ISSUE BRIEF

ECONOMIC POLICY INSTITUTE | ISSUE BRIEF #256 JUNE 25, 2009

FIRST-CONTRACT ARBITRATION FACTS

The Canadian Experience

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Canada's economy is more closely integrated with the U.S. economy than any in the world. Canada is also our biggest trading partner, and many U.S. corporations operate profitably there. So Canada's use of arbitration to resolve negotiations of a first contract in a newly unionized workplace can teach us a lot about how the process could work in the United States. This Issue Brief answers some common questions about the first-contract arbitration process and recommends successful practices the United States might be able to adopt from its neighbor to the north.

What is first-contract arbitration?

First-contract arbitration (FCA) is a mechanism found in numerous state laws in the United States and in national and provincial laws in Canada to encourage good faith collective bargaining between a newly formed union and the employer. FCA gives the recently certified union or the employer the option of entering binding arbitration when the parties cannot resolve their first collective bargaining agreement. As stipulated in the Employee Free Choice Act (EFCA), if negotiation of the first contract drags on without resolution, either side may, after 90 days of bargaining, request the help of the Federal Mediation and Conciliation Service (FMCS). If the FMCS is unable to help the parties resolve their disagreement, the dispute is referred to an arbitration panel that has the power to determine the terms and conditions of the collective agreement. Under EFCA this first agreement would be binding for two years, but it could be extended if the parties agree. Currently, the National Labor Relations Act (NLRA) provides for mediation by the FMCS in instances of a stalemate, but has no mechanism such as FCA to ensure that a first contract is concluded.

Why do we need first-contract arbitration?

Under the current system of industrial relations, even in good economic times there is a huge disparity in bargaining power between employers and employees. Unions serve as one of the only ways workers can increase their influence in company policy and see their interests represented in contract negotiations. Yet in recent years, most employees who have formed new unions have been unable to bargain first contracts with their employers in a timely way, and many

never obtain a contract. One study found that between 1999 and 2004, only 38% of unions established by a majority vote and certified for collective bargaining by the National Labor Relations Board were successful in reaching a first contract within one year, and only 56% obtained a contract within two years.[1]

Many employers fight employees' attempts to unionize by hiring high-paid consultants who emphasize a strategy of out-waiting workers. These consultants preach the ideology that, "you haven't lost [to a union] unless you sign a contract," and stall negotiations until bargaining is at a standstill.[2] Protracted contract negotiations can cause workers to lose faith in their ability to improve pay or conditions of work. By dragging negotiations out, management can erode the support employees had for their union during the election and certification process. Without a contract, the union cannot make good on its promises to improve wages and working conditions. For businesses, "the urge to deny the union a contract altogether is likely to be more prevalent in first-contract negotiations than in renegotiations of expiring agreements."[3] Through delay, the company diminishes the bargaining power of the union and defeats its employees' desire to unionize and negotiate for better working conditions.

There are many incentives for companies to bargain in bad faith, and the NLRA is little help to employees whose employer engages in delay and bad faith bargaining. Proving bad faith is extremely difficult, and the NLRA remedy is less than a slap on the wrist: the NLRA simply issues a cease-and-desist order that requires the employer to return to the bargaining table. Thus, an unfair labor practice charge of bargaining in bad faith is generally an exercise in futility. Research shows that, "the presence of an Unfair Labor Practice Charge (ULPs) reduced the likelihood of completing contract negotiations by 30%, and less than 10% of contract negotiations involving a ULP reach a first contract within one year of union certification."[4] Stronger remedies and a mechanism to encourage good faith bargaining are needed.

How would first-contract arbitration help?

First-contract arbitration would enhance relationships between employers and employees and inspire a more positive attitude at the bargaining table. With the guarantee of a contract at the end of the process, both sides would focus on actually negotiating instead of stalling or filing unfair labor practice charges. Canada has proven that this system can work. FCA provisions are widespread throughout Canada, and a recent study of Canadian firms between 1976 and 2005 found that FCA reduces work stoppages during the first contract period by at least 50%.[5] Nor do first contract arbitration statutes lengthen the duration of work stoppages when they do occur. The study's most important finding was that "FCA supports and encourages the collective bargaining process and is not a substitute for it." *Even when arbitration was requested, the likelihood of an imposed contract averaged around 5% and never rose above 8%.*[6] Fears that unions will simply put off bargaining in hopes that an arbitrator will impose a favorable contract are not borne out by the facts.

