federation of Postal Clerks v. Blount (1971)

In United Federation of Postal Clerks v. Blount (1971), an unincorporated public employee labor organization brought suit in an effort to seek declaratory and injunctive
relief invalidating portions of the Civil Service Reform Act (5 U.S.C. § 7311) and Executive Order 11491. The Civil Service Reform Act “prohibited any government employee from accepting or holding a position in federal government if he participated in a strike against the Government of the United States.”

Executive Order 11491

The United States District Court for the District of Columbia held that the provisions of the statute and the Executive Order did not violate any constitutional rights of the employees and the Government’s motion to dismiss the complaint was granted.

The District Court stated that

the fact that public employees may not strike did not interfere with their rights which are fundamental and constitutionally protected. The right to organize collectively and to select representatives for the purposes of engaging in collective bargaining is a fundamental right. The right to strike because of its more serious impact on the public interest is more vulnerable to regulation than the right to organize. Executive Order 11491 clearly and expressly defined strikes, work stoppages, and slowdowns as unfair labor practices. In the private sphere, the strike is used to equalize bargaining power, but this has universally held not to be appropriate when its object and purpose can only be to influence the essentially political decisions of Government in the allocation of resources. Congress has an obligation to ensure that the machinery of the Government continues to function at all times without interference. Prohibition of strikes by its employees is a reasonable implementation of this obligation (Blount, 1971).

The rights of public employees were considered by the U.S. Supreme Court.


In City of Madison Joint School District v. Wisconsin Employment Relations Commission (1976), a school teacher who was not a union member addressed the school board at a public meeting and spoke on the subject of the union’s “fair share” clause proposal to defray collective bargaining costs. The Wisconsin Employment Relations
Commission, the Circuit Court of Dane County, Wisconsin, and the Supreme Court of Wisconsin agreed and held that the

right to freedom of speech and the right to petition the government could be abridged in the face of a clear and present danger that the speech would bring about substantive evils that the legislature had a right to prevent and that the abridgment of the teacher’s right to speak was justified in order to avoid dangers to labor-management relations (*Wisconsin Employment, 1976*).

On appeal the U.S. Supreme Court reversed and remanded. The Court held that

(1) the speech of the nonunion teacher at the open board meeting did not constitute negotiations, and thus did not constitute a clear and present danger to labor-management relations; (2) the nonunion teacher had not sought to bargain or to offer to enter into any bargain with the board and did not appear to be authorized by any other teachers to enter into any agreement; and (3) the nonunion teacher had spoken as one of the board’s employees and also as a concerned citizen on an important decision in government (*Wisconsin Employment, 1976*).

There continued to be controversy about collective bargaining in the public sector. A major argument against the applicability of private sector labor law to the public sector was that the economics was different. The private sector was based on a market economy that did not apply to the public sector. The constraints in the public sector were political. The employment-benefit relationship or trade-off that exists in the private sector was not present in the public sector. An often cited difference between public and private sector employment was that unions in the public sector have the opportunity to bring pressure on their employees through the political process. Unions have used the legislature to obtain their goals that were under negotiation at the bargaining table. The federal government and a majority of the states prohibit striking by common law or statute. The courts determine, on a case-by-case basis, whether the public interest overrides the basic right to strike. The debate shifted to substitutes for striking. Fact-finding was foremost among the choices. The *Civil Service Reform Act* provided a resolution.
§ 7119 (c). The Federal Service Impasses Panel or its designee shall promptly investigate any impasse presented to it under subsection (b) of this section. The Panel shall consider the impasse and shall either (i) recommend to the parties procedures for the resolution of the impasse; or (ii) assist the parties in resolving the impasse through whatever methods and procedures, including fact-finding and recommendations, it may consider appropriate to accomplish the purpose of this section.

Fact-finding produced a formal report with recommendations and suggested that the “unreasonable” party bend to the weight of “public pressure” over the issues and yield or modify its position. The report also can “harden” the positions of both parties and make it even less likely to allow dispute resolution. Fact-finding did not provide finality.

§ 7119 (c). If the parties do not arrive at a settlement after assistance by the Panel, the Panel may (i) hold hearings; (ii) administer oaths, take the testimony or deposition of any person under oath, and issue subpoenas as provided in § 7132 of this title; and (iii) take whatever action is necessary and not inconsistent with this chapter to resolve the impasse. (C) Notice of any final action of the Panel under this section shall be promptly served upon the parties, and the action shall be binding on such parties during the term of the agreement, unless the parties agree otherwise.

Under the National Labor Relations Act, workers, public and private, had the right to engage in walkouts if they were protesting unsafe conditions. In National Labor Relations Board v. Washington Aluminum Company (1962), the National Labor Relations Board issued an order directing an employer to reinstate employees whom the employer had discharged for leaving work without permission on claims that the shop was too cold and thus unsafe to work in. The United States Court of Appeals for the Fourth Circuit refused to enforce the order on the ground that the walkout did not amount to a concerted activity protected by § 7 of the National Labor Relations Act. The workers left the shop without giving the employer an opportunity to avoid the work stoppage by granting a concession to the demand. On certiorari the U.S. Supreme Court reversed the
judgment and remanded the case with directions to enforce the Board’s order in its entirety. The Court stated that although the company contended to the contrary, we think that the walkout did grow out of a labor dispute within the plain meaning of the definition of that term in § 2 (9) of the Act which declared that it included any controversy concerning terms, tenure or conditions of employment (Washington Aluminum, 1962).

Collective bargaining and the political process are very well connected in the public sector, one affecting the other and vice versa. In the public sector there is a specific responsibility to protect public interest. Traditionally, public employment in the United States has been legally classified as a “privilege”, not as a “right”, and as a consequence of this distinction, government workers have not been able to exercise the same constitutional prerogatives as other citizens (Martin, 1977).

United States Civil Service v. National Association of Letter Carriers (1973) In most cases, federal employees cannot bargain over the important issue of compensation, except in select agencies. Federal workers are prohibited from striking and other forms of political activity are considered illegal. In the Hatch Act’s restrictions against voluntary participation by the federal civil service, it was stated that Congress had the constitutional right to restrain the political activities of classified employees (Martin, 1977). The U.S. Supreme Court ruled in United States Civil Service v. National Association of Letter Carriers (1973) that it is not only important that Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent (National Association, 1973).

States were not required to treat employees any differently than the U.S. Supreme Court, unless required by state law. The ultimate control of state personnel relationships
is, and will remain with, the States (Martin). Collective bargaining at all public employment levels was discouraged on the basis of the privilege doctrine as described by Martin. The doctrine stated that benefits that government confers on its employees are privileges and not rights. Government services were characterized as “essential” and thus many bargaining rights were denied to public employees. However, in recent years citizens have adapted to many civil service strikes: postal, air controllers, and other local level workers.

Executive Order 10988 (1962)

President Kennedy’s Executive Order 10988 (1962) established a pattern for labor management relations in the federal government. The order specified three types of unions: formal, informal, and exclusive. Union or agency shops were prohibited. Advisory arbitration of grievances was permitted but resolution of impasses was left to the parties. Arbitration in interest disputes was prohibited.

§ 1 (a). Employees of the Federal Government shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity.

§ 3 (a). Agencies shall accord informal, formal, or exclusive recognition to employee organizations which request such recognition.

§ 5 (b). When an employee organization has been formally recognized, the agency, through appropriate officials, shall consult with such organization from time to time in the formulation and implementation of personnel policies and practices, and matters affecting working conditions that are of concern to its members.

Union membership grew tremendously following the implementation of Executive Order 10988. The number of employees in exclusive units increased dramatically and the percentage of all employees covered by formal agreement increased to forty-nine percent in 1974 (Freeman, 1988).
Executive Order 11491 (1969)

President Nixon’s *Executive Order 11491 (1969)* attempted to remedy numerous negotiation problems that developed since 1962. There were problems with multiple labor representatives, the absence of a neutral enforcement system, and the abuse of power by agency heads and unfair labor practices.

§ 1 (a). Each employee of the executive branch of the Federal Government has the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization or to refrain from any such activity, and each employee shall be protected in the exercise of this right.

§ 10 (a). An agency shall accord exclusive recognition to a labor organization when the organization has been selected, in a secret ballot election, by a majority of the employees in an appropriate unit as their representative.

§ 17. When voluntary arrangements, including the services of the Federal Mediation and Conciliation Service or other third-party mediation, fail to resolve a negotiation impasse, either party may request the *Federal Service Impasses Panel (FSIP)* to consider the matter.

The Federal Service Impasse Panel (FSIP)

The *Federal Service Impasses Panel (FSIP)* was created and authorized to resolve bargaining stalemates (*CSRA, 1978*). The *Federal Labor Relations Authority (FLRA)* was also created to manage labor relations in the public sector. The *FLRA* was designed similar to the *NLRB* and was set up to decide questions related to the representation of rights, negotiability of contract proposals, exceptions to arbitration awards, and unfair labor practices. The investigation and prosecution of unfair labor practices was with the *General Counsel* of the *FLRA (CSRA, 1978)*.

Title VII of the *CSRA* defined the scope of negotiations in federal government collective bargaining. Many topics that were commonly bargained for in the private sector were excluded from negotiations in the federal government. The original statute
prohibited negotiations for wages in most cases, determination of budget, assignment of employees, assignment of work, discipline of workers, and the contract out of agency work.

The determining factor was whether the agency had the discretion to set wages and benefits. Negotiation was then required with the union. Executive Orders 10988 and 11491 excluded many of the topics commonly negotiated in the private sector, such as wages, hours, overtime, rates, holidays, annual leave, pensions, insurance, and union security. The CSRA continued with this restrictive approach. The territory for bargaining remained unchanged, and matters of law and matters subject to government-wide regulation remained unarguable (Coleman, 1980).

Under Title VII, there were three categories of negotiability: issues which the parties have a duty to bargain in good faith, issues where bargaining was prohibited, as a matter of law, and issues over which management had discretion whether to bargain or not.

Negotiability in the federal government was controlled by a rank order of relationships between collective bargaining contracts and federal statutes, agency rules and regulations, and interagency rules and regulations. Contracts were not permitted to contradict statute.

The FSIP developed broad powers to accept or refuse to take jurisdiction over negotiation disputes and to recommend procedures for resolving impasses. In the CSRA’s § 7119 (c), FSIP decisions were considered “binding” and it was an unfair labor practice to refuse cooperation with the FSIP. The FLRA had the authority to sustain, overturn, or modify an arbitrator’s award, based on the conflicts with written laws, rules
The Merit System Protection Board (MSPB)

The FLRA generally refused to further review cases where the appeal consisted of disagreement with the arbitrator’s: (1) interpretation of contract; (2) finding of fact; (3) evaluation of the evidence and testimony; and (4) reasoning and conclusions in resolving the dispute. Statutory standards of review were used by arbitrators and the Merit System Protection Board (MSPB), which had the responsibility to protect federal employee rights and interests, and both used substantial evidence for any agency actions taken for unacceptable performance. Employees appealed cases to the MSPD but sometimes did not work through the arbitration process in favor of the negotiated grievance procedure.


In Bowen v. United States Postal Service (1982), a discharged employee filed a grievance through his labor union as provided by the collective bargaining agreement. When the union refused to take the grievance to arbitration, the employee sued the employer and the union, seeking damages and injunctive relief and charged that the employer had violated the collective bargaining agreement by dismissing him without just cause and charged that the union had breached its duty of fair representation. The United States District Court for the Western District of Virginia returned a verdict in favor of the employee and approved the apportionment of damages of $30,000 against the union and $22,954 against the employer. The United States Court of Appeals for the Fourth Circuit accepted the District Court’s findings of fact but overturned the damages award, holding that the reimbursement of lost earnings was the obligation of the employer only. On certiorari, the U.S. Supreme Court reversed and remanded. The
Court held that “the damages were required to be apportioned between the employer and the labor union where the damages sustained by the employee were caused initially by the employer’s unlawful discharge and were increased by the union’s breach of its duty of fair representation (United States Postal, 1982).

Executive Order 12871 (1993)

President Clinton established the National Partnership Council, in Executive Order 12871 (1993), to advise the President and propose specific reforms in the law for employee relations in the government. The executive order required each agency to establish “labor-management partnerships” programs.

§ 1 (b). The National Partnership Council shall advise the President on matters involving labor-management relations in the executive branch. Its activities shall include supporting the creation of labor-management partnerships and promoting partnership efforts in the executive branch.

§ 2 (a). The head of each agency shall create labor-management partnerships by forming labor-management committees or councils at appropriate levels to help reform Government.

§ 2 (c). The head of each agency shall provide systematic training of appropriate agency employees (including line managers, first line supervisors, and union representatives who are Federal employees) in consensual methods of dispute resolution, such as alternative dispute resolution techniques and interest-based bargaining approaches.

State and Local Government

There is no comprehensive common legal framework within which to work for state and local government employees. State and local labor relations existed through a complex map of common-law doctrines, judicial decrees, executive orders, statutes, and ordinances. In the public sector outside the federal government, the trend has been to consider most topics bargainable, including wages, hours, and conditions of employment.
Most states have no statutory provisions limiting the scope of bargaining but impose on
the parties the duty to bargain with respect to “wages, hours, and other terms and
conditions of employment” (Horowitz, 1994).

The labor relations situation for public employees was extremely diverse in each
city, county and state in the United States. State and local government employees, unlike
their federal counterparts, have resorted to strikes as a way to ensure their respective
employers meet their demands. The large majority of jurisdictions prohibited public
employees from striking; however, hundreds of public employees’ strikes have taken
place in the last 30 years. The constitutional protection of the First Amendment and the
Fourteenth Amendment for protection of speech, expression and association and the
rights of a person of life, liberty, and property as protected by due process of law, were
important to public sector employees, particularly to employees in states without public
sector collective bargaining status.

