HEALTH CARE

REMARKS BY WAYNE L. HORVITZ

PREPARED: 8-8-79

By Wayne L. Horvitz

Five years ago Congress put the finishing touches on a piece of legislation that had taken 18 months to fashion, and passed and sent to the President Public Law 93-360.

This important piece of legislation did two things: It removed the exemption from Taft-Hartley enjoyed by private non-profit hospitals; and it established special bargaining procedures for health care industry negotiations.

There were few at the time who argued that the exemption shouldn't be removed. It had not been in the original 1935 Wagner Act; a federal court expressly ruled in 1942 that such hospitals were covered. Furthermore, common sense argued that hospital employees should enjoy the same rights as other American workers. And finally there were statistics to show that the exemption had not had much effect anyway, except to drive up the number of days of work lost because of recognition strikes, since exempted unions couldn't file for NLRB certification procedures.

The case for establishing special bargaining procedures, however, was not so clear nor clean-cut. The AFL-CIO argued that no exception should be made; that the exemption should be removed and that health care institutions and their organized employees should operate under the same rules governing the rest of private industry.

Industry on the other side contended that patient care as well as labor-management relations should be considered, and that measures should be enacted which would reduce the likelihood of strikes and minimize their impact on health care when they did occur. The California Hospital Association proposed factfinding and a 120-day cooling-off period after the expiration of a contract.

The bills passed by the House and Senate differed. The House version included a modified 60-day cooling-off period with a board of inquiry appointed by the Federal Mediation and Conciliation Service to operate during that time. The Senate version did not.

When the final bill emerged from committee, it contained the board of inquiry provision as it now exists. This board is appointed by the director of FMCS, has 15 days to complete its work, and makes its report before the existing agreement expires.

There was only one problem. The language used to draft this compromise and graft it to the trunk of the basic Taft-Hartley provisions was imprecise and allowed a loophole for the parties to wriggle through when they wished to frustrate a board.

It was the intention of Congress that FMCS would be notified of a health care dispute 60 days before an existing contract expired and have 30 days to determine whether a board was needed. Thus a board would take effect 30 days before the old agreement ran out, would have 15 days to complete its work, and the parties would have 15 days to consider the findings of the board.

Unfortunately, the language of the law says that FMCS has 30 days to determine whether a board should be appointed after having been notified by the parties that a dispute exists, and that the notification to FMCS that a dispute exists shall be given within 30 days after the parties have notified each other that one or the other wishes to modify or terminate an existing agreement; that notification must be given 90 days before the old contract expires.

Interpreted literally, which is what two federal courts have done, this means that the parties are free to notify FMCS that a dispute exists immediately after the 90-day notification is exchanged, and before any bargaining has taken place. Since the clock begins to run the moment the notice is received by the Service, the 30-day period in which the decision to appoint a board can run out 60 days before the old contract expires, which invariably is far too early in the negotiations to be of any real value in reaching a settlement.

This does not mean that the parties can avoid a board by taking this tack. The courts have upheld our authority to appoint a board even in advance of serious bargaining. It is clear, however, that the value of such a board is diminished if it must complete its work while the parties are still in the preliminary stages of negotiations.

This is true even when the formal notification is given to FMCS 60 days before a contract expires, as Congress intended. Quite often serious bargaining doesn't really begin until the last few days, and a board appointed 30 days before a contract expires that must complete its work in 15 days may be almost as useless as a board appointed 60 days or more in advance.

To get around this problem, the Service has developed the technique of using a joint stipulation agreement between the parties by which they authorize the director of the Service to appoint a factfinder at a later date; for example, at the end of the contract if no new agreement is reached, or when a 10-day strike notification is served by a union.

Normally, such a factfinder would operate under the same procedures as a board of inquiry, unless the parties and the Service agree to others.

Interestingly, in the past year or so, we've been using this technique more and more and our statistics now show slightly more instances of factfinders being appointed by the Service as a result of stipulation agreements than boards of inquiry being appointed by the Service under the terms of Public Law 93-360. Which is not to say that either boards of inquiry or factfinders are widely used in health care disputes. In the five years that the law has been in effect, the Service has appointed boards or factfinders in only about 3 percent of all health care cases.

In part this is because the law very plainly states that boards should be appointed only in disputes in which a strike or lockout would have a serious impact on the delivery of health care services; and certainly a vast number of disputes do not fit in this category.

But the percentage is low for another reason. In addition to considering the consequences of a work stoppage on the delivery of health care, the Service also considers the impact of a board on the bargaining. If it appears that a board would not help negotiations then none is appointed.

And finally, many times mediation works so well that nothing else is needed.