In most cases the prospect of a third party making contract decisions gives both parties the incentive to reach an agreement on their own. On average in Canada, only 1.4% of collective bargaining agreements with newly certified unions are actually imposed, and the highest occurrence seen in a single year was 7.5%.[7] This variation in the number of applications for arbitration and the rate of imposition is largely due to variation in the specific type of FCA provided under the different provincial laws. The method proposed in EFCA is only one possible system of FCA; there are four separate models of FCA legislation in use across Canada today, and each produces different outcomes.

The different Canadian FCA models are:[8]

- **Automatic (Manitoba since 1985—**After specific time limits have been exceeded either the employer or the union can apply for FCA. No evidence or finding of dysfunctional bargaining is necessary and access to arbitration is automatic and generally unfettered. This form of FCA is the most similar to what is proposed in the Employee Free Choice Act.

- **Fault (British Columbia from 1974-93; federal jurisdiction since 1978; Newfoundland since 1985;**

Quebec)—Applications for arbitration are first reviewed by the Minister of Labor, who may refer them to a Canadian provincial Labor Board. The applicant must provide evidence of bargaining in bad faith or that bargaining has become dysfunctional (reached a standstill). This form of FCA introduces a political element to the process not characteristic of other forms of arbitration and it involves an extra layer of screening. The parties are least likely to apply for arbitration under this method of FCA used.

- **No-fault (Ontario from 1996-2005, Saskatchewan since 1994)—**The application for arbitration is sent directly to the Labor Board together with evidence that the parties have bargained to impasse.

- **Mediation-supported (British Columbia since 1993)—**When parties reach an impasse in negotiations and a strike vote has been passed, either party may apply to British Columbia's Labor Board, which calls for mediation. The mediator encourages the parties to reach agreement, but if an agreement is not reached within 20 days, then the mediator can recommend the parties to a third party with powers of arbitration. This third party has the power to arbitrate small unresolved issues, undertake broader arbitration, or to let a work stoppage take place. Mediation-supported FCA yields more applications but generates the fewest imposed contracts.

Conclusion

Each of these forms of FCA streamlines the collective bargaining process so that employers and employees can focus on their work without wasting time and money on a work stoppage or sitting endlessly at the negotiating table. The threat of arbitration is strong enough that the two parties almost always elect to settle the contract themselves. Any of these several types of FCA would improve our current system of labor relations.

It is important to note that there is no evidence that FCA in Canada has made Canadian firms less competitive or done anything but strengthen the Canadian economy. To the contrary, Canada has a large trade surplus with the United States, and its unemployment rate in May 2009 was 8.4%, compared to 9.4% in the United States.

Endnotes

1. Ferguson, John-Paul, and Thomas Kochan. *Sequential Failures in Workers' Right to Organize.* Rep. 2008. Another study—Bronfenbrenner, Kate. *No Holds Barred: The Intensification of Employer Opposition to Organizing*. Briefing Paper #235. May 20, 2009. The Economic Policy Institute—found that only 48% had a contract by the end of the first year.
2. Johnson, Susan. *First Contract Arbitration: Effects on Bargaining and Work Stoppages.* Rep. 2008.
3. Cooke, William. The failure to negotiate first contracts: Determinants and policy implications. *Industrail and Labor Relations Review* 38 (1985): 163-78. JSTOR.
4. Ferguson, John-Paul, and Thomas Kochan. *Sequential Failures in Workers' Right to Organize.* Rep. 2008.
5. Johnson, Susan. *First Contract Arbitration: Effects on Bargaining and Work Stoppages.* Rep. 2008.
6. Ibid.
7. Ibid.
8. Ibid.