An Experiment in Compulsory Arbitration: Section 716 of the New York State Labor Relations Act

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NOTES & COMMENTS

AN EXPERIMENT IN COMPULSORY ARBITRATION:
SECTION 716 OF THE NEW YORK STATE
LABOR RELATIONS ACT

The bitter work stoppages which plagued New York's private non-profitmaking (voluntary) hospitals during the early 1960's vividly illustrated the need for conciliation machinery designed to reconcile the interests of these institutions and their employees. Indeed, the continued invocation of the strike in the assertion of labor's collective demands threatened the public's interest in maintaining uninterrupted service in such essential institutions. This note will focus upon the remedial statute enacted by the legislature, Section 716 of the New York State Labor Relations Act, with special emphasis upon its efficacy and constitutionality in light of Long Island College Hospital v. Cathewood, and subsequent legislative developments.

I. SECTION 716 UNDER LONG ISLAND COLLEGE HOSPITAL

INTRODUCTION

The Plight of the Workers in Voluntary Hospitals

The absence of federal and state regulatory legislation prior to 1963 placed the labor relations of voluntary hospitals in a sui generis

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2 The continued operation of these facilities has grown in significance in view of the threatened shutdown by a number of New York City's municipal institutions in response to proposed budget reductions. Newsweek, April 7, 1969, at 49. Although New York State recently created the New York City Health and Hospitals Corporation in an attempt to administer the finances of the member hospitals in a more efficient and economical manner, Act of May 26, 1969, ch. 1016, §§ 1-25, N.Y. Laws, 1969 Sess. 1591-1612, voluntary hospitals are presently requesting municipal and state assistance in an effort to offset operating deficits attributable to a recent "freeze" on medicaid reimbursements, N.Y. Times, Sept. 28, 1969, at 28, col. 1. The termination of services by either would crucially affect the availability of vital services. The already overcrowded voluntary hospitals have been compelled to establish priority systems in their 75 infirmaries. The 34 private, profitmaking hospitals in New York City, which often accommodate cases the voluntary hospitals reject, have also experienced the pressures of increased demands for bed space. Only the city's 17 general-care hospitals have maintained a relatively stable occupancy rate. Id., Mar. 3, 1969, at 1, col. 3, at 22, cols. 3-7.

The numerical superiority of the voluntary hospitals, coupled with the increasing demands for bed space, illustrate the perilous consequences inherent in a work stoppage affecting these facilities.


niche of our nation's labor history. The federal exemption was the result of a 1947 amendment to the National Labor Relations Act which specifically omitted these institutions from the class of employees within its jurisdiction. Prior to its amendment in 1963, the New York State Labor Relations Act (hereinafter SLRA or Act) embodied a similar jurisdictional limitation. In order to fully comprehend the

7 The term "employer" . . . shall not include . . . any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual . . . .
8 The flavor of the deep thought accompanying the new definition pervades the congressional debates on the amendment. For instance, the following dialogue occurred when Senator Tydings introduced the amendment before the Senate:

Mr. Tydings: Mr. President, this amendment is designed merely to help a great number of hospitals which are having very difficult times . . . . [N]o profit is involved in their operations, and I understand from the Hospital Association that this amendment would be very helpful . . . .

Mr. Taft: The committee considered this amendment, but did not act on it, because it was felt it was unnecessary . . . [because] hospitals were not engaged in interstate commerce, and . . . their business should not be so construed.
93 CONG. REC. 4997 (1947) (emphasis added). Following a few brief inquiries regarding the institutions affected, and the effect on their employees, the amendment was passed. Id. While the House bill extended the exemption to religious, scientific, charitable, and educational non-profit organizations, the conference agreement adopted the Senate resolution relating to "nonprofit corporations and associations operating hospitals." Id. at 6441.

For an interesting discussion of the creation of the voluntary hospital exclusion under federal law, see Kochery & Strauss, The Nonprofit Hospital and the Union, 9 BUFFALO L. REV. 255, 256-59 (1959). It is interesting to note that both Senator Taft and Congressman Hartley believed these institutions fell without interstate commerce. Id. at 258. Yet, in Central Dispensary & Emergency Hosp. v. NLRB, 50 N.L.R.B. 393 (1943), enforced, 145 F.2d 852 (D.C. Cir. 1944), cert. denied, 324 U.S. 847 (1945), the circuit court outlined the respondent's purchases and sales as well as the number of workers employed, and concluded:

Such activities are trade and commerce and the fact that they are carried on by a charitable hospital is immaterial to a decision of this issue [jurisdiction]. 145 F.2d at 853. The court failed to recognize any public policy criteria significant enough to "deprive hospital employees of the privilege granted to the employees of other institutions." Id.

7 For an outline of various statutes regulating non-profit institutions in other jurisdictions, see Bader, supra note 1, at 236-38 & nn.16-18.
8 Prior to 1963, section 715 of the SLRA excluded employees of charitable, educational and religious associations and corporations, consequently exempting voluntary hospitals from the provisions of the Act. The rationale for this exclusion was explained in a supporting statement to a bill urging the elimination of the exemption recommended by the Joint Legislative Committee on Industrial and Labor Conditions in 1962:

The application of this act (by virtue of the exclusions contained in Sec. 715) presently excludes employees of charitable, educational and religious associations and corporations. These are the classic exemptions contained in many federal and state acts relating to employee-employer relations. Historically, they have been perpetuated on the theory that such institutions perform a community and public service with private funds.

The same rationale which has formed the basis for such institutions to be exempt from taxation by government, has been used to avoid governmental in-
significance of the extended jurisdiction, the prior statutory framework must be briefly examined.9

The SLRA created a State Labor Relations Board10 (hereinafter Board), and established the right of employees to organize and bargain collectively through representatives of their own choosing.11 The Board determined the "appropriateness" of bargaining units,12 conducted elections,13 and certified exclusive bargaining representatives as selected by the majority of employees in an "appropriate" unit.14 The SLRA enumerated a number of unfair labor practices,15 and directed the Board to deter these practices by expeditiously hearing charges against employers, and issuing orders thereon.16 Judicial review was provided for "[a]ny person aggrieved by a final order of the board,"17 and such petitions were granted precedence over all other matters.18 However, the SLRA specifically excluded from its purview the employees of any charitable, educational or religious association or corporation,19 thereby denying the employees of voluntary hospitals access to the procedures provided by the Act.

The rationale for extending the coverage of the Act to employees of private profitmaking (hereinafter proprietary) hospitals,20 while deny-

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9 The New York Act has been characterized as a "little Wagner Act" inasmuch as it was originally patterned after the federal law. However, this characterization is no longer completely accurate since the state has not yet adopted the 1947 and 1959 federal amendments. Thus, for example, the New York Act does not proscribe union unfair labor practices. See K. Hanslowe, Procedures and Policies of the New York State Labor Relations Board 9-10 (1964).
10 N.Y. Labor Law § 702 (McKinney 1965). The present statute contains the provisions added to §§ 701, 705, 713 and 715, extending the coverage of the Act to employees of voluntary hospitals, and also provides for compulsory arbitration of disputes as provided in section 716 (McKinney Supp. 1969).
12 Id. § 705(2).
13 Id. § 705(3).
14 Id.
15 Id. § 704.
16 Id. § 706.
17 Id. § 707(4).
18 Id. § 707(7).
19 Id. § 715.
20 Proprietary hospitals are not excluded from the coverage of state law. In Dr. H.F. McChesney (Adelphi Hosp.), 2 S.L.R.B. 266 (1989), the Board, in asserting jurisdiction over a proprietary hospital, stated:

The criterion for exemption contained in the Act, and dictated by the reasons for
ing protection to the employees of voluntary hospitals, has been variously stated. Leon Davis, President of Local 1199, Drug and Hospital Employees Union, has traced the origin of the exclusion to the somewhat naive belief that institutions dedicated to the provision of medical and educational benefits primarily through the altruism of others should be exempt from socially-oriented regulation. Another commentator has suggested that the distinction was drawn on the basis of "employers ... in business for personal gain and those whose activities are in the interest of the public welfare." Indeed, one court has gone so far as to suggest that the charitable character of the voluntary hospital alone provides its employees with sufficient assurance of benign treatment.

Decisional law in New York aggravated the plight of these workers by withholding their most potent weapon — the right to strike. For example, in Society of New York Hospital v. Hanson, the court issued an injunction permanently restraining the New York Building and Construction Trades Council's Maintenance Organization from striking. Categorizing a suspension of services as "improper and inimical to [the] public interest," the court noted that "[t]he necessity of avoiding ... tragic consequences to the public clearly outweighs the sound general policy favoring the protection of labor's right to strike." Such exemption, is not the nature of the business ... but is, rather, whether or not the enterprise is conducted for private profit. Id. at 266 (emphasis added). Accord, M.P.H., Inc. (Madison Park Hosp.), 2 S.L.R.B. 277 (1939); Dr. Robert A. Mason (Royal Hosp.), 2 S.L.R.B. 273 (1939).

Local 1199 is presently an affiliate of the Retail, Wholesale and Department Store Union, AFL-CIO, and represents over 20,000 workers in voluntary hospitals and homes in, and around, New York City. Brief for Local 1199 as Amicus Curiae at 3, Long Island College Hosp. v. Catherwood, 23 N.Y.2d 20, 241 N.E.2d 892, 294 N.Y.S.2d 697 (1968).

See Statement of Leon J. Davis, President, Local 1199, Drug and Hospital Employees Union, AFL-CIO, in JOINT LEG. COMM. REP. ON IND. & LAB. CONDITIONS, N.Y. LEGIS. DOG. NO. 26, at 155 (1962).

J. Vladeck, Collective Bargaining in Voluntary Hospitals and Other Nonprofit Operations, NYU 19TH CONF. ON LAB. 221, 223 (1967).

Trustees of Colum. Univ. v. Herzog, 269 App. Div. 24, 28-29, 55 N.Y.S.2d 617, 620 (1st Dep't), aff'd, 298 N.Y. 605, 64 N.E.2d 351 (1945). The courts believed that the legislature intended to encourage charitable contributions, Vladeck, supra note 24, at 223 (citing the Herzog case).


185 Misc. 937, 59 N.Y.S.2d 91 (Sup. Ct. N.Y. County 1945).

Id. at 945, 59 N.Y.S.2d at 96.

Id. at 943, 59 N.Y.S.2d at 96 (emphasis added). As a result of the judicial prohi-
With the spectre of the strike removed, voluntary hospitals elected to reduce operating expenses by hiring "the otherwise unemployable" at subsistence wages while providing substandard working conditions. Increased discontent was fomented by the judiciary's failure to enjoin work stoppages by proprietary hospital employees. Significantly, the Hanson court, recognizing the inequities inherent in arbitrary distinctions based solely upon the status of the employer, had urged the legislature to consider proposals providing alternative means of relief. At one point the court concluded:

No institution in our form of government should be altruistic, yet niggardly. It might well be that their shining lights of benefaction, mercy and charity, irradiating far and wide, should at least be reflected to the basement of their own structure and their magnanimity extended even to the lowliest within their walls.

Organized labor's response was not long in the offing. As early as 1958, Local 1199 objected to the intolerable conditions prevailing in these institutions by initiating a prolonged organizational campaign. Except for an early "voluntary" recognition by Montefiore Hospital, voluntary hospitals, relying upon the detrimental effect on employee discipline, the difficult bargaining position of a charitable institution, and their quasi-governmental status, consistently resisted employee organization. This resulted in work stoppages lasting approximately...
two months at eight voluntary hospitals in New York City. Union-hospital relations during the next three years witnessed bitter strikes, involving sit-down picketing, violence, and the imprisonment of several officers of Local 1199. It is a sad commentary upon the plight of these employees that the clamoring of the unions did not involve the usual picket-line demands for higher wages, shorter hours, and better working conditions, but rather, was directed toward a goal which most workers had gained a decade earlier — union recognition.

The Legislature Offers a Solution

Continuing labor-management strife in voluntary hospitals resulted in widespread demands for remedial legislation. Responding to the pulse of the electorate, Governor Rockefeller advocated the removal of the voluntary hospital exemption from the SLRA. Finally, in 1963, pressure from the state's chief executive, complemented by the outcry of the electorate, persuaded the legislature to abolish the exemption. In addition to codifying the common law prohibition against strikes, the bill also included a unique remedial section providing for mediation, fact-finding, and compulsory and binding arbitration to resolve "disputes" between voluntary hospitals and their employees. Section 716 empowered both the Industrial Commissioner

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36 See Bader, supra note 1, at 242.
37 Id. at 243.
38 Id. and cases cited therein.
39 Union recognition has been the goal in nearly every initial strike in voluntary hospitals. Hepton, Battle for the Hospitals 41 (Cornell Univ. School of Ind. & Lab. Relations, 1963). For a discussion of the recent crisis in Charleston, South Carolina, which began as a strike by hospital workers seeking union recognition, but blossomed into a national cause for civil rights, see N.Y. Times, May 4, 1969, § 4, at 4, col. 1.
41 N.Y. Labor Law §§ 705-15 (McKinney 1965). Since the elimination of this exemption, the legislature has also repealed the provision denying coverage of the SLRA to employees of charitable, religious and educational associations and corporations. Id. § 715 (McKinney Supp. 1969). As a result, the provisions of the SLRA now extend to all employees except:

(1) employees of any employer who concedes to and agrees with the board that such employees are subject to and protected by the provisions of the national labor relations act or the federal railway labor act; or (2) employees of the state or of any political or civil subdivision or other agency thereof.

Id.

In effect then, all employees in the state are covered since the labor relations of those employees encompassed within subdivision two are governed by the Taylor Law, N.Y. Civ. Serv. Law §§ 200-12 (McKinney Supp. 1969). But see § 701(3) limiting the scope of the term employee.

42 N.Y. Labor Law § 713 (McKinney 1965). This provision also makes it unlawful for a "non-profitmaking hospital . . . to institute, declare or cause, or attempt to institute, declare or cause any lockout of [their] employees. . . ."
43 Id. § 716, as amended, (McKinney Supp. 1969). The original bill was limited to
and the New York State Board of Mediation to submit "disputes," as defined therein, to a fact-finding commission, and, upon rejection of the findings by either party, to binding arbitration. The provision contained a self-imposed limitation in scope by providing its own definition of the controversies encompassed:

As used in this section "grievance" means any controversy or claim arising out of or relating to the interpretation, application or breach of the provisions of an existing collective bargaining contract. As used in this section "dispute" means all other controversies, claims or disputes between the employees of a non-profit-making hospital or residential care center . . . concerning wages, hours, union security, seniority or other economic matters, including, but not limited to, controversies, claims or disputes arising in the course of negotiating, fixing, maintaining, changing or arranging such terms or conditions.

The new amendments "meshed into the existing system controversies between non-profitmaking hospitals and unions, leaving representation issues to the Labor Board, subject to court review under section 707, and economic issues to mediation, fact-finding and compulsory arbitration." As a result of this extended coverage, unions were no longer compelled to resort to illegal strikes in their effort to secure certification as exclusive bargaining representatives. Instead, the amended procedure granted unions engaged in organizing voluntary hospitals that status afforded organizations seeking certification as the representative of industrial and commercial workers. Consequently, a union could merely petition the Board for certification as the exclusive representative of an "appropriate" unit of hospital employees. If the hospital refused to bargain with a duly certified union, the Board was authorized to issue a judicially enforceable order directing the hospital
to bargain in good faith. However, since the Board order in a certification proceeding is not a "final order," it is not subject to judicial review until drawn into question by a petition for enforcement, or by review of an order restraining an unfair labor practice. Therefore, the employer, in order to attack the Board certification in the courts, ordinarily would be compelled to refuse to bargain. The union would subsequently file an unfair labor practice charge alleging an unlawful refusal to bargain. Since the court's adjudication of this allegation would necessarily involve the validity of the interlocutory certification, its jurisdiction a fortiori encompassed all prior determinations.

It should be noted, however, that it has proven difficult to obtain reversal of Board certifications. Section 705(2) authorizes the Board to exercise a considerable degree of discretion in this area:

The board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization, to collective bargaining and otherwise to effectuate the policies of this article, the unit appropriate. . .

Such a broad determinative function exercised by an administrative agency ordinarily receives only cursory judicial examination.

Appropriate Bargaining Units in Voluntary Hospitals

Since the scope of a bargaining unit is often determinative of the majority status of an interested organization, unit determination is of vital concern to both management and labor. Among voluntary
hospitals, management's preference for a large single unit is necessarily antagonistic to the unions' general inclination for distinct units for each separate skilled or semi-skilled assemblage of workers. Logically, the guidelines should coincide with an interrelationship among the interested employees, i.e., a community of interest in wages, hours, supervision, and working conditions.

Prior to the implementation of the new statute, the Board, confronted by these conflicting policy considerations, conducted a public hearing in an attempt to ascertain the attitudes of the respective parties regarding the grouping of voluntary hospital employees. Predictably, the position of the unions corresponded either to "their own jurisdictions or the extent of their organizing success." Local 1199 favored a grouping of the service and maintenance employees, while Local opted for a more comprehensive assemblage, including clerical and technical employees as well as the two above-mentioned categories. The employer-hospitals, on the other hand, claimed a "quasi-governmental" status and opposed multiple "unitization." Indeed, the policy considerations underlying their contentions are rather persuasive. The creation of various units compels numerous bargaining sessions and increases both the possibility of a work stoppage and the cost of negotiation. The resultant administrative burdens are even more worrisome. Voluntary hospitals contend that the character of their operations mandates flexibility in designating work assignments. Consequently, they opposed any form of fractionalization which would circumscribe their adaptability.

55 The position of the hospitals will be discussed infra notes 62-64 and accompanying text.
56 See Note, Unit Determination and the Problem of Craft Severance, 19 CASE W. RES. L. REV. 327 (1968).
57 N.Y. Times, June 14, 1963, at 34, col. 2; Bader, supra note 1, at 244-45 & n.41; Vladeck, supra note 24, at 228-29.
58 Vladeck, supra note 24, at 228.
59 Bader, supra note 1, at 245; Vladeck, supra note 24, at 229.
60 Local 144, Hotel and Allied Service Employees Union, Service Employees International Union, AFL-CIO. During the course of the litigation in Long Island College Hospital, the name of the union was changed from Building Service Employees International Union to Service Employees International Union. Jurisdictional Statement of Appellant Local 144, at 1*.
61 Bader, supra note 1, at 245; Vladeck, supra note 24, at 229.
62 Vladeck, supra note 24, at 230-31. For earlier exemption arguments relying upon a "quasi-governmental" status, see Kochery & Strauss, supra note 6, at 279-81.
64 Id. Counsel for the Greater New York Hospital Association summarized these views in the following manner:

Fractionalization of hospital bargaining units sow [sic] the seeds of work jurisdiction disputes, controversies over work assignments and inter-union competition;
The Board's task has involved a difficult balancing of two contradictory, yet equally valid, assertions. It has been further complicated by the early-recognized, and oft-repeated, general policy against fractionalization of hospital personnel into a myriad of separate bargaining groups. Yet, it is equally true that certain employees, having particular needs and problems resulting from the distinct nature of the services they perform, may justifiably fear that their special interests will be sacrificed if they are merged into a broader unit. Additionally, the Act contains a "professional proviso," which mandates distinct units for members of this category if they so desire.

The Board's position at the public hearing, as well as in its early determinations, delineated five rudimentary groupings: maintenance and service employees; technicians; office and clerical workers; registered nurses; and licensed practical nurses. Accordingly, the Board rejected the broad unit aspirations of Local 144 in Hayes Seventy-Third Corp. by excluding clerical and technical personnel from an overall service and maintenance unit. Severance was justifiably based upon a diversion of skills, duties, educational backgrounds, and interests. Subsequently, in addition to granting separate units for clerical and technical employees, the Board sanctioned an individual unit for they multiply grievances and compound administrative burdens; they can effectively impair the efficiency of hospital service.


In St. John's Queens Hosp., 26 S.L.R.B. 529, 532 (1969), decided only three months after the effective date of the amendment, the Board stated:

As a matter of general policy, we do not deem it advisable to compartmentalize hospitals into numerous small bargaining units any more than is necessary.


In any case where the majority of employees of a particular craft, or in the case of a non-profitmaking hospital or residential care center where the majority of employees of a particular profession or craft, shall so decide the board shall designate such profession or craft as a unit appropriate for the purposes of collective bargaining.

N.Y. LABOR LAW § 705(2) (McKinney 1965) (emphasis added).


26 S.L.R.B. at 430.

28 Manhattan Eye, Ear & Throat Hosp., 26 S.L.R.B. 587 (1969); Jamaica Hosp., 26
service personnel.\textsuperscript{73} Of course, the compartmentalization of units within the "professional proviso"\textsuperscript{74} was necessitated by its mandatory character; the Board must comply with the desires of the workers involved.\textsuperscript{75} Several additional separate and distinct "appropriate" units have also been granted to "supervisory" personnel\textsuperscript{76} under the Act.\textsuperscript{77}

Clearly, the five basic groupings delineated by the Board are justifiable. The only criticism which can be levied relates to service employee severance;\textsuperscript{78} there, the policy considerations against compartmentalization far outweigh the demands of the individual employees for a separate unit.\textsuperscript{79}

\textbf{The Scope of Section 716}

\textit{The Long Island College Hospital Marathon}

On July 1, 1963, Local 144 filed a petition with the Board requesting certification as representative of the \textit{service and maintenance} workers of Long Island College Hospital.\textsuperscript{80} Subsequently, on March 26, 1964, the Maintenance Division of the Building and Construction Trades Council also filed a petition\textsuperscript{81} with the Board seeking a unit limited to the \textit{skilled employees} engaged in the \textit{maintenance} of the plant and engineering departments.\textsuperscript{82} On July 6, 1964, after due consideration, the Board issued its Decision, Order and Direction of Election, requiring an election in which the service employees were to vote simply for or against representation by Local 144.\textsuperscript{83} The