First Amendment rights generally allowed a worker to join a union or advocate
joining a union without fear of being discharged by the employer. Employees were
permitted to speak on public issues, but this right was balanced by the interests of the
state and local governments’ responsibilities to provide public services.

Mount Healthy City School District Board of Education v. Doyle (1977)

In Mount Healthy City School District Board of Education v. Doyle (1977), an
untenured school teacher, with several past performance issues, spoke out on public radio
against the school principal’s policies. The school board did not renew the teacher’s
contract at the end of the year and cited the teacher’s lack of tact and professionalism.
The United States District Court for the Southern District of Ohio held that the teacher
was entitled to reinstatement with back pay, as his First and Fourteenth Amendment rights were violated. The U.S. Court of Appeals for the Sixth Circuit affirmed. On certiorari, the U.S. Supreme Court vacated the Court of Appeals’ judgment and remanded the case. The Court held that

(1) the school board was not entitled to assert any Eleventh Amendment immunity from suit in the federal court, since under state law, the board was more like a county or city, not entitled immunity, than it was like an arm of the state, (2) the teacher’s constitutional claims were not defeated merely because he did not have tenure, (3) even with protection of free speech, the mere fact that the conduct was found by the District Court to have played a “substantial part” in the board’s decision not to renew the teacher’s contract did not amount to a constitutional violation justifying remedial action by the board, (4) the District Court had erred in not determining whether the board showed by a preponderance of evidence that it would have reached the same decision on re-employment of the teacher, and (5) the case would be remanded, since it could not be determined from the lower court’s opinions what conclusion those courts would have reached had they applied the proper test (Doyle, 1977).

Connick, District Attorney in and for the Parrish of Orleans, Louisiana v. Myers (1983)

In Connick, District Attorney in and for the Parrish of Orleans, Louisiana v. Myers (1983), an employee in the District Attorney’s office was terminated for refusing a transfer and for being insubordinate by distributing a questionnaire to her colleagues on office morale, transfer policies and the need for a grievance committee. The United States District Court for the Eastern District of Louisiana agreed with the employee that her right to constitutionally protected free speech had been violated. She was granted reinstatement, back pay, damages, and attorney’s fees, holding that the questionnaire was the reason for her termination and that the issues in the questionnaire were matters of public concern and that the employer had not demonstrated that the questionnaire had substantially disrupted the work environment. The U.S. Court of Appeals for the Fifth Circuit affirmed. The U.S. Supreme Court reversed. The Court held that
the discharge did not offend the First Amendment since (1) the employee spoke out not as a citizen but as an employee upon matters of personal interest, and the federal court is not the appropriate forum to review the wisdom of personnel decisions taken by a public agency, (2) the District Court erred by imposing the burden on the state to justify the employee’s discharge by requiring it to clearly demonstrate that the speech interfered with the operation of the office and (3) the limited First Amendment interest here did not require the employer to tolerate action that disrupted the office, undermined the supervisor’s authority and destroyed the close working relationships in the office (Myers, 1983).

Pickering v. Board of Education of Township High School District 205 (1968)

In *Pickering v. Board of Education of Township High School District 205* (1968), the U.S. Supreme Court ruled that in the “absence of proof of false statements knowingly or recklessly made by a teacher, his right to speak on issues of public importance could not furnish the basis for his dismissal” (*Pickering, 1968*).

A balance had to be struck between the interest of public employees as citizens commenting on issues of public interest and the interest of the state as an employer delivering on public services. State and local employers were prevented from arbitrarily disciplining or dismissing employees. The U.S. Supreme Court used a two-part test to decide whether the employee was deprived of a protected interest and what process was due.

Board of Regents of State Colleges v. Roth (1972) and Perry v. Sinderman (1972)

In *Board of Regents of State Colleges v. Roth* (1972) and *Perry v. Sinderman* (1972), employees’ rights of liberty, property and due process were considered. The U.S. Supreme Court held in *Roth* that the employee’s right to due process applied only to the “deprivation of interests encompassed within the Fourteenth Amendment’s protection of liberty and property, and the range of such interests was not infinite, and procedural due process protected only interests that a person had already acquired” (*Roth, 1972*). In
*Perry v. Sinderman*, the Court held that “there was no requirement in the Constitution that an untenured teacher be afforded a hearing unless it can be shown that the non-retention deprived the teacher of some interest of liberty or property” (*Sinderman, 1972*). However, the Court recommended that the teacher be given “a hearing by the college board, following which the matter could come before the courts for review supported by the information developed at the hearing” (*Sinderman*).

A property interest was usually found when an employee had a tenured position or when he was protected by civil service rules or a collective bargaining contract. An employee may be protected when he had the expectation of continued employment. Liberty interest existed when an employee’s reputation was harmed or his expectation to find further employment was affected.

Public sector collective bargaining has come into conflict at the state level with civil service regulations. Unions continue to work in this area of disagreement between civil service codes and the collective bargaining statutes and agreements to expand the scope of bargaining. State and federal systems of government have sovereign powers. The concept of sovereignty is inherent in the supreme power of a political state. “Any state that possesses and maintains supreme power can determine whether or not an individual or a group of individuals can initiate a claim against the state” (*Imundo, 1975*). Local governments are not sovereign and must not enter into collective bargaining agreements with employee organizations without state passed legislation authorization. States established boards or agencies to enforce these laws of public sector collective bargaining. These agencies handled these issues: unit determination, bargaining agent recognition and certification, impasse resolution, and grievance arbitration.
Employers continued to resist the idea of legalizing strikes by public employees because of the sovereign nature of government and the fundamental necessity of government services. “The operation of the government is organized around a system of checks and balances that delimit the exercising of power by an individual or group” (Imundo). State and local governments have resorted to three basic procedures to press the process of finality: mediation, fact-finding, and arbitration. Binding arbitration attempted to prevent strikes through legally imposed penalties for failure to reach agreement. State policymakers provided a wide variety of dispute resolution mechanisms when legislating bargaining rights; most notable was compulsory arbitration (Ichniowski, 1982). Final-offer arbitration was another method to dispute resolution in the public sector where the arbitrator may not compromise but accepted entirely one position or the other. Ichniowski (1982) found that municipalities that provided for collective bargaining in any form experienced significantly fewer strikes than did municipalities in environments where there was no law or where bargaining was outlawed. In addition, municipalities with a duty-to-bargain environment without arbitration experienced more strikes than municipalities with arbitration.

The variables in state bargaining laws used to measure the differing legal environments for collective bargaining include two principal aspects of the law – bargaining rights and impasse procedures. Some state frameworks establish the right of employee organizations to merely “meet and confer” with employers or “present proposals” (Ichniowski, 1982). In general there are four classifications of public bargaining laws: states with no specific provisions for collective bargaining or where bargaining is illegal; states where labor organizations have the right to present their views
to employers but which falls short of the “duty-to-bargain” provision; states which have a
duty-to-bargain provision but no compulsory arbitration mechanism for resolving
disputes; and states which have duty-to-bargain and provide compulsory arbitration.

Opposition to compulsory arbitration continued due to the fact that it displaced
the political responsibility by delegating governmental authority to a third party who was
not responsible to the electorate. However, there was still support for this kind of
arbitration as it tended to prevent strikes and delegated legal authority, with explicit
standards and guidelines for arbitrators, and had procedural safeguards with court review
written statutorily. This system of arbitration did not have the power to impose a burden
or charge.

Public policies vary among the states and some public policies have had a greater
impact than others on reducing strike frequency for public employees. In Pennsylvania,
policymakers have decided that the exercise of the right to strike in the public sector is,
within limits, more important than the costs possibly imposed on the public by strikes
(Olson, 1986). Olson found that in New York, policymakers have successfully deterred
strikes by imposing substantial penalties on striking unions and employees. Olson
determined that many state public employees considered the benefits of interest
arbitration over the strike.

To compare the probability of a strike with and without arbitration, assume that
unions initially choose between a strike and arbitration by selecting the procedure
with the higher expected outcome. Following the use of either procedure,
however, the union may invoke the procedure that was not initially chosen in an
attempt to obtain an outcome superior to that already obtained from the first
procedure. Under this decision framework, compulsory arbitration will reduce the
strike probability if unions initially choose arbitration in most negotiations and
seldom strike because of an unfavorable arbitration award (Olson, 1986).
The trend in public sector bargaining has been toward mutual responsibility for wages, hours, and working conditions, however the conflict between sovereignty and accountability and bilateral authority has been strongly ideologically recognized and imbedded in discussion and disagreement. The movement of work involvement and labor-management cooperation continues to grow more prevalent in the work environment. The concern for these “involvement committees” is that they can be considered “management dominated” and thus not permitted by the Wagner Act as amended under the Taft-Hartley Act. Worker-management relations continue to be under review in the courts, the state and federal legislatures, and the employee and employer organizations.

Interest in “employee participation programs” has heightened as competition from foreign manufacturers has increased. However, when “non-professional” employees participated in joint problem-solving structures with management, it was argued that they were performing a managerial function (Lee, 1987). Unions have often described these groups as “company unions” dominated by the employer, in violation of the NLRA. When “professional” employees attempted to organize, management frequently challenged the lawfulness of such a union, stating that the employees were performing “managerial duties.”

Payne v. The Western & Atlantic Railroad Company (1884)

One of the main issues in public employment was the employer’s rights to discharge nonunion employees at will. Union employees were generally protected under their respective collective bargaining agreements, as stipulated by contract. The at-will doctrine can be traced back to the 1884 Payne Case of the Supreme Court of Tennessee.
which was noted for its interpretation of the common law right of an employer to discharge an employee.

In *Payne v. The Western & Atlantic Railroad Company* (1884), the Tennessee Supreme Court examined the common law and the following question: Is it unlawful to threaten to discharge employees if they trade with a certain merchant? The court stated that

if the act is unlawful it must be on other grounds than breach of contract, as, that it unjustly deprives plaintiff of customers and trade to which his fair dealing entitles him, and thus destroys his business. For any one to do this without cause is censurable and unjust (*Payne, 1884*).

However, in *Payne*, the court was unwilling to control human behavior, liberty and normal commerce. Employers were expected to trade, buy and sell goods, and hire and fire workers to promote healthy profits and good business practices. The court held that employers may dismiss their employee at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong.

If in the act of discharging them, they break no contract, then no one can sue for loss suffered. Trade is free; so is employment. The law leaves employer and employee to make their own contracts; and these, when made, it will enforce. Either the employer or employee may terminate the relation at will, and the law will not interfere, except for contract broken (*Payne, 1884*).

The case represented a seminal decision for the at-will doctrine of employment. Absent a contract, an employer or employee can end the working relationship at their will, at any time, for almost any reason, including no reason at all. These issues have been challenged to provide greater protection for nonunion employees against unjust termination of employment. The courts have developed three broad categories of
exceptions to the employer’s right to terminate employees at will: public policy, breach of implied-in-fact contract, and implied covenant of good faith and fair dealing.

The public policy exception extended to employees who had a recognized claim for wrongful discharge when the discharge was contrary to a clear mandate of public policy. This exemption also extended to cases of professional employees who were asked to violate the employee’s professional code of conduct. The public policy exception is the most widely accepted exception and is applied in 43 of 50 states (Hackstock, 2002). Public policy is generally defined as the “well-established public policy of the State” existing in the state constitution or state statutes.

Blair v. Honda of Honda of America (2002)

In Blair v. Honda of Honda of America (2002), an employee was terminated for excessive absences from work. The employee suffered from medical allergies that were exacerbated by the materials on the manufacturing line, and she filed a complaint against Honda, alleging breach of contract and wrongful discharge in violation of Ohio public policy. The court stated that “Ohio employment law was based on the general premise that all employment is considered at-will, whereby either party may terminate the employment relationship for whatever reason and whenever either so desires” (Blair, 2002). The court further said that “when asserting a claim for wrongful discharge in violation of public policy, a plaintiff must first demonstrate that clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law” (Blair). In the end the court held that

to allow the employer to terminate the employee for missing work due to an illness caused by the employer’s decision to require the employee to work in an unsafe environment would jeopardize the public policy that demands that employees be provided with a safe work environment (Blair).
The court found that a clear public policy of workplace safety had been violated and ordered the judgment of the Common Pleas Court of Union County, Ohio reversed and remanded for further disposition.

Goff-Hamel v. Obstetricians & Gynecologists (1999)

A more controversial and delicate exception to employment at will is when the court finds that an employer has breached an implied contract with the employee. In Goff-Hamel v. Obstetricians & Gynecologists (1999), an employee left her previous place of employment of eleven years for a promise of new employment at a new clinic. One day before beginning work, the employee received a call from the new clinic stating that they had decided not hire her after all. The employee sued for breach of oral contract. The court stated that “the employee had a right to assume he would be given a good faith opportunity to perform his duties” (Goff-Hamel, 1999). The court reversed the judgment of the trial court and remanded the case for further proceedings.
CHAPTER III
AN ANALYSIS OF STATE STATUTES AND CASE LAW

A review of statutes and case law was conducted for the fifty states to determine the current status of public employee and specifically public school teacher labor law, collective bargaining, and strike laws. To assist in the research, state secretaries and superintendents of education and state attorneys general from the fifty states were contacted by letter to request up to date information regarding their respective state’s applicable statutory language and corresponding legal challenges in the courts. A total of forty-five states responded, with thirty states providing information from both the state’s department of education and the office of the attorney general and the remainder providing information from one of the two sources.