Even before the law was passed, FMCS began conferring with the parties in the health care industry, and that has continued. One of the things that has been brought to our attention is that in many instances the parties would like to be consulted before a board is appointed. Recently, we issued new regulations which provide for procedures whereby the parties can submit jointly a list of one or more persons that they would feel comfortable working with as a board of inquiry. The list should be submitted 90 days prior to the expiration of the contract so that: one, construction of the list won't interfere with bargaining later in the negotiations; and, two, FMCS can contact the individuals on the list early to see if they would be available to serve.

Let me add, however, that FMCS is not bound to appoint a person on the list.

Sometimes the parties in a health care dispute prefer to use their own factfinding or arbitration procedures to resolve their differences. The new regulations make it an FMCS policy to defer to such procedures as long as they meet certain criteria which enable the Service the meet its obligations under the law.

The Service will defer to private factfinding and not appoint a board of inquiry when: The private factfinding procedure agreed to by the parties provides for an automatic point in time at which factfinding begins; that it provides for an agreed upon procedure for selecting an impartial factfinder; that it provides that there can be no strike or lockout during the factfinding period and for at least seven days after the factfinding is completed; and that it requires the factfinder to prepare a written report containing findings of fact and recommendations for settlement, a copy of which is to be given to each party and the Service.

The Service will defer to private interest arbitration when: The interest arbitration procedure provides there can be no strike or lockout or changes of employment during the proceedings; that the award is final and binding; a fixed method is prescribed for selecting an arbitrator; and a written award is made by the arbitrator.

The law provides that when FMCS appoints a board of inquiry, the board is paid for by public funds. The same holds true when the parties enter into a stipulation agreement that allows FMCS to appoint a factfinder at a subsequent point.

When the Service defers to private factfinding or arbitration procedures, however, the cost of the services of the factfinder or arbitrator must be borne by the parties.

I'd like to stress one thing very strongly. I don't want to appoint boards. I don't want the Service to have to do any more than the bare minimum in health care negotiations. I want the parties to settle their own disputes in their own way, and that is why I backed the new regulations--to give the parties the greatest possible latitude to work out their differences in their own way.

This not to say I or the Mediation Service has any intention of shirking duties under the law. It simply reflects my philosophy that the parties should do for themselves, rather than have the government do for them--or to them, as the case may be.

I began by saying that the health care law was passed by Congress five years ago. Five years is a good round number, and a five-year perspective is a useful one for judging just how well or poorly a law has operated.

Statistics are usually misleading, so I don't claim these figures prove anything; but it's interesting to note that work stoppages occur in approximately 4 to 5 percent of our health care cases, and in about 12 to 15 percent of all our other cases. These figures vary slightly ~~from year to year~~ in other years, but not by much.

On the surface, it looks like the special health care procedures are three times more effective in preventing lockouts and strikes than normal bargaining with mediation.

Unfortunately, we can't say that with any degree of surety.

In all our other cases, we pick and choose only those which most need our attention. Naturally, we choose those in which bargaining problems exist, and these are the logical candidates for work stoppages at some point down the road.

The health care law says that FMCS shall mediate all cases. I'm sure that there are some that get by us. But by and large, we do our best to find them all, track them, and see them through.

My point is that we don't screen out the health care cases that don't require our attention, as we do many times with dispute cases in other industries.

But subjectively, I do think the law is working. The 10-day strike notice was intended to insure adequate time for transferring patients and so forth before a strike. Our experience has been that it has been of some help in the bargaining process, too.

In the past fiscal year, strikes occurred in 4.6 percent of health care cases, and in 13.3 percent of all other cases.

It has enabled the parties who get behind in their bargaining schedule to go past a contract expiration without the union suffering a loss of credibility because it didn't strike, and without management having to bargain under the pressure of an instant strike at any time.

The board of inquiry provision has not only added a new dimension to negotiations, it has put pressure on the parties to make progress early to avoid a board, and it has been the catalyst for the stipulation agreement for later factfinding and the deferral to private procedures and arbitration that I've already discussed.

What the law doesn't do and can't do is discuss the problems of healthcare bargaining, such as the role of the third party payor, the impact of state and local regulatory commissions, and so forth.

But what it may have done is force us to talk among ourselves and come up with forums that otherwise wouldn't have existed.

We now have a revived joint labor-management committee, and a new interest in the subject, judging by the periodicals that have sprouted and the articles being written.

Since health care is almost the largest industry today in this country, and one that has come under increasing criticism because of its increasing costs to consumers, there's much to discuss.

I believe it is the role of the Mediation Service to be part of that discussion, and to work with the parties to explore new and better ways make health care bargaining work.