\textsuperscript{73} Long Island College Hosp., 32 S.L.R.B. No. 51 (1969).
\textsuperscript{74} N.Y. LABOR LAW § 705(2) (McKinney 1965).
\textsuperscript{75} There have been numerous distinct units recognized under this provision. See, e.g., Menorah Home & Hosp., 32 S.L.R.B. No. 22 (1969) (licensed practical nurses); Brooklyn Eye & Ear Hosp., 32 S.L.R.B. No. 21 (1969) (resident physicians); Nassau Hosp. Ass'n, 31 S.L.R.B. No. 45 (1968) (registered pharmacists); Gouverneur Ambulatory Care Unit, 30 S.L.R.B. 125 (1967) (social workers).
\textsuperscript{76} It is interesting to note that supervisory personnel are expressly excluded from the coverage of the NLRA. 29 U.S.C. § 152(3) (1964): "The term 'employee' . . . shall not include ... any individual employed as a supervisor . . . ."
\textsuperscript{77} See, e.g., Brookdale Hosp. Center, 31 S.L.R.B. No. 102 (1968) (supervisory social workers); Metropolitan N.Y. Nursing Home & Ass'n, 28 S.L.R.B. 417 (1965) (registered nurses).
\textsuperscript{78} Long Island College Hosp., 32 S.L.R.B. No. 51 (1969).
\textsuperscript{79} Although the avoidance of compartmentalization does not require the single overall unit frequently sought by the hospitals, policy wise, the Board should favor a unit combining service and maintenance employees.
\textsuperscript{80} Long Island College Hosp., 27 S.L.R.B. 405, 408 (1964).
\textsuperscript{81} Id. at 406. The petition of the Maintenance Division followed the withdrawal of Local 1199 from the proceedings.
\textsuperscript{82} Id. at 408.
\textsuperscript{83} Id. at 416-18.
maintenance employees were to vote separately, on a complicated ballot containing three confusing questions, to determine their proper representative. The 460 service employees overwhelmingly rejected representation by Local 144. Of the 46 maintenance employees casting unchallenged ballots (20 ballots were blank, and there were 5 "NO" votes), 21, a majority, voted for separate representation. A corresponding majority selected Local 144 as their exclusive representative. Since the maintenance employee's ballots were tallied separately, the Board, on December 28, 1964, over the Objection to the Election filed by the hospital, and without a hearing thereon, certified approximately 50 maintenance workers, out of a total of more than 1500 employees, as an appropriate bargaining unit. Local 144, as well as the hospital, had repeatedly contended that such a designation was clearly inappropriate. On December 30, 1964, the certified union's request that negotiations begin was repudiated by the hospital, so that the validity of the Board's certification could be contested. However, the union, rather than following the traditional procedure of filing a section 704(6) unfair labor practice charge alleging that the hospital had refused "to

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84 Id. at 415-16.
85 The final count was 309 against, and 151 in favor of representation by Local 144. Brief of Petitioner-Appellant at 13. (This was the first of two briefs filed by the hospital [hereinafter Brief for Petitioner-Appellant I]).
86 Id. at 13. Certification is determined by a majority of the eligible employees voting regardless of the percentage of participants. N.Y. LABOR LAW § 705(1) (McKinney 1965).
87 Brief of Local 1199 as Amicus Curiae at 4.
88 Brief for Petitioner-Appellant at 9 (this was the second brief filed by the hospital [hereinafter Brief for Petitioner-Appellant II]).
89 Brief for Petitioner-Appellant I at 13, & App. 20.
90 On Jan. 14, 1965, counsel for the hospital wrote the union's president the following letter:

The Long Island College Hospital has advised me that it wishes to contest the validity of the [proceedings] under which the New York State Labor Relations Board certified your union as the representative of certain maintenance and engineering employees of the Hospital and to contest, also, the propriety of the Board's procedures. As you doubtless know, the only way the Hospital can get these matters before the courts is by refusing to recognize your union or to bargain collectively with it, there being no direct appeal to the courts from the Board's certification.

Brief for Petitioner-Appellant I at 14, & Apps. 21, 34.
bargain collectively with the representative of [its] employees," responded by invoking for the first time the provisions of section 716(4). Pursuant to the procedures enumerated in section 716, the Industrial Commissioner, on June 30, 1965, upon the recommendation of the Mediation Board, issued an "Order Establishing [a] Fact-Finding Commission." This commission recommended recognition of the union even though it realized that the resultant effect upon the employer-hospital would be rather inequitable:

If this Commission proceeds, the union is not likely to file a refusal to bargain charge and the employer will presumably never get a court decision on its various objections to the way their certification election was conducted. Nor can this Commission properly review the SLRB's decisions on those objections. The SLRB's rulings then, would go unreviewed.

Subsequent to the hospital's rejection of the commission's recommendation regarding recognition, the Industrial Commissioner ordered compulsory arbitration.

The hospital then commenced two causes of action, seeking both to enjoin the operation of the fact-finding commission and to stay the compulsory arbitration. The lower courts denied relief and

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91 N.Y. LABOR LAW § 704(6) (McKinney 1965).
92 Id. § 716(4). This subdivision empowers the New York State Mediation Board and the Industrial Commissioner, in the absence of a collective bargaining agreement providing for final and binding arbitration between the hospital and its employees, to exercise all powers vested in them by subdivision (3). That subdivision provides in pertinent part:

Every collective bargaining contract between the employees of a non-profit-making hospital . . ., or their representatives, and such hospital . . . which does not contain provisions for the final and binding determination of disputes shall be deemed to include provisions for: (a) the appointment of a fact-finding commission by the New York State mediation board upon the request of both parties to the dispute, or by the industrial commissioner upon his own motion and upon certification by such board that in its opinion efforts to effect a voluntary settlement of the dispute have been unsuccessful. Such fact-finding commission shall have all of the powers and duties, including the power to make recommendations for the settlement of the dispute, as are vested in a board of inquiry by article twenty-two . . .; and (b) the submission of the dispute to final and binding arbitration . . . by such mediation board upon the request of both parties . . . or by the industrial commissioner . . .

Id. § 716(3).
93 Brief for Defendant-Respondents State Officials and Fact-Finding Commission at 4-5. The Honorable Orrin G. Judd, currently United States District Judge in the Eastern District of New York, Mr. Joseph Murphy, Vice-President of the American Arbitration Association, and Professor Michael I. Sovern of Columbia University were appointed to the Fact-Finding Commission.
94 Id.
95 Id.
97 54 Misc. 2d 712, 283 N.Y.S.2d 249 (Sup. Ct. N.Y. County 1967).
the appellate divisions affirmed. In the New York Court of Appeals, Chief Judge Fuld, speaking for the majority, conceptualized the basic issue ("one of first impression") presented by these cases in the following manner:

Where a nonprofit making hospital challenges the representation status of a union, does section 716 of the New York State Labor Law . . . empower the . . . Industrial Commissioner to appoint a fact-finding commission to make recommendations for the settlement of the dispute and, if its recommendations are rejected, to submit the issues to compulsory arbitration before the New York State Board of Mediation?

The Court, in reversing the two unanimous appellate division decisions, held that the Commissioner lacked such power.

"Disputes" Within Section 716

The interpretation of the Court of Appeals severely limits the availability of the procedures contained in section 716. This restriction was based upon the language of the amendments themselves, the statute's legislative history, and a number of policy considerations. The Court found that although the 1963 amendments had extended the Labor Board's traditional jurisdiction to include representation questions involving non-profitmaking hospitals, "all other disputes (primarily economic issues) were to be determined through [the] mediation, fact-finding and compulsory arbitration" procedures embodied in section 716. However, the definition of "disputes" contained therein

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99 29 App. Div. 2d 642, 287 N.Y.S.2d 313 (1st Dep't 1968); 28 App. Div. 2d 1092, 283 N.Y.S.2d 1014 (1st Dep't 1967). The position of the first department fluctuated regarding the "dispute" question. The court originally stated in the action to enjoin the fact-finding commission that this was not a "dispute" within the meaning of section 716. Nevertheless, it denied relief by interpreting the action as an attempt to judicially review the certification of the union. It stated that the only avenue to obtain judicial review of certifications was a direct appeal from a final order arising in an enforcement proceeding. 26 App. Div. 2d 543, 271 N.Y.S.2d 764 (1st Dep't 1966). In the action to stay arbitration, the court reversed its earlier position of the companion case stating that the hospital's refusal to negotiate with the union was a "dispute" within the meaning of section 716. Yet, the court adhered to the traditional procedure of withholding judicial review absent a final order in an enforcement proceeding. 29 App. Div. 2d 642, 287 N.Y.S.2d 313 (1st Dep't 1968). Because of their intimate connection, the two cases were consolidated for argument in the Court of Appeals.