The review of state statutes and case law demonstrated an identifiable geographic pattern to the status of public employee labor law. The states were divided into 3 regions. Region I was No State Collective Bargaining Laws. In this region were predominantly the Southern states through the Southwestern and into the Western states. Region II was Collective Bargaining Laws with the Northeastern through the Midwestern and parts of the Western states. Florida and Tennessee were the exceptions from the South. Region III was made up the Northeastern, Midwestern, and Western states where ten states Permitted Strikes, plus Alaska and Hawaii, to make a total of twelve states to permit public employees to strike.
Region I – No State Collective Bargaining Laws

Alabama—Statutes

None

Alabama—Court Cases

In *Walker County Board of Education v. Walker County Education Association* (1983), the plaintiff appealed a decision by the Walker County Circuit Court to the Supreme Court of Alabama, where the School Board of Education had adopted certain policies that were applicable to all professional staff members in the Walker County School System. These policies included issues of dismissals, reduction in personnel, grievance procedures, and other employee concerns. A dispute arose between the Board and the employee organizations, the Walker County Education Association (WCEA) and the Walker County Education Support Personnel Organization (WCESPO), over decisions by the Board to reduce personnel, stating that these decisions violated the policies previously set forth. The Alabama Supreme Court concluded, “the policies were adopted pursuant to statutory authority and were unilaterally adopted by the plaintiff and were not the product of collective bargaining” (*Walker County, 1983*). The Court further stated that

the concept of “collective bargaining,” as understood and applied in the field of private industry, implies bargaining sanctions and weapons not available to public employees, such as the right to strike and other incidents of the private employment relationship not appropriate in the public employment field. It also implies two bargaining units of co-equal status, each with unlimited power to enter into binding commitments. This concept does not apply in the case of the state with relation to its employees (*Walker County, 1983*).

The court further concluded that
the Board has authority under Title 16 § 8 (10) of the Code of Alabama 1975 to “consult with” a representative of the employee organization when that “consultation” is in the context of meeting, discussion, and recommendation. Title 16 § 8 (10) obligates the Board to “directly, or indirectly consult with the professional organization representing the majority of the certified employees and in addition to also consult with professional assistants, principals, teachers, and interested citizens (Walker County, 1983).

Title 16 § 8 (10) of the Code of Alabama 1975 only obligates the Board to meet and consult with those persons set out in the statute; it does not obligate the Board to reach any agreement, accept any proposals or negotiate any matter if it does not with to do so. The Board is free to reject the proposals submitted for any reason or no reason, without committing an unfair labor practice or subjecting itself to any sanction. However, once the Board accepts a policy pursuant to statutory mandate the same remains in full force and effect to the extent it does not violate Alabama law until modified or amended by the Board in accord with the procedure set forth in Title 16 § 8 (10) (Walker County, 1983).

The Court found that the trial court had properly determined that the provision for binding arbitration was unenforceable unless voluntarily agreed into by the Board and the WCEA and WCESPO.

Arizona—Statutes

None

Arizona—Court Cases

In Board of Education of the Scottsdale High School District v. Scottsdale Education Association (SEA) (1972), the Court of Appeals of Arizona reviewed an appeal from the Maricopa County Superior Court to determine the legality of an order for the Board to follow an “impasse” procedure called for by a “Professional Negotiation Policy” executed by the SEA and the Board.

The Court stated that

there is no objection to the organization of the plaintiff as a labor union, but if its organization is for the purpose of “demanding” recognition and collective
bargaining, the demands must be kept within legal bounds. The plaintiff does not have the right to organize for all of the purposes for which employees in private enterprise may unite. It does not mean that, having organized, it is necessarily protected against unfair labor practices or that it shall be the exclusive bargaining agent for all employees of the unit. It means nothing more than that the plaintiff may organize and bargain collectively for the pay and working conditions which it may be in the power of the board of education to grant (Scottsdale Education Association, 1972).

The Board was determined to be authorized to enter into “collective bargaining” with a representative of the teacher-employees when that “collective bargaining” was in the context of meeting and consulting with. The Court found that “the decision of whether the Board desires to enter into such a “collective bargaining” situation remains for the Board, and actions to compel or coerce the Board to so bargain collectively against its better judgment are improper” (Scottsdale Education Association, 1972).

Arkansas—Statutes

None

Arkansas—Court Cases

Without a collective bargaining law for public employees, school districts have devised alternate methods to promote a good working environment. The Little Rock School District Board of Education established a working relationship with all employees to result in a working environment, which is productive, efficient, and creative. Staff members are permitted to work with their supervisors to determine their working conditions, to use the process of “meet and confer” or to select another process of negotiation (Little Rock School District Negotiation Practices, 1999).

In Wilson v. Pulaski Association of Classroom Teachers (1997), a group of
taxpayers with children in the Pulaski County School District filed a lawsuit against the Pulaski Association of Classroom Teachers challenging the legality of a teacher strike. The Supreme Court of Arkansas stated that “it is clear that the ability of public employees to withhold their services involves a question of significant public interest, the resolution of which would preclude future litigation” (Pulaski, 1997). The Court further stated that based on previous cases, Potts v. Hay, 229 Ark. 830 (1958) and City of Ft. Smith v. No. 38, AFL-CIO, 245 Ark. 409, (1968), strikes for public employees were illegal in Arkansas. The Court further explained the jurisdiction of equity with respect to public employees.

There is no doubt but that equity will exercise jurisdiction to restrain acts or threatened acts of public corporations or of public officers, boards, or commissions which are ultra vires and beyond the scope of their authority (Pulaski, 1997).

The Court affirmed the decision of the lower court, finding that the appellant had failed to make a showing of irreparable harm, and did not uphold the order of injunction against the teachers’ organization. On dissent, the minority of the Court stated that

the issue of whether teachers who are public employees may strike against their government employers is an issue of significant public interest that must be addressed. The language in City of Fort Smith is unequivocal and is, at the very minimum, persuasive authority for the proposition that strikes by public employees is illegal. (Pulaski, 1997).

Colorado—Statutes

None

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**Colorado—Court Cases**

Public school employees in Colorado bargain under a voluntary agreement in which the local association seeks a collective bargaining agreement with the school district and obtains it through a representation election, employee organization, or collaboration.

In *Lori Lazuk v. School District No. 1, City and County of Denver (2000)*, the plaintiff appealed a decision from the District Court of the City and County of Denver to the Court of Appeals of Colorado, Division Three, and the case was decided in favor of the defendants, School District No. 1. The plaintiff, a schoolteacher, had openly questioned the school’s leadership and was subsequently transferred to another school. The plaintiff asserted that the school board cannot delegate the power to transfer a teacher and, therefore, the collective bargaining agreement entered into by the school district and the teachers’ association, which provides for teacher transfers without school board approval, is invalid (*Lazuk, 2000*).

The Court stated that by adopting the collective bargaining agreement as school board policy, the school board exercised its authority to delegate the authorization to transfer teachers. The Court concluded that the trial court had not abused its discretion in denying plaintiff’s request for preliminary injunction and affirmed the lower court’s decision.

**Georgia—Statutes**

The only statutory provision recognizing a right of public employees to collectively bargain is the *Firefighters Mediation Act*. *O.C.G.A. § 25-5-1* allows firefighters to join labor unions and enter into contracts with local municipalities having
over 20,000 citizens. The state legislature allows municipalities to decide whether they will enter into collective bargaining. The law outlaws strikes, work stoppages, and slowdowns.

**Georgia—Court Cases**

In *Camden County v. Haddock (1999)*, a county employee was terminated by the Camden County Commission as a result of a county budget deficit and related problems. The employee alleged violations of procedural due process and a violation of the open meetings law. The trial court granted her motion for summary judgment on the grounds that the county had violated its own personnel policy. However, on appeal to the Georgia Supreme Court, the Court concluded that the county had not violated the due process clause and reversed the decision. The court stated that

the State Constitution provided the same procedural rights in public employment cases as the federal due process clause. Public employees have a property interest in continued employment for due process purposes when a personnel manual provides that an employee can only be terminated for cause. The focus of the procedural due process analysis is whether the state makes adequate procedures available, not whether the plaintiff takes advantage of those procedures and achieves a successful outcome (*Haddock, 1999*).

**Kentucky—Statutes**

Kentucky law provides for specific exception to the collective bargaining laws for firefighters and police. Kentucky Revised Statutes, Ch. 345 addresses collective bargaining for firefighters and Kentucky Revised Statutes, Ch. 78 addresses police.

§ 345.030. Employees’ right to organize for the purpose of collective bargaining. Firefighters of a city of the first class shall have, and shall be protected in the exercise of, the right of self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing on questions of wages, hours, and other conditions of employment free
from interference, restraint, or coercion.

§ 78.470. In any county in the Commonwealth of Kentucky, which has a population of 300,000 or more, and which has adopted the merit system, the county employees in the classified service as police may organize, form, join or participate in organizations in order to engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid and protection, and to bargain collectively through representatives of their own free choice.

Kentucky—Court Cases

While public employees in Kentucky do not have the right to strike, public agencies may elect to voluntarily negotiate with a representative of its employees, although it has no duty to do so.

In Fayette County Education Association (FCEA) v. Board of Education of Fayette County (1980), the Court of Appeals of Kentucky reviewed a judgment from the Fayette County Circuit Court over a collective bargaining agreement. The Board of Education of Fayette County had decided to bargain collectively with Fayette County teachers. A poll was taken among teachers and the results indicated that the majority of teachers favored collective bargaining and that a majority desired the FCEA to represent them. The court held that “the Board of Education of Fayette County could not designate any individual or group representing a group of employees as exclusive representative for all employees” (Fayette County, 1980). The Court upheld the lower court’s decision and the agreement was void.

Mississippi—Statutes

None
**Mississippi—Court Cases**

In *Biloxi Firefighters Association v. City of Biloxi, Mississippi (2002)*, a previous city council resolution had directed the city mayor to enter into good faith negotiations with the Biloxi Firefighters Association so as to establish an understanding concerning wages, hours of work and conditions of employment. However, a newly elected mayor vetoed the resolution. The state circuit court granted summary judgment in favor of the city whereupon the Association appealed to the Supreme Court of Mississippi. The Court concluded that

one city council cannot legally adopt a resolution binding a successor administration on discretionary matters. A collective bargaining agreement is policy-oriented, reflecting the will of a certain administration. To hold that such action as a matter of law binds a subsequent administration would violate well-settled Mississippi case law (*Biloxi, 2002*).

The circuit court’s grant of summary judgment in favor of the city was affirmed in all respects.

**North Carolina—Statutes**

North Carolina public employees are prohibited from becoming members of trade unions or labor unions. North Carolina General Statute § 95-98 (1959) declared all public employee collective bargaining illegal.

§ 95-98. Any agreement, or contract, between the governing authority of any city, town, county, or other municipality, or between any agency, unit or instrumentality thereof and any labor union, trade union, or labor organization, as bargaining agent for any public employees of such city, town, county or other municipality, or agency or instrumentality of government, is hereby declared to be against the public policy of the State, illegal, unlawful, void and of no effect.

**North Carolina—Court Cases**
In *James H. Bailey v. State of North Carolina* (1998), the systems of retirement benefits for public employees were in question. The North Carolina General Assembly had approved at least thirteen different public employee retirement systems which were operating for the purpose of providing public servants with retirement benefits. The retirement systems included three different benefit and contribution schemes: mandatory defined benefit plans, optional plans, and noncontributory plans. The mandatory plan included the Legislative Retirement System, the Consolidated Judicial Retirement System, and the Teachers’ and State Employees’ Retirement System, the Local Government Employees’ Retirement System, and the Disability Income Plan. In testimony during the trial in the Superior Court of Wake County, it was determined that the state government had made innumerable communications that retirement benefits would be exempt from state taxation. The trial court held that state legislation which partially taxed state and local government retirement benefits was an unconstitutional impairment of contract under the United States Constitution and a material breach of contract.

On appeal to the Supreme Court of North Carolina, the central issue was whether the plaintiffs had an enforceable contract right which was unconstitutionally impaired by the State of North Carolina.

A public employee has a right to expect that the retirement rights bargained for in exchange for his loyalty and continued services, and continually promised him over many years, will not be removed or diminished. Plaintiffs, as members of the North Carolina Local Governmental Employees’ Retirement System, had a contractual right to rely on the terms of the retirement plan as these terms existed at the moment their retirement rights became vested (*Bailey, 1998*).

The Court held that the relationship between the Retirement Systems and employees vested in the system is contractual in nature, the right to benefits exempt from
state taxation is a term of such contract, and such exemption does not constitute an unconstitutional contracting away of the State’s sovereign power. The case was affirmed on the lower court’s holding that the legislation was unconstitutional as an improper impairment of contract and taking of property without compensation.

**Texas—Statutes**

The Texas Government Code, § 617.002 prohibits collective bargaining by public employees.

§ 617.002 (a) An official of the state or of a political subdivision of the state may not enter into a collective bargaining contract with a labor organization regarding wages, hours, or conditions of employment of public employees.

§ 617.002 (c) An official of the state or of a political subdivision of the state may not recognize a labor organization as the bargaining agent for a group of public employees.

**Texas—Court Cases**

In *Corpus Christi Independent School District v. Padilla* (1986), employees of the school district filed suit complaining that the superintendent had denied them a hearing before the Board of Trustees (Board) to hear their grievances. The employees had been reassigned and in effect received reduced work hours. On appeal to the Court of Appeals of Texas of the Thirteenth District, the Court held that the Board was “empowered to delegate the authority to the superintendent, pursuant the Texas Education Code, § 23.26 (b)” (*Padilla, 1986*). The Court determined that the Board’s policy on hearing grievances did not infringe upon any of the employees’ constitutionally protected rights. The Court further noted that
The presentation of a grievance is in effect a unilateral procedure, whereas a contract or agreement resulting from collective bargaining must of necessity be a bilateral procedure culminating in a meeting of the minds involved and binding the parties to the agreement. The presentation of a grievance is simply what the words imply, an no more. It is clear that the Texas statute carefully prohibits striking and collective bargaining, but does permit the presentation of grievances, a unilateral proceeding resulting in no loss of sovereignty by the municipality (*Padilla, 1986*).

The Court of Appeals reversed the lower court’s decision. The employees had never approached the Board during the open forum portion of the Board’s meeting and the superintendent was legally authorized to meet with the employees and deny their grievances.

*Virginia—Statutes*

Virginia does not recognize collective bargaining by public employees. These laws date back to the Virginia Code of 1950.

§ 40.1-57.2. Prohibition against collective bargaining. No state, county, municipal, or like governmental officer, agent or governing body is vested with or possesses any authority to recognize any labor union or other employee association as a bargaining agent of any public officers or employees, or to collectively bargain or enter into any collective bargaining contract with any such union or association or its agents with respect to any matter relating to them or their employment or service.

*Virginia—Court Cases*

In *School Board of the City of Richmond v. Parham (1978)*, a Virginia public schoolteacher filed a motion to force the School Board of the City of Richmond to submit a grievance to arbitration. The Circuit Court granted the teacher’s motion and the School Board appealed the decision to the Supreme Court of Virginia. At issue is whether grievances within local school districts can be given to an arbitration panel or if
the School Board has the final decision in disputes. At the heart of this controversy are
the provisions of Article VIII of the Virginia Constitution.

Article VIII, § 4. Board of Education. The general supervision of the public
school system shall be vested in a Board of Education.

Article VIII, § 5 (e). Subject to the ultimate authority of the General Assembly,
the Board shall have primary responsibility and authority for effectuating the
educational policy set forth in this Article, and it shall have such other powers and
duties as may be prescribed by law.

The Court determined that the School Board policy of binding arbitration had
denied the School Board the right to decide upon the ultimate application of the policy.
“The provision effectively divests the School Board of a function indispensable to its
power of supervision” (Parham, 1978).

The Court reversed the decision of the trial court and the schoolteacher’s motion
was dismissed. Final judgment was entered declaring the binding arbitration provision
invalid.

Region II – Collective Bargaining Laws

Connecticut—Statutes

The State Board of Labor Relations defines and protects the statutory rights of
public sector employees to form, join or assist labor organizations. The three key statutes
for public employees and teachers are the Teachers’ Negotiations Act (TNA), Conn. Gen.
Stat. §§ 10-153 (a) et seq., the Municipal Employee Relations Act (MERA), Conn. Gen.
5-270 et seq.
The statutes allow employees to form unions and collectively bargain over wages, hours, and conditions of employment. Connecticut explicitly allows collective bargaining for retirement benefits and related issues. The law includes binding interest arbitration for all issues but it also gives the legislature the ability to reject an award by a two-thirds vote if the state has insufficient funds to carry out the award.

§§ 10-153 (a). Members of the teaching profession shall have and shall be protected in the exercise of the right to form, join or assist, or refuse to form, join or assist, any organization for professional or economic improvement and to negotiate in good faith through representatives of their own choosing with respect to salaries, hours, and other conditions of employment free from interference, restraint, coercion or discriminatory practices by any employing board of education or administrative agents or representatives thereof in derogation of the rights guaranteed.

§§ 5-271. Public employees shall have and shall be protected in the exercise of the right of self-organization, to form, join or assist any employee organization, to bargain collectively through representatives of their own choosing on questions of wages, hours, and other conditions of employment…free from actual interference, restraint or coercion.

Both laws prohibit strikes by public employees and provide for impasse resolution through binding arbitration of disputes in negotiations, listed in Connecticut General Statutes §§ 10-153 (e) and §§ 7-475.

Connecticut—Court Cases

In Local 391, Council 4, AFSCME, AFL-CIO v. Department of Corrections (2003), the local union, consisting of state, county, and municipal employees moved to vacate an arbitration award that it claimed the arbitrator had exceeded his powers and imperfectly executed them on a final award. The plaintiff moved to appeal the trial court’s decision to uphold the arbitration decision by stating that the court improperly
held that the arbitration award drew its essence from the parties’ collective bargaining agreement. On appeal to the Appellate Court of Connecticut, the Court held that it is not our role to determine whether the arbitrator’s interpretation of the collective bargaining agreement was correct. It is enough to uphold the judgment of the court, denying the plaintiff’s application to vacate the award, that such interpretation was a good faith effort to interpret the terms of the collective bargaining agreement (Department of Corrections, 2003).

The judgment of the lower court was affirmed and the arbitration decision was upheld.

Delaware—Statutes

The State of Delaware has a Public School Employment Relations Act, which confers certain rights on employees to organize a collective bargaining unit and establishes procedures for creating and regulating such a unit in Delaware Code §§ 4003 – 4004. Second it obligates boards of education and certified bargaining units to negotiate with each other in §§ 4004 (a) and 4013 and prohibits strikes in §§ 4006, enumerates certain unfair labor practices in § 4007, gives the Public Employment Relations Board enforcement powers in §§ 4008, 4009, and 4014, and establishes a two-step mechanism for facilitating resolution or impasses in fulfilling the mandate to attempt to reach a voluntary collective bargaining agreement.

§ 4003. (1) School employees shall have the right to organize, form, join or assist any employee organization, provided that membership in, or an obligation resulting from collective bargaining negotiations to pay any dues, fees, assessments or other charges to an employee organization shall not be required as a condition of employment for certified professional school employees. (2) School employees shall have the right to negotiate collectively or grieve through representatives of their own choosing.
Delaware—Court Cases

In *Colonial Education Association v. Board of Education of Colonial School District* (1996), a teacher was disciplined in connection with alleged inappropriate conduct with students. Collective bargaining representatives sought names of student complainants and witnesses in order to evaluate and process the teacher’s grievance. The School District refused to disclose the names and the bargaining representative filed an unfair labor practice complaint with the Public Employment Relations Board. The Board and the Court of Chancery, of New Castle County held that an unfair labor practice had occurred but that disclosure of names without prior consultation with parents was not appropriate. On appeal to the Supreme Court of Delaware, it was held that

(1) the School District committed an unfair labor practice by unconditionally deciding not to disclose the names, but (2) parents had a right to voice objections to the release of student names to bargaining representatives (*Colonial Education, 1996*).

The Court affirmed the lower court’s decision and held that an unfair labor practice under *Delaware Code* § 4007 was committed by the School District.

Florida—Statutes

Public employees in the State of Florida have the constitutional right to collectively bargain. In the *Florida Statutes, Chapter 447, Labor Organizations and Public Employees*, §§ 447.201 and 447.203, public employees include employees of the state, counties, school boards, municipalities, and special taxing districts. This includes all fire, police, corrections, schoolteachers, and support personnel, medical personnel, state troopers, tool collectors, sanitation employees, and clerical employees. The Public
Employees Relations Commission is the neutral adjudicative body which resolves public sector labor disputes, career service appeals, veterans’ preference appeals, and drug testing cases, and whistle blower appeals.

Public employers must implement ratified collective bargaining agreements with respect to wages, hours, and terms of employment, despite the fact that such implementation may conflict with applicable civil service board rules. If an impasse is reached, the Commission has an impasse and mediation coordinator to resolve impasses in labor negotiations. Mediation is an option previous to impasse. However, if an agreement is not reached, the Public Employees Relations Act contains no statement that either party is compelled to agree or required to make concessions and the agreement is not binding.

§ 447.201. The public policy of the state is to provide statutory implementation of § 6, Article I of the State Constitution, with respect to public employees, to promote harmonious and cooperative relationships between government and its employees, both collectively and individually, and to protect the public by assuring the orderly and uninterrupted operations and functions of government. Nothing herein shall be construed either to encourage or discourage organization of public employees. The state’s public policy is best effectuated by: (1) granting to public employees the right of organization and representation; (2) requiring the state, local governments, and other political subdivisions to negotiate with bargaining agents duly certified to represent public employees; (3) creating a Public Employees Relations Commission to assist in resolving disputes between public employees and public employers and (4) recognizing the constitutional prohibition against strikes by public employees and providing remedies for violations of such prohibition.

Florida—Court Cases

In Hillsborough County Governmental Employees Association v. Hillsborough County Aviation Authority (1988), the Supreme Court of Florida reviewed a decision of the Second District Court of Appeal. The petitioners, Hillsborough County
Governmental Employees Association (GEA) and the Hillsborough County Police Benevolent Association (PBA), as certified negotiators for their respective groups of public employees, bargained collectively, and reached an agreement with, the respondents, the Hillsborough County Aviation Authority. The agreements were ratified by the employees and pursuant to Florida Statute 447.309 (3), the Authority requested the Hillsborough County Civil Service Board to amend its rules to follow the new provisions of the agreement. The Board refused and the Authority was forced to notify its employees that it would not implement the new contractual provisions. The PBA and the GEA filed unfair labor practice charges with the Public Employees Relations Commission (PERC). PERC determined that the Authority had committed an unfair labor practice. The Board appealed to the Second District Court and the Court reversed PERC’s decision on the ground that the Authority could not have violated its duty to bargain in good faith if it was simply following statutory and case law. The Court provided the following question in its decision:

When provisions of a collective bargaining agreement which has been entered into by a public employer conflict with civil service rules and regulations and the governmental body having amendatory power over the civil service rules refuses to amend those rules in such a manner as to eliminate the conflict, does § 447.309 (3) apply to civil service rules and therefore govern the effectiveness of the collective bargaining agreement, (Hillsborough, 1988).

On appeal to the Supreme Court of Florida, the Court held that a service board did not have the authority to strike provisions at will, leaving any collective bargaining agreement of no real value. The Court stated that this was far too great a price to pay for “uniform personnel administration.”

The Florida Constitution guarantees public employees the right of effective collective bargaining. This is not an empty or hollow right subject to unilateral denial. It is one which may not be abridged except upon the showing of a
compelling state interest. No such showing has been made here. While it is clear that § 447.309 (3) does apply to this conflict, it is equally clear that the statute, as applied, unconstitutionally abridges the fundamental right of public employees to bargain collectively (Hillsborough, 1988).

The Court held that a public employer must implement a ratified collective bargaining agreement even if this implementation may conflict with applicable civil service board rules. The Court remanded the case for disposition consistent with this opinion.

Indiana—Statutes

The Indiana Certified Educational Employee Bargaining Statute, Indiana Code §§ 20-7.5-1-1 to 20-7.5-1-14 provides for the right of collective bargaining for public school teachers.

IC § 20-7.5-1-3. School employers and school employees shall have the obligation and the right to bargain collectively, and shall enter into a contract embodying any of the matters on which they have bargained collectively.

IC § 20-7.5-1-13. The school employer and the exclusive representative may at any time submit any issue in dispute to final and binding arbitration.

IC § 20-7.5-1-14. It shall be unlawful for any school employee, school employee organization to take part in or assist in a strike against a school employer or school corporation.

Indiana—Court Cases

In Tippecanoe Education Association v. Tippecanoe School Corporation (1998), an elementary school teacher was deemed to be deficient in her teaching skills by her supervisor, the school principal. The teacher filed grievance that the evaluation forms were improperly completed, not indicating the specific performance behavior to be
addressed. The principal denied the grievance, and the superintendent thereafter informed the teacher that she would not be rehired. The Tippecanoe Education Association demanded arbitration for the teacher’s grievance. The arbitrator ordered reinstatement of the teacher with back pay, that the principal had failed to correctly fill out the evaluation forms. The trial court granted summary judgment in favor of the school, concluding that the arbitrator exceeded the scope of his authority. On appeal to the Court of Appeals of Indiana, Second District, the Court found that (1) the principal did not violate applicable procedures in completing the evaluation forms, so the arbitrator should have declined to rule in favor of renewing the teacher contract and (2) the arbitrator shall “have no power to rule on the termination of services or failure to re-employ any teacher” (Tippecanoe, 1998). The lower court’s decision was affirmed.

Iowa—Statutes

§ 20.1. The general assembly declares that it is the public policy of the state to promote harmonious and co-operative relationships between government and its employees by permitting public employees to organize and bargain collectively.

§ 20.12. It shall be unlawful for any public employee or any employee organization, directly or indirectly, to induce, instigate, encourage, authorize, ratify, or participate in a strike against any public employer.

Iowa—Court Cases

In O’hara v. State of Iowa (2002), a public employee was terminated for improper sexual advances towards an intern. The case was grieved all the way to the director of the Iowa Department of Personnel. In the final grievance step, the union representative withdrew its support based on the allegations against the employee. The employee filed a
prohibited practice complaint against the union with the Public Employees Relation Board (PERB). The employee filed suit in district court against the State of Iowa for breach of the collective bargaining agreement, for terminating his employment without just cause, and for discrimination for sexual orientation.

On appeal to the Supreme Court of Iowa, the Court held that the district court was correct in its assertion that it lacked subject matter jurisdiction over the employee’s claim against the union for breach of its duty to fair representation. The court further held that the district court had erred in determining that it lacked subject matter jurisdiction over the employee’s claim against the State for breach of the collective bargaining agreement.

§ 20.11 (5) provides for judicial review of the PERB’s decision and such actions are special proceedings; therefore, there is no right to a jury trial (O’hara, 2002).

The Court reversed and remanded for further proceedings against the State.

Maine—Statutes

The State of Maine provides a uniform basis for reorganizing the right of public employees to join labor unions, of their own choosing. Teachers have the right to be represented by labor unions in collective bargaining for terms and conditions of employment. The State Employees Labor Relations Act and the Municipal Public Employees Labor Relations Law provide for municipal and state employees.

§ 979-B. A person may not directly or indirectly interfere with, intimidate, restrain, coerce or discriminate against state or legislative employees or a group of employees in the free exercise of their rights, herby given, voluntarily to join, form and participate in the activities of organizations of their own choosing for the purposes of representation and collective bargaining.

§ 963. No one shall directly or indirectly interfere with … or discriminate against public employees or a group of public employees in the free exercise of their
rights…for the purposes of representation and collective bargaining.

**Maine—Court Cases**

In *Union River Valley Teachers Association v. Lamoine School Committee* (2000), the School Committee appealed a decision by the trial court that confirmed an arbitration ruling, contending that the arbitrator had erred by disregarding the labor contract. In arbitration, the issue was whether a teacher’s termination proceedings were in compliance with the collective bargaining agreement. The arbitrator determined that the dismissal had been improper and recommended a ten-day unpaid suspension. The School Committee argued that the arbitrator had exceeded his authority and violated public policy. On appeal to the Supreme Court of Maine, the Court affirmed the lower court’s decision and supported the arbitrator’s decision granting the teacher’s request to be reinstated. The School Committee, not the arbitrator, by voluntarily agreeing to arbitration of dismissals, established pursuant to statute the standard of just cause for dismissal. The surrender in collective bargaining agreements of powers granted to boards of education by statute to an arbitrator may later prove inconvenient or disruptive. However, this should have been considered at the bargaining table.

The burden of establishing that the arbitrator exceeded his authority lies squarely with the Committee, and has failed to meet its burden. Accordingly we affirm the lower court’s confirmation of the arbitration award (*Lamoine School, 2000*).

**Maryland—Statutes**

The State of Maryland provides two separate collective bargaining laws that cover school employees. The first pertains to all certified employees and the second affects
non-certified employees. The collective bargaining process includes fact-finding procedures that allow for panels to review both sides of the dispute, report findings, and make recommendations for settlement.

§§ 6-402, 6-503. Public school employees may form, join, and participate in the activities of employee organizations of their own choice for the purpose of being represented on all matters that relate to salaries, wages, hours, and other working conditions.

Maryland—Court Cases

In Board of Education of Prince George’s County v. Prince George’s County Educator’s Association (1987), the teachers’ association filed a formal grievance over a dispute with the school board involving an education program. The grievance claimed that a board policy had violated a collective bargaining agreement by changing the program and thus affecting teacher salary without cause. An arbitrator from the American Arbitration Association denied the grievance. The teachers’ association filed suit in the Circuit Court for Prince George’s County, claiming that the arbitrator had “exceeded his power.” The petition was denied and was then further appealed to the Maryland Court of Appeals. On appeal, the Court stated, “the employer did not violate the parties’ collective bargaining agreement and the new program that was created did not violate any provisions of the agreement,” (Prince George, 1987) and the grievance was denied.

Massachusetts—Statutes

Chapter 150E, § 2. Employees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on
questions of wages, hours, and other terms and conditions of employment, and to engage in lawful, concerted activities for the purpose of collective bargaining.

**Massachusetts—Court Cases**

In *Lyons v. School Committee of Dedham* (2003), two teachers were laid off of work but claimed “tenure” to the superintendent of schools. The superintendent declined to recognize the teachers’ tenure and the teachers filed grievance. The case went to arbitration where the arbitrator determined in favor of the school district and denied the teachers “tenure” status. The case went to trial court and the arbitration decision was vacated based on public policy. On appeal to the Supreme Court of Massachusetts, the case was remanded to the original arbitrators to determine an appropriate remedy. The judge stated that “our review of an arbitrator’s award is limited in scope” and that the only grounds for vacating an award applies when “the arbitrators exceed their powers or render an award requiring a person to commit an act or engage in conduct prohibited by state or federal law” (*School Committee of Dedham, 2003*). The Court determined that “tenure” status should be no grounds to vacate an arbitration award.

**Michigan—Statutes**

Collective bargaining legislation was first enacted by Public Act 336 of 1947, known as the *Public Employment Relations Act* (PERA). The act grants public employees the right to organize and negotiate with public employers. In 1994, Public Act 112 amended PERA to provide penalties against public school teachers that strike and to restrict issues that can be “bargained” by the public school teacher.

§ 423.209. It shall be lawful for public employees to organize together or to form, join or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective negotiations or bargaining or other mutual aid and protection, or to negotiate or bargain collectively with their public employers through representatives of their own free choice.

**Michigan—Court Cases**

In *St. Clair Intermediate School District and Academy for Plastics Manufacturing Technology v. St. Clair County Education Association* (2001), a school nurse attempted on numerous occasions to have her position included as a position that the union bargained for in contract negotiations. The school district refused. The union brought charges against the school district stating that they violated PERA, by threatening to terminate the school nurse based on her complaints. On appeal to the Court of Appeals of Michigan, the Court determined that school district did violate PERA.

There was competent, material, and substantial evidence on the whole record to support the conclusions of the hearing referee that the conduct violated PERA because it was an attempt to coerce the school nurse while she was engaged in the exercise of her rights guaranteed by PERA (*St. Clair*, 2001).

**Nebraska—Statutes**

The *State Employees Collective Bargaining Act* recognizes the right of state employees in bargaining units, represented by an exclusive collective bargaining agent to negotiate with employers on matters of wages, hours, and other terms and conditions of employment. Mediators are used to assist with negotiations, and the Special Master’s ruling is binding, with appeal possible by either party to the Commission of Industrial Relations.
§ 81-1370. The Legislature hereby finds and declares that it is the public policy of this state and the purpose of the State Employees Collective Bargaining Act to promote harmonious, peaceful, and cooperative relationships between state government and its employees and to protect the public by assuring effective and orderly operations of government. Such policy is best effectuated by (1) recognizing the right of state employees to organize for the purpose of collective bargaining and (2) requiring state employees to negotiate with and enter into written agreements on matters of wages, hours, and other terms and conditions of employment.

Nebraska Court Cases

In Crete Education Association v. Saline County School District (2002), school teachers alleged that the school district had committed prohibited practices in violation of Nebraska Statute, by directly dealing with a bargaining unit member regarding a mandatory subject of bargaining and paying the bargaining unit member a signing bonus. The teacher received an increased salary above the designated annual salary under the collective bargaining agreement, assigned by the school district. The Commission of Industrial Relations (CIR) found the school district in violation of Nebraska Statute and ordered the district to cease and desist from deviating from the negotiated agreement in payment of salaries and benefits, cease and desist from paying the new teacher in deviation from the negotiated agreement, and cease and desist from bypassing the bargaining unit and dealing directly with its represented employees. On appeal to the Supreme Court of Nebraska, the Court affirmed and supported the decision of the Commission and the lower court.

The CIR’s order was affirmed insofar as it (1) found that the district engaged in prohibited labor practices; (2) ordered the district to cease and desist from deviating from the negotiated agreement in payment of salaries and benefits; (3) ordered the district to cease and desist from paying the teacher in deviation from the negotiated agreement; (4) ordered the district to cease and desist from bypassing the bargaining unit and dealing directly with its represented employees regarding wages, terms, and conditions of employment; and (5) ordered the
district to cease and desist from paying teachers signing bonuses which is not included in the negotiated agreement. The CIR’s order was reversed insofar as it (1) found that the district engaged in prohibited labor practices in communicating and (2) ordered the district to post notices regarding its violation of the negotiated agreement (Saline County, 2002).

Region III – Strikes Permitted

Alaska—Statutes

Alaska Statute § 23.40.070 affirms the right of public employees to organize for the purpose of collective bargaining. The law requires public employers to negotiate with and enter into agreements with employee organizations for the purpose of determining wages, hours, and conditions of employment

§ 23.40.070. The legislature finds that joint decision-making is the modern way of administering government. If public employees have been granted the right to share in the decision-making process affecting wages and working conditions, they have become more responsive and better able to exchange ideas and information on operations with their administrators.

§ 23.40.070. The policies are to be effectuated by (1) recognizing the right of public employees to organize for the purpose of collective bargaining; (2) requiring public employers to negotiate with and enter into written agreements with employee organizations; and (3) maintaining merit-system principles among public employees.

Alaska Statutes classify public employees in three classes which affect the bargaining unit’s authority to strike.

§ 23.40.200 (a). Public employees are employed to perform services in one of three classes: (1) those services which may not be given up for even the shortest period of time; (2) those services which my be interrupted for a limited period but not for an indefinite period of time; and (3) those services in which work stoppages may be sustained without serious effects on the public.

§ 23.40.200 (d) The employees in the third class may engage in a strike if a majority of the employees in a collective bargaining unit vote by secret ballot to do so. The parties shall submit to advisory arbitration before the employees may engage in a strike.
Employees in the second class may also engage in strikes and the strike may not be enjoined unless it can be shown that it has begun to “threaten the health, safety, or welfare of the public.”

Alaska—Court Cases

In Alaska Public Employees Association v. State of Alaska (1992), at issue was whether the state’s classification plan for state jobs and its assignment of salary ranges to that plan are mandatory subjects of collective bargaining under Alaska’s Public Employment Relations Act (PERA). On appeal to the Supreme Court of Alaska, the Court stated that

the unions contend that the assignment of jobs to classes falls within the scope of the state’s personnel policies affecting the working conditions of the employees. The state, argues that job classification falls within the scope of the general policies describing the function and purposes of a public employer. We agree with the state (State of Alaska, 1992).

The Court concluded that the salary range assignment also cannot be a “mandatory subject” of collective bargaining under the state’s present system.

In PERA, the legislature expressly reinforces the importance of the merit principle and refrains from stating that implementation of the merit principle may ever be mandatorily contingent upon the approval of its employees or outside arbitrators (State of Alaska).

The lower court’s decision affirming the State Labor Relations Agency Order was affirmed.

California—Statutes

There are five major statutory sections dealing with collective bargaining for
public employees in California. They are the **State Employer-Employee Relations Act** (Government Code §§ 3512 – 3524), the **Meyers-Milias-Brown Act** (Government Code §§ 3500 – 3511), the **Educational Employment Relations Act** (Government Code §§ 3540 – 3549.3), the **Higher Education Employer-Employee Relations Act** (Government Code §§ 3560 – 3599), and the **Excluded Employees Bill of Rights Act** (Government Code §§ 3525 – 3539.5).

The **State Employer-Employee Relations Act**, known as SEERA or the Dills Act provides for collective bargaining for rank-and-file employees employed by the State of California. The **Meyers-Milias-Brown Act**, known as the MMBA provides for collective bargaining for rank-and-file employees employed by municipalities and counties. The **Educational Employment Relations Act**, known as the EERA provides for collective bargaining for employees in the public school system.

The right to strike is not specifically provided for or prohibited by any of these Acts. The right to strike and prohibitions against striking has been addressed through the California Public Employment Relations Board (PERB) and the California courts.

PERB ruled, under EERA, that pre-impasse strikes are presumptively illegal if the conduct violates the duty to bargain or the duty to participate in the impasse procedures in good faith. PERB further ruled that post-impasse strikes under EERA are not unlawful where they do not result in the total breakdown of basic education for students and negotiations were free from coercive tactics that hold education hostage (*Compton USD*, 1987).

§ 3540. It is the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the public school systems by providing a uniform basis for recognizing the right of public school employees to join organizations, to be represented by the organizations, to select one of the
organizations as the exclusive representative, and to afford employees a voice in the formulation of educational policy.

§ 3543 (a). Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of all matters of employer-employee relations.

California—Court Cases

In County Sanitation District No. 2 of Los Angeles v. Los Angeles Co. Employees Association (1985), the trial court, in a tort action, awarded a county sanitation district damages and prejudgment interest against a county employees’ union in connection with the union’s involvement in a labor strike against the district. The trial court found the strike to be unlawful and in violation of the public policy of the state.

On appeal to the Supreme Court of California, the Court reversed the lower court’s decision, holding that the common law prohibition against public sector strikes should not be recognized, that strikes by public sector employees as such are neither illegal nor tortuous under California common law, and that it is not unlawful for public employees to engage in a concerted work stoppage for the purpose of improving their wages or conditions of employment, unless it has been determined that the work stoppage poses an imminent threat to public health or safety (Los Angeles, 1985).

The Court’s decision was compelled not only by “common law principles but also by the California Constitution.” The Court refuted the traditional justifications for a ban on all public employee strikes and recommended a modern approach to be prepared for the national and international influences on labor laws.

Other states and countries have developed a wide range of policies for dealing with public employee strikes, and the arena is clearly one in which experimentation should be encouraged. We should not attempt to prejudge the constitutionality of any particular legislative response. If we were to adopt the
district’s position, that there exists an absolute common law ban on public employee strikes in the context of the present statutory scheme, substantial questions of constitutional dimension would arise (Los Angeles, 1985).

Hawaii—Statutes

In the State of Hawaii, public employees have the right to organize for the purpose of collective bargaining, as provided by the Hawaii Revised Statutes, Chapter 89. §§ 89-11 to 89-12 describes which bargaining units are entitled to strike and which are subject to an arbitration process in lieu of striking.

§ 89-1 (a). The legislature finds that joint decision-making is the modern way of administering government.

§ 89-1 (b). The legislature declares that it is the public policy of the State to promote harmonious and cooperative relations between government and its employees. These policies are best effectuated by (1) recognizing the right of public employees to organize for the purpose of collective bargaining; (2) requiring public employers to negotiate with and enter into written agreements with exclusive representatives on matter of wages, hours, and other conditions of employment; and (3) creating a labor relations board to administer these provisions.

§ 89-12 (b). It shall be lawful for an employee, who is not prohibited from striking under subsection § 89-12 (a) and who is in the appropriate bargaining unit involved in an impasse, to participate in a strike under the following conditions: (1) the requirements of § 89-11 relating to the resolution of disputes have been complied with in good faith; (2) the proceedings for the prevention of any prohibited practices have been exhausted; (3) the collective bargaining agreement and any extension of the agreement has expired; and (4) the exclusive representative has given a ten-day notice of intent to strike, together with a statement of its position on all remaining issues in the dispute, to the employer and the board.

Hawaii—Court Cases

In Lewis W. Poe v. Hawaii Labor Relations Board (2004), an employee filed five
prohibited practice complaints with the Hawaii Labor Relations Board (HLRB), based on the collective bargaining agreement, without the assistance of the union, and pursued these complaints through step three of the grievance procedure. The HLRB dismissed each of the employee’s complaints concluding that the employee needed to exhaust his available remedies prior to bringing a prohibited practice complaint against the employer, alleging a breach of the collective bargaining agreement. The HLRB further stated that the employee needed to establish that the union “breached its duty of fair representation” in failing to pursue his grievance to arbitration. Absent this claim, the Board dismissed the employees complaint.

The case was appealed to the circuit court, alleging that the HLRB had erred and the court affirmed all of the HLRB’s dismissals. On appeal to the Supreme Court of Hawaii, the Court concluded that the employee “lacked standing to pursue his claim because he failed to demonstrate that his union breached the duty to fair representation” (*Hawaii Labor, 2004*). The Court affirmed the lower court’s decision.

**Illinois—Statutes**

5 ILCS 315/1 § 2. It is the public policy of the State of Illinois to grant public employees full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating wages, hours, and other conditions of employment or other mutual aid or protection.

5 ILCS 315/6 § 6. Employees of the State have the right of self-organization, and may form, join or assist any labor organization, to bargain collectively through representatives of their own choosing.

5 ILCS 315/17 § 17. Nothing in this Act shall make it unlawful or make it an unfair labor practice for public employees, other than security employees, peace officers, fire fighters, and paramedics, to strike except as otherwise provided by
In *Buchna v. Illinois State Board of Education* (2003), a teacher was terminated from employment, for failing to successfully remediate under Article 24A of the School Code. The teacher’s case was reviewed by a hearing officer appointed by the Illinois State Board of Education, and the hearing officer affirmed the school district’s decision to terminate the teacher. On appeal to the county circuit court, the decision was again affirmed. The teacher appealed to the Appellate Court of Illinois, Third District, claiming that:

1. the hearing officer applied an incorrect legal standard;
2. the evidence does not support the hearing officer’s decision; and
3. the circuit court’s order is against the manifest weight of the evidence (*Illinois State*, 2003).

On appeal, the Court concluded that the teacher was not properly evaluated and thus had been improperly terminated. The school district placed weight in its argument on the fact that its teacher rating system resulted from collective bargaining. However, the Court stated that:

The mere fact of mandatory bargaining does not authorize parties to contravene any statute, in the process. The school district’s departure from statute was unauthorized (*Illinois State*, 2003).

The teacher’s termination decision was reversed.

**Montana—Statutes**

§ 39-31-101. In order to promote public business by removing certain recognized sources of strife and unrest, it is the policy of the state of Montana to encourage the practice and procedure of collective bargaining to arrive at friendly adjustment of all disputes between public employees and their employers.
§ 39-32-110. It shall be unlawful for any employee of a health care facility to participate in a strike if there is another strike in effect at another health care facility within a radius of 150 miles. Employees of a health care facility must give 30 days written notice of any strike and must specify in the notice the day the strike is to begin.

Montana—Court Cases

In Arrowhead School District No. 75 v. Klyap (2003), a teacher was hired by the local school district during the same time that the teachers were considering forming a union. The union was not formed and the teacher was hired with a contract which included a liquidated damages clause in case of breach of contract. The teacher claimed there was no contract but the school district took steps to collect the liquidated damages clause money when the teacher resigned. The district court found that the school district had suffered damages to find a teacher replacement and awarded judgment in favor of the school. On appeal to the Supreme Court of Montana, the Court stated that

the liquidated damages provision was not unconscionable because the 20% amount of salary forfeiture was within the teacher’s reasonable expectations being familiar with the employment needs of the school and the damages the school would suffer upon breach of contract (Klyap, 2003).

The Court held that the lower court had correctly determined that the damages clause between the teacher and the school was enforceable and the court’s decision was affirmed.

Ohio—Statutes

§ 4117.03. Public employees have the right to (1) form, join, assist, or participate in, or refrain from forming, joining, assisting, or participating in any employee organization of their own choosing; (2) engage in other concerted activities for the purpose of collective bargaining; (3) representation by an employee organization; and (4) bargain collectively with their public employers to determine wages,
hours, terms and other conditions of employment.

§ 4117.23. In the case of a strike that is not authorized in accordance with this chapter, the public employer may notify the state employment relations board and request the board to determine whether the strike is authorized under Chapter 4117 of the Revised Code.

Ohio—Court Cases

In Whitsel v. Southeast Local School District (1973), the local school district terminated a teacher’s continuing contract following a school demonstration of 350 students. During a public hearing with the Board of Education, the teacher’s termination was supported, for his behavior during the student demonstration and for his previous criticism of the Board and his personal beliefs, attitudes, and religious views. On appeal to the United States Court of Appeals for the Sixth Circuit, the Court held that the teacher had been terminated not for his views and beliefs but for his insubordination. The court stated that it “could not substitute its judgment for that of the School Board so long as the Board did not infringe on any of the teacher’s constitutionally protected rights” (Whitsel, 1973).

Oregon—Statutes

§ 243.662. Public employees have the right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations.

§ 243.726. (1) Participation in a strike shall be unlawful for any public employee who is not included in an appropriate bargaining unit for which an exclusive representative has been certified by the Employment Relations Board or recognized by the employer; or is included in an appropriate bargaining unit that provides for resolution of a labor dispute to final and binding arbitration. (2) It shall be lawful for a public employee who is not prohibited from striking under
subsection (1) of this section and who in the appropriate bargaining unit involved in a labor dispute to participate in a strike over mandatory subjects of bargaining.

**Oregon—Court Cases**

In *Walter v. Scherzinger and Portland School District (2004)*, the union sought judicial review of the State’s Employment Relations Board (ERB) declaratory ruling that a proposal by the respondent, Portland Public School District (PPS) to contract out the district’s custodial services did not violate the Custodian’s Civil Service Law (CCSL), and therefore was not a prohibited subject for bargaining under the *Public Employee Collective Bargaining Act* (PECBA). On appeal to the Court of Appeals of Oregon, the Court concluded that the CCSL did not preclude PPS’s private contracting proposal.

Nothing in the CCSL’s text or pertinent context required PPS to hire persons providing custodial services as employees. There was nothing in the CCSL that limited PPS’s ability to procure custodial services through contracts comporting with the public contracting laws. The CCSL merely provided that, in those circumstances in which PPS did, in fact, employ persons as probationary or permanent custodians or assistant custodians, the appointment, retention, promotion, or discharge of those employees must comply with the requirements of the CCSL (*Walter, 2004*).

The Court concluded that PPS’s proposal did not violate PECBA and the ERB’s legal conclusions were affirmed.

**Pennsylvania—Statutes**

§ 1101.101. The General Assembly of the Commonwealth of Pennsylvania declares that it is the public policy of this Commonwealth and the purpose of this act to promote orderly and constructive relationships between all public employers and their employees. The General Assembly has determined that the overall policy may best be accomplished by (1) granting to public employees, the right to organize and choose freely their representatives; (2) requiring public employers to negotiate and bargain with employee organizations representing public employees and to enter into written agreements; and (3) establishing procedures to provide for the protection of the rights of the public employee, the
§ 1101.1002. Strikes by public employees during the pendency of collective bargaining procedures set forth in Article VIII are prohibited. In the event of a strike during this period the public employer shall initiate an action for the same relief and utilizing the same procedures required for prohibited strikes.

Pennsylvania—Court Cases

In Central Dauphin Education Association v. Central Dauphin School District (2001), the school district appealed from a preliminary injunction granted by the Court of Common Please of Dauphin County which required the district to provide work to teachers pursuant to an expired collective bargaining agreement. In addition, the union made a motion to dismiss the appeal since the parties have ratified a new collective bargaining agreement.

The union commenced a lawful strike and the school district responded by imposing new terms and conditions of employment including new wages and health care coverage. The teachers planned to return to work so as not to violate state law.

If a strike by employees or a lockout by an employer will prevent the school entity from providing the period of instruction required, 180 days, by the last day of the school year, the parties shall submit to mandated final best-offer arbitration (Central Dauphin, 2001).

The Court of Common Pleas found that it was readily apparent that injunctive relief was necessary to prevent immediate and irreparable harm which could not be compensated for by damages. The school district unilaterally implemented terms and conditions of employment at a time when the union was conducting a limited lawful strike. These changes preceded the utilization of the arbitration procedures outlined by statute.
On appeal to the Commonwealth Court of Pennsylvania, the Court held that the school district’s actions “clearly altered the status quo and disrupted labor peace” (*Central Dauphin*). The Court found it reasonable for the Common Please Court to conclude that the school district’s implementation of terms when the union was to return to work and prior to completion of required bargaining resulted in “irreparable harm to the union and justified issuing a preliminary injunction to maintain the status quo” (*Central Dauphin*). The Court affirmed the Common Please Court’s issuance of the preliminary injunction and the motion to dismiss the appeal is denied.

**Vermont—Statutes**

§ 903. (a) Employees shall have the right to self-organization; to form, join or assist employee organizations; to bargain collectively through representatives of their own choice, and to engage in concerted activities for the purpose of collective bargaining. (b) No state employee may strike or recognize a picket line of an employee or labor organization while in the performance of his official duties.

**Vermont—Court Cases**

In *Chittenden South Education Association v. Hinesburg School District* (1986), teachers and the school district reached impasse over contract negotiations. After final mediation and fact finding efforts, the teachers went on a thirteen day strike. The school district replaced all employees with permanent replacements. The union immediately filed unfair labor practices against the school district alleging that the school district had refused to bargain in good faith and improperly hired permanent replacements. On appeal to the Supreme Court of Vermont, the Court affirmed the administrative decision
of the Vermont Labor Relations Board (VLRB), holding that the school district converted the walkout into an unfair labor practice by unilaterally deleting binding grievance arbitration. The VLRB had ordered the school district to add those provisions to the contract offer and to reinstate all striking teachers. The Court held these decisions well within the VLRB’s discretion.

*Wisconsin—Statutes*

§ 111.80 (4). It is the policy of this state, in order to preserve and promote the interests of the public, the employee and the employer alike, to encourage the practices and procedures of collective bargaining in state government subject to the requirements of the public service and related laws.

§ 111.89. Upon establishing that a strike is in progress, the employer may either seek an injunction or file an unfair labor practice charge with the commission. The occurrence of a strike and the participation therein by an employee do not affect the rights of the employer, in law or in equity, to deal with the strike.

*Wisconsin—Court Cases*

In *Dodgeland Education Association v. Wisconsin Employment Relations Commission (2002)*, the school district maintained that “teacher preparation time” was not a mandatory subject of bargaining but a permissive one. The union held that this was a mandatory subject of bargaining because it primarily related to wages, hours, and conditions of employment. The Wisconsin Employment Relations Commission (WERC) held that “teacher preparation time” was permissive, in support of the district’s view. On appeal to the Supreme Court of Wisconsin, the Court affirmed WERC’s decisions on all issues. Teacher prep time was considered permissive and not a fringe benefit.

Affording that decision due weight deference, we found that WERC’s
interpretation of fringe benefits was reasonable and furthers the purpose of the Wisconsin Municipal Employment Relations Act, because it was based on the ordinary and accepted meaning, and was consistent with previous case law (Dodgeland, 2002).
CHAPTER IV
SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

This dissertation investigated the jurisprudence and statutory language concerning public employee labor law and the collective bargaining laws and strike laws for teachers and other municipal, state and local government employees. The purpose of this dissertation was to research the current state statutes and to review the case law for public employee labor law in the United States. In addition, the purpose of this dissertation was to offer recommendations based on the current state of the law as represented in the research to assist public employees, school administrators, government supervisors, legislators and other government individuals in positions of authority in formulating policies that will be in the best interests of both the government and its employees and the public that it serves.

This chapter summarizes the findings of chapters two and three and includes a summary of public employee labor law by state in the United States. Included are conclusions and recommendations for school officials and other public employee managers and legislators regarding the issues of collective bargaining and striking in the public sector.

Summary of Literature Review

The courts have permitted collective bargaining in the public sector, with state and federal laws determining the extent of this right for public employees. The right to strike by public employees has also been considered and established by state and federal law and state and federal case law. The collective bargaining process in the United States
has evolved over the last 200 years, designed to resolve disputes between two parties, the employer and the employee. The relative strength to bargain of each party depends significantly on the state and federal laws and the case law as written. This balance of negotiating power has changed dramatically over the course of the last 200 years.

The public sector has 50 different state laws and several federal laws shaping the extent of collective bargaining for public employees. Public employee labor unions and public employers are limited in their range of actions during collective bargaining by laws written at the local, state, and federal level in the United States.

The public employee arena is affected by a changing political and economic process. The political process and collective bargaining are well intertwined in the public sector. The doctrines of government sovereignty and government employee privilege have been addressed by the courts. Collective bargaining has been denied when the essentiality of government services is hindered. However, the public has adapted in recent years to postal strikes, teacher strikes, and other disruptions of public service as public service labor bargaining has become more accepted by the general public.

The history of the laws of public sector collective bargaining and the right to strike go back to the Philadelphia Cordwainers’ Case (Commonwealth v. Pullis, 1806). In order to understand the state of public employee labor law in the United States, it is necessary to provide a detailed review of the history of all labor law, public and private. In Commonwealth v. Pullis (1806), the English common law set the precedent, stating that “jumping wages” by force of a strike or other concerted action was illegal and open to fine and possible imprisonment. The decision in Pullis effectively made unions illegal.

In Commonwealth v. Hunt (1842), a similar situation as in Pullis arose and the
defendants were charged with “conspiracy” but the courts ruled that such “societies” and associations were legal as long as the actions taken by the unions were not criminal in nature. *Hunt* set a precedent outside the scope of common law for years to come by allowing the concerted activities of labor unions. However any activity that was deemed harmful to the employer could result in financial liability on the part of the union. The courts were now responsible to find a judicial balance between the competing economic interests of the workers and the employers. The courts were also expected to consider the overall benefit or detriment to the public.

The *Sherman Antitrust Act of 1890* provided statutory language that “unlawful conspiracies” would be brought to the courts. The *Act* was passed to promote competition and to break up large monopolies but did not benefit the unions. In two cases, the U.S. Supreme Court ruled directly in relation to the application of the *Sherman Act*. In *Loewe v. Lawlor (1908)* and *Lawlor v. Loewe (1915)*, under § 7 of the *Sherman Act*, the Court ruled against union activity for preventing free trade and commerce and permitted an award for damages.

The *Clayton Antitrust Act of 1914* was passed to give relief to labor unions and to support the antitrust provisions of the *Sherman Act*. The *Clayton Antitrust Act* stated that unions were not “illegal combinations” or conspiracies in restraint of trade.

The *Norris-LaGuardia Act of 1932* provided boundaries for injunctions not to be given without proper hearing and finding of fact. The *National Labor Relations Act of 1935* created a national administrative agency, the *National Labor Relations Board (NLRB)* to manage labor and management relations in the United States. The *NLRB* provided that
Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining (NLRA, 1935).

The NLRB became the “expert agency” in regulating labor disputes. Labor organizations were permitted to protest unfair working conditions and to act in their workers’ best interests. Management was required to bargain in good faith.

The NLRB was designed to develop a body of case law that would oversee the relationship between labor and management. In one of the first cases, NLRB v. Jones and Laughlin Steel Corporation (1937), the U.S. Supreme Court accepted the constitutional theory that Congress was to regulate labor relations. The NLRB was authorized by the Act to prevent employers from taking discriminatory and coercive action against employees and their union and to preclude employers from interfering with the employees’ right to self-organization. The NLRB was further empowered and supported by the authority of the Circuit Court of Appeals. The courts demonstrated their support of the NLRB by backing the findings of the NLRB and not undermining the agency by changing its decisions at will.

In United Steelworkers v. American Manufacturing Company (1960), the courts further showed their support of the NLRB by holding that it was not for the courts to weigh the merits of a grievance or the equities of an employee’s claim. The Labor Management Relations Act clearly stated that the claim made by a party, employee or employer, was to be considered on its face and governed by the contract, and the court had no business interfering with this process. The courts upheld this general view of the Board’s authority to ensure a uniform federal interpretation of the law.

In the early days of the NLRA, Congress passed several laws in order to better
working conditions in the United States. The *Social Security Act*, the *Fair Labor Standards Act*, and the *Taft-Hartley Act* were passed in an effort to improve the overall conditions in the workplace. The *Taft-Hartley Act* was written in an effort to balance the ground rules between employers and employees. In addition, the *Taft-Hartley Act* made all strikes by government employees illegal.

The *Labor-Management Reporting and Disclosure Act (LMRDA)* was passed by Congress to prevent unfair labor practices by employers. The *LMRDA* helped to reduce corruption and racketeering in unions and included a “bill of rights” for union members. The *LMRDA* and the *Taft-Hartley Act* further supported the *NLRA* and provided guidelines for employers and employees to follow in collective bargaining.

As the legal activities of the unions and the employers became more defined, the issue of picketing came up in several cases. In *Thornhill v. Alabama (1940)*, the petitioner was charged and convicted for picketing. On certiorari, the U.S. Supreme Court held that it was not justified to proscribe the “freedom of discussion” and reversed the decision. In other cases following *Thornhill*, the U.S. Supreme Court further defined the boycott and clarified that the First Amendment did not protect violence.

*Violence has no sanctuary in the First Amendment. The presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages (Claiborne, 1982).*

The Court was not willing to protect behavior that was violent and illegal, but the Court did not see speeches, marches, and threats of social ostracism as a basis for legal damages award. The *NLRA* was written to promote collective bargaining where parties would have the widest latitude in bargaining tactics, pressure, and economic weaponry. The *NLRB* was not designed to over-regulate the bargaining process.
Employers challenged the actions taken by unions and their members. In *NLRB v. Insurance Agents* (1960), the employer complained that the “slowdown” was an unfair labor practice under § 8 (b) (3) the NLRA which stated that

§ 8 (b) (3). It shall be an unfair labor practice for a labor organization or its agents to refuse to bargain collectively with an employer, provided it is the representative of his employees.

The U.S. Supreme Court reversed the decision of the NLRB and stated that the Board was not set up to be an arbiter of the kinds of economic weapons being used by both sides. The behavior of the unions continued to be reviewed by the courts. Some actions were considered protected and other actions were called unprotected or prohibited. § 7 of the NLRA guaranteed that

§ 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

In addition § 13 of the NLRA clearly protected the right to strike.

§ 13. The right to strike is preserved. Nothing in this Act shall be construed so as either to interfere with or impede or diminish the right to strike.

In response to the concerted activities of the unions, the employers responded with the lockout. In *American Ship Building Company v. National Labor Relations Board* (1965), the U.S. Supreme Court held that the company lockout did not violate § 8 (a)(1) or (a)(3) of the NLRA when, after a bargaining impasse was reached, the employer created a lockout situation by temporarily shutting down his plant for the sole purpose of bringing economic pressure to bear in support of his legitimate bargaining position.

The courts considered the requirements of “good faith bargaining” and continued to review the balance of economic and strategic bargaining power between unions and
employers. The courts upheld the obligation of both sides to bargain to impasse on mandatory subjects of bargaining. The courts provided that for items to be considered mandatory, they had to bear a direct and significant relationship to the terms and conditions of employment.

The unions and employers made great efforts to come to terms with the issues of what was legal and what was not legal in terms of labor negotiations. The unions wanted to keep the option to strike in order to hold their ground economically and strategically to ensure a fair contract. The employers complained about loss of business and customers and requested from the courts the right to hold lockouts and to hire permanent replacements.

The courts supported arbitration as a means to resolve labor conflict. Arbitration was preferred over the strike, lockout, or other methods of “economic warfare.” The NLRB facilitated the arbitration process by using its own jurisdiction and by not reversing the arbitrators’ awards when the arbitration process was fair and the unfair labor practice issue had been addressed by the arbitrator.

A very important part of the evolution of labor relations in the United States is the development and implementation of Equal Employment Opportunity and Civil Rights laws. The Civil Rights Act of 1964, the Equal Employment Opportunity Commission, the Equal Pay Act of 1963, the Age Discrimination in Employment Act of 1967, the Rehabilitation Act of 1973, the American with Disabilities Act of 1990, and the Civil Rights Act of 1991 influenced the way employers and employees accomplished their work every day.

Labor relations in the public sector have been shaped by the history and precedent
set in the private sector, however, the public sector is set apart from the private sector with many notable differences, economically, strategically, and politically. The Civil Service Reform Act of 1978 adopted many of the provisions in the Taft-Hartley Act, providing a pattern of labor relations for the public sector to be similar to the private sector.

Public sector collective bargaining caused a great deal of controversy. One of the major arguments against the applicability of private sector labor law to the public sector was that the economics was very different. The private sector in the United States was based on a market economy that did not apply to the public sector. The public sector included an important political process that affected the relationship between employer and employee that simply did not exist in the private sector. The public interest was held against the needs of the government employees to strike.

In most cases, federal employees were not permitted to bargain on the topic of compensation. Federal workers were also prohibited from striking. State employees were not required to treat employees any differently, unless delineated by state law. Collective bargaining at all public employment levels was discouraged on the basis of the privilege doctrine, stating that government employment benefits were privileges and not rights. Government services were characterized as “essential” and many bargaining rights were denied to public employees, but in more recent years, citizens have come to accept many civil service strikes: postal workers, air traffic controllers, teachers, and other local level workers.

President Kennedy’s Executive Order 10988 established the union in public sector employment. President Nixon’s Executive Order 11491 tried to improve the negotiation
process in the public sector. President Clinton’s *Executive Order 12871* established the *National Partnership Council* to advise the President and propose specific reforms in the law for employee relations in the government. The executive order required each government agency to establish “labor-management partnerships” programs.

Public sector labor relations at the state level exist without a comprehensive common legal framework. State and local labor relations are determined through a complex map of common law doctrines, judicial decrees, executive orders, statutes, and ordinances. The labor relations situation for public employees has been extremely diverse in each city, county and state in the United States.

State and local government employees, unlike their federal counterparts, have often resorted to strikes as a way to impose their needs on their respective government employers.

*First Amendment* rights allowed a government worker to join a union without fear of being discharged. However the rights of the government employee were balanced by the interests of the state and local governments’ requirement to provide public services.

Employers continued to resist the possibility of legalizing public employee strikes because of the sovereign nature of government and the fundamental necessity of government services. State and local governments resorted to three basic procedures to press the process of finality: mediation, fact-finding, and arbitration.

Public policies varied greatly among the states and some public policies had a greater impact on reducing strike frequency for public employees. Arbitration in its various forms: interest arbitration, final offer arbitration, and binding arbitration attempted to stem the tide of striking public employees. The trend in public sector
bargaining has been toward mutual responsibility for wages, hours, and working conditions, but the conflict between sovereignty and accountability and bilateral authority has been strongly debated and continues to exist in a state of fluctuation. The movement of work involvement and labor-management cooperation continues to grow more prevalent in the work environment.

Summary of State Statutes

The review of state statutes and case law provided a clear geographic pattern to the status of public employee labor law. The Southern states through the Southwestern and into the Western states (Region I) predominantly have No State Collective Bargaining Laws. The Northeastern through the Midwestern and parts of the Western states (Region II) have Collective Bargaining Laws. Florida and Tennessee were the exceptions in the South. In the Northeastern, Midwestern and Western states (Region III), ten states Permitted Strikes, plus Alaska and Hawaii, to make a total of twelve states to permit public employees to strike.

Unions and employee associations represented about 40 percent of State and local government workers in the late 1990s. This number has continued a steady rise in the last five years. The rights of public sector employees to organize and bargain collectively vary from state to state. There are important differences in governments’ willingness to permit strikes and disruptions of public services (Cimini, 1998).

Unionization in State and local government did not grow significantly until the 1960s and 1970s after President Kennedy issued Executive Order 10988. States adopted a variety of laws for managing collective bargaining in the public sector. Laws varied
from comprehensive laws, covering all classes of public employees, to laws in some states which only dealt with specific groups of employees such as police, firefighters, and teachers. The status of collective bargaining also changed from state to state, from mandatory to permissive, with some states providing “meet and confer” options.

State legislatures have generally prohibited strikes by State and local government employees up until the 1960s. In the 1990s and more recently, 12 States have either statutorily or through common law and additional legal acts provided for the right to strike to public sector employees.

Alaska state law affirms the right of public employees to strike unless it “threatens the health, safety, or welfare of the public.” California prohibits only pre-impasse strikes and otherwise does not specifically provide or prohibit public employee strike activity. Hawaii has statutorily recommended “joint-decision making” and provides public employees the right to strike and also has an arbitration process in lieu of striking. Montana prohibits strikes by health care facility members under certain conditions. There are no additional limitations on other public employees when striking. Ohio prohibits strikes by public safety personnel. Strike action by other public sector employees is permitted if impasse has not been resolved. Oregon prohibits strikes by police, firefighters and health workers. All other public employees have the right to strike after following mediation and fact-finding procedures. Pennsylvania does not permit strikes by prison and mental health personnel. Strikes by other public employees are allowed after following mediation and fact-finding procedures. Vermont prohibits State employees from striking. Municipal employees in the “performance of official duties” may also not strike. All other public employees can strike after following fact-
finding procedures and arbitration. Wisconsin prohibits State employees from striking. Municipal employees are permitted to strike after mediation-arbitration procedures have failed.

In Region I, Alabama, Arizona, Arkansas, Colorado, Georgia, Kentucky, Mississippi, North Carolina, Texas, and Virginia have no collective bargaining laws. In these states, labor law activities are sanctioned by court decisions, attorney general opinions, local ordinances and executive orders.

In *Board of Education of the Scottsdale High School District v. Scottsdale Education Association (1972)*, the Court of Appeals of Arizona concluded that the decision of either party in entering into a collective bargaining agreement remains optional and to compel or coerce either side to bargain against its better judgment is improper.

In Arkansas, workers are encouraged to work with supervisors to determine their own working conditions by using the process of “meet and confer” or any other method of agreed on negotiation.

In North Carolina, public employees are prohibited from bargaining. In Texas, public employees are prohibited from bargaining, and in Virginia the laws do not recognize public employees’ rights to collectively bargain.

In Region II, states have collective bargaining laws that vary from comprehensive to permissive. Connecticut has laws that define and protect the statutory rights of public sector employees to “form, join or assist labor organizations.” Connecticut law prohibits strikes but provides for impasse resolution through binding arbitration. Florida public employees are permitted to collectively bargain but not to strike. Mediation is an option
previous to impasse resolution. Beyond impasse, there is no statement that compels either party to agree or is required to make concessions and the agreement is not binding. Delaware, Indiana, Iowa, Maine, Maryland, Massachusetts, and Michigan provide for public employee collective bargaining as written in the representative state statute but restrict public employees from striking. In Nebraska, public employee collective bargaining is supported by statute and mediators are used to assist with negotiations and the Special Master’s ruling is binding.

Conclusions

1. The overall working conditions in the organized sector of the United States economy are determined by collective bargaining on a daily basis and not solely by legislation. There are three main pieces of legislation that have helped govern industrial relations: The National Labor Relations Act of 1935 (NLRA), The Railway Labor Act of 1926 (RLA), and The Labor Management Reporting and Disclosure Act of 1959 (LMRDA).

2. The behavior of unions was reviewed by the courts and some actions were considered protected and others were unprotected or prohibited. Actions which were prohibited could be cause for the NLRB to obtain a cease-and-desist order through an administrative process or from the circuit court of appeals.

3. § 7 of the NLRA provided that employees “shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively, and to engage in concerted activities.” The Supreme Court held that walkouts were generally protected activity.

4. The U.S. Supreme Court examined the dynamics and specifics of the strike. §
13 of the NLRA stated that nothing in the NLRA was written to interfere with the right to strike. However, the right to strike met some limitations. Taft-Hartley prohibited strikes during emergencies affecting national security and health.

5. In response to the strike, the employers utilized the lockout. In *American Ship Building Company v. National Labor Relations Board* (1965), the U.S. Supreme Court held that the employer had not violated the NLRA when he shut down the plant and laid off his workers for the sole purpose of bringing economic pressure in support of his bargaining position.

6. Equality issues are addressed in collective bargaining, but the main support for ensuring that equal employment opportunities are available in the workplace is through the following federal civil rights laws: *Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963 (EPA), The Age Discrimination in Employment Act of 1967 (ADEA), Title I of the American with Disabilities Act of 1990 (ADA), and The Civil Rights Act of 1991*

7. The *Civil Service Reform Act of 1978 (CSRA)* placed into statutory form many of the provisions that already existed in executive orders. Title VII of the CSRA adopted many of the concepts in the Taft-Hartley Act, creating an environment of labor relations in the federal government which was similar to the private sector.

8. Public employment in the United States has been legally classified as a “privilege” and not a “right.” Federal workers were prohibited from striking. *Executive Order 10988 (1962)* defined three types of unions: formal, informal, and exclusive. Many topics that were commonly bargained for in the private sector were excluded from negotiations in the federal government.
9. There is no comprehensive common legal framework for state and local government employees. State and local labor relations were defined by common-law doctrines, judicial decrees, executive orders, statutes, and ordinances. The large majority of jurisdictions prohibited public employees from striking, however state and local government employees have resorted to strikes numerous times in the last 30 years.

10. There are three main classifications of public bargaining laws: (a) states with no specific provisions for collective bargaining or where bargaining is illegal; (b) states where labor organizations have the right to present their views but falls short of the “duty-to-bargain”, states which have a duty-to-bargain but no compulsory arbitration mechanism, states which have duty-to-bargain and provide compulsory arbitration; and (c) states that permit strikes.

11. The at-will doctrine of employment, absent a contract, allows any employer or employee to end the working relationship at their own will, at any time, for almost any reason, including no reason at all. The courts have developed three broad categories of exceptions to the employer’s right to terminate employees at will: public policy, breach of implied contract, and implied covenant of good faith.

Recommendations

1. A balance must be found between the interest of public employees as citizens and the interest of the state as an employer delivering on public services. Public sector collective bargaining has come into conflict at the state level with civil service regulations. Unions continue to work in this area of disagreement between civil service codes and the collective bargaining statutes and agreements to expand the scope of public
sector bargaining. Local governments should not enter into collective bargaining agreements with employee organizations without state passed legislation authorization.

2. The sovereign nature of government and the fundamental necessity of government services, except in the case of emergency services such as police, fire, and medical, should not preclude the public employee from participating in concerted activities, including the strike. State and local governments have resorted to three basic procedures to press the finality of negotiations: mediation, fact-finding, and arbitration. Binding arbitration attempts to prevent strikes through legally imposed penalties for failure to reach agreement.

3. The mechanism for resolving disputes is one of the most important issues facing the public sector. Local, state, and federal government agencies should utilize the wide range of available impasse resolution methods. Governments without adequate laws for resolving impasse, either in statute, agreement, or case law, should experiment with alternative methods of dispute resolution.

4. Public sector labor relations, limited because the right to strike does not exist in most states, through legislation, court decisions, or attorney-general opinions, should implement alternative methods to dispute resolution to include: arbitration, conciliation, facilitation, fact-finding, negotiation and mediation.

5. Public sector employees have implemented “meet and confer” methods with employers where the responsibility of key decisions regarding wages, hours, and working conditions are shared and discussed openly among employers and employees. The conflict between sovereignty and accountability and bilateral authority has continued to be a topic of discussion and disagreement. Employers and employees should continue to
make attempts to reach agreements in the best interests of the employees, the public, and the government agency.

6. Public sector employees’ rights vary greatly from state to state. Three main Regions exist, divided by the absence of state collective bargaining and strike legislation, the presence of state legislation, and the right of public employees to strike. States rights should be preserved but the disparity in public employees’ rights in the United States, from state to state, should be addressed by the federal government in conjunction with the representative legislatures of each state and governors. A standard level of public employees’ rights, to include the right to bargain and the right to strike, should be provided by federal law, at a minimum, permitting each state to support the law through further legislation, which would better define the law, to specifically address the local needs and to provide a higher standard, without removing any rights of the employer or the employee.

7. Healthcare has emerged as the most contentious bargaining issue. Health insurance in the United States is tied to employment. In unionized employment, healthcare is “bargainable.” Employers are not legally bound by state or federal law to provide a standard of health coverage. As costs continue to rise, employers have attempted to reduce coverage and pass a larger portion of the costs to the employees, by using the bargaining table as the forum for negotiation. Federal and state legislation should be written to provide a standard level of care for all employees. The collective bargaining of employee and employee family healthcare should not be permitted, and the practice of pushing the cost ever more to the employee should be prohibited.
APPENDIX A:

SAMPLE LETTER TO STATE ATTORNEY GENERAL
As a doctoral student at the University of Central Florida in Orlando, Florida, I am conducting research for a dissertation concerning *Public Employee Labor Law in the United States*. My research includes case law and state and federal statutes.

I am writing to you to request your assistance. I would like to confirm the law from your state for both case law and statute.

- At this time, does your state have an active law written that directly addresses both/either collective bargaining and/or striking for public employees?

I am interested in the statutory language as written in your state. I am also researching the most significant case law of the past ten years, from approximately 1990 to today.

- When were the statutes written? Have they been challenged in court?

I appreciate your help in addressing the above listed questions. I hope to have a positive impact on this very important and current topic – public employee labor law.

Please return all information in the enclosed self-addressed stamped envelope. I can be reached by telephone at (321) 779-2000, ext. 213, at Satellite High School in Brevard County, Florida and via email at bulao@brevard.k12.fl.us.

Thank you in advance for your time and consideration.

Sincerely,

Oleh A. Bula
APPENDIX B:

SAMPLE LETTER TO STATE DEPARTMENT OF EDUCATION
January 1, 2004

As a doctoral student at the University of Central Florida in Orlando, Florida, I am conducting research for a dissertation concerning Public Employee Labor Law in the United States. My research includes case law and state and federal statutes.

I am writing to you to request your assistance. I would like to confirm the law from your state for both case law and statute.

- At this time, does your state have an active law written that directly addresses both/either collective bargaining and/or striking for public employees?

I am interested in the statutory language as written in your state. I am also researching the most significant case law of the past ten years, from approximately 1990 to today.

- When were the statutes written? Have they been challenged in court?

In addition, if you have information concerning administrative rules that are mandated by school boards at the local level, please include this data as well.

I appreciate your help in addressing the above listed questions. I hope to have a positive impact on this very important and current topic – public employee labor law.

Please return all information in the enclosed self-addressed stamped envelope. I can be reached by telephone at (321) 779-2000, ext. 213, at Satellite High School in Brevard County, Florida and via email at bulao@brevard.k12.fl.us.

Thank you in advance for your time and consideration.

Sincerely,

Oleh A. Bula
APPENDIX C:

TABLE OF CASES
Adair v. United States, 208 U.S. 161; 28 S. Ct. 277; 52 L. Ed. 436; LEXIS 1431 (1908).


Biloxi Firefighters Association v. City of Biloxi, Mississippi, 810 So.2d 589; LEXIS 106 (2002).


Board of Education of Prince George’s County v. Prince George’s County Educator’s Association, 309 Md. 85; 522 A.2d 931; LEXIS (1987).


Board of Regents of State Colleges v. Roth, 408 U.S. 564; 92 S. Ct. 2701; LEXIS 131 (1972).


Coppage v. Kansas, 236 U.S. 1; 35 S. Ct. 240; 59 L. Ed. 441; LEXIS 1798 (1915).


County Sanitation District No. 2 of Los Angeles v. Los Angeles Co. Employees Association, 38 Cal.3d 564; LEXIS 275 (1985).

Crete Education Association v. Saline County School District, 265 Neb. 8; 654 N.W.2d 166; LEXIS 240 (2002).

Dodgeland Education Association v. Wisconsin Employment Relations Commission, 250 Wis. 2d 357; 639 N.W.2d 733; LEXIS 23 (2002).

Drake Bakeries Incorporated v. Local 50, American Bakery & Confectionery Workers


Fayette County Education Association v. Board of Education of Fayette County, 626 S.W.2d 217; Westlaw (1980).


Goff-Hamel v. Obstetricians & Gynecologists; 256 Neb. 19; LEXIS 17 (1999).

Gompers v. Bucks Stove & Range Company, 221 U.S. 418; 31 S. Ct. 492; 55 L. Ed. 797; LEXIS 1746 (1911).

Hillsborough County Governmental Employees Association v. Hillsborough County Aviation Authority, 522 So.2d 358; Westlaw (1988).


Loewe v. Lawlor, 208 U.S. 274; 28 S. Ct. 301; 52 L. Ed. 488; LEXIS 1769 (1908).


National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U.S. 1; LEXIS 1122 (1937).

National Labor Relations Board v. Local Union No. 103, International Association of Bridge, Structural & Ornamental Iron Workers, AFL-CIO, 434 U.S. 335; 98 S.


National Labor Relations Board v. Yeshiva University, 444 U.S. 672; 100 S. Ct. 856; LEXIS 25 (1979).

O’hara v. State of Iowa, 642 N.W.2d 303; LEXIS 57 (2002).

Payne v. The Western & Atlantic Railroad Company, 81 Tenn. 507; LEXIS 66 (1884).


School Board of the City of Richmond v. Parham, 218 Va. 950; 243 S.E. 2d 468;
Westlaw (1978).


*Thornhill v. Alabama,* 310 U.S. 88; 60 S. Ct. 736; LEXIS 1153 (1940).


*Union River Valley Teachers Association v. Lamoine School Committee,* ME 57; 748 A.2d 990; LEXIS (2000).


*Walker County Board of Education v. Walker County Education Association,* 431 So. 2d
948; LEXIS 4157 (1983).


APPENDIX D:

TABLE OF STATE CONSTITUTIONS AND STATUTES
The Alaska Public Employment Relations Act, Alaska Statutes Title 23, Ch. 40, §§ 23.40.070 et seq.


The California Excluded Employees Bill of Rights Act, Government Code §§ 3525 – 3539.5.

The Connecticut Teachers’ Negotiations Act, Connecticut General Statutes, §§ 10-153 (a) et seq.

The Delaware Public School Employment Relations Act, Ch. 40, §§ 4001 – 4019.

The Florida Public Employees Act, Florida Statutes, Chapter 447, Labor Organizations and Public Employees, §§ 447.201 and 447.203.


The Hawaii Public Employee Bargaining Rights, Hawaii Rev. Stats., Ch. 89, § 89-1 et seq.


The Indiana Certified Educational Employee Bargaining Statute, Indiana Code §§ 20-7.5-1-1 to 20-7.5-1-14.

The Kentucky Revised Statutes, Firefighters’ Bargaining Rights, K.R.S. Ch. 345, §§ 345.010 et seq.

The Kentucky Revised Statutes, Police Bargaining Rights, K.R.S. Ch. 78, §§ 78.400 et seq.


The Maryland State Teachers Bargaining Law, Md. Code Ann., §§ 6-401 – 6-411


The Municipal Employee Relations Act, Connecticut General Statutes, §§ 7-467 et seq.

The Nebraska State Employees Collective Bargaining Act, Nebraska Const. Article 13, Ch. 81, § 81-1369 et seq.
The North Carolina General Statutes, Public Employee Labor Law. N.C.G.S. Ch. 95, Art. 12, § 95-98.

The Ohio Public Employees’ Collective Bargaining, Ohio Rev. Code Ann. §§ 4117.01-4117.23.

The Oregon Public Employee Collective Bargaining Act, O.R.S. § 243.650 et seq.


The State Employee Relations Act, Connecticut General Statutes, §§ 5-270 et seq.


The Vermont State Employees Labor Relations Act, Vt. Stat. Ann., Title 3, Ch. 27, §§ 901-1006.


The Code of Virginia, Labor and Employment, Title 40.1, § 57.2.

APPENDIX E:

TABLE OF FEDERAL STATUTES AND ORDERS


The Erdman Act, c. 370, 30 Stat. 424 (1898).


The United States Constitution, Article I, § 8.
LIST OF REFERENCES