100 Judge Keating disqualified himself from the original argument in the Court of Appeals, resulting in a 3-3 division. As a result, the Court on its own motion, directed reargument, 22 N.Y.2d 889, 239 N.E.2d 925, 293 N.Y.S.2d 343 (1968), and with the temporary addition of Judge Gibson to the Court pursuant to section 2 of article VI of the state constitution, disposed of the case in a 4-3 decision.


102 Id. at 34, 241 N.E.2d at 895, 294 N.Y.S.2d at 701.

103 Id. at 35, 241 N.E.2d at 895, 294 N.Y.S.2d at 701.
specifically limited its scope to controversies involving economics and union security. The acceptance of a broader definition of the term "dispute" would result in two administrative agencies possessing concurrent jurisdiction to determine the same issue. Such a broad interpretation of a statute is generally avoided, since it necessarily involves duplicative proceedings, and delays the final determination of a controversy. In any event, the instant controversy presented no doubt whatsoever concerning the division of jurisdiction between the Board and the Industrial Commissioner:

[The Labor Board is given exclusive jurisdiction with respect to questions of representation and the Industrial Commissioner and State Mediation Board are granted powers confined to economic matters.]

The Court concurred in the legislative belief that the complexity and difficulty involved in the designation of appropriate bargaining units required the exercise of expertise possessed only by the Board. The Savarese Bill, submitted prior to the adoption of the 1963 amendments, had proposed the implementation of mediation and compulsory arbitration procedures comparable to the provisions contained in section 716, yet, was expressly rejected by the legislature because its broad definition of "labor disputes" included controversies "concerning the association or representation of persons." In addition, the Court believed that the very language of the amendments illustrated underlying policy considerations which categorically rejected the inclusion of representation issues within the purview of section 716 "disputes." For instance, a broad interpretation of this section would enable "five

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104 "'Dispute' means all . . . controversies, claims or disputes . . . concerning wages, hours, union security, seniority or other economic matters . . . ." N.Y. LABOR LAW § 716(1) (McKinney 1965). This definition must be compared with the definition of "labor disputes" contained in section 701(8), which defines the general terms utilized throughout the SLRA:

The term "labor dispute" includes . . . any controversy between employers and employees . . . concerning terms, tenure or conditions of employment or concerning the association or representation of persons in negotiating . . . terms or conditions of employment. . . .

Id. § 701(8) (emphasis added). The Court pointed out that if the legislature had intended to make section 716 applicable to representation issues, "it would have been a simple matter to have included those section 701 words in the definition contained in section 716 (subd. 1)." 23 N.Y.2d at 35, 241 N.E.2d at 896, 294 N.Y.S.2d at 702.

105 23 N.Y.2d at 36, 241 N.E.2d at 897, 294 N.Y.S.2d at 703.

106 Id. at 36, 241 N.E.2d at 897, 294 N.Y.S.2d at 703-04.

107 Id. at 34, 241 N.E.2d at 895, 294 N.Y.S.2d at 702, citing In re Harold Levinsohn Corp. (Joint Bd. of Cloak, Suit, Shirt & Reefer Makers' Union), 299 N.Y. 454, 466, 87 N.E.2d 510, 515 (1949).

hospital employees — out of a total of 100 or more” to compel mediation, fact-finding, and arbitration “even though those five speak for none but themselves; and this process could be repeated so long as any other minority group made similar . . . demands . . . .”109 Such an augmentation of the rights of minority groups would conflict with modern-day labor policy which is premised upon the belief that a majority labor organization is the most effective vehicle to secure improvements in wages, hours and working conditions.110 This policy necessarily subordinates the individual employee’s power to settle his own relations with his employer, and vests power in the chosen representatives of the employees to act in their interest.111

In the instant case, since the controversy did concern representation, which is not a “dispute” within section 716(1), the Industrial Commissioner did not possess the authority to appoint the fact-finding commission, or to submit the issue to compulsory arbitration. Thus, a condition precedent to the utilization of section 716 by a union is the prior establishment of its exclusive representative status under sections 705 and 707.112

Judge Burke, the author of the dissenting opinion, asserted that the New York State Constitution clearly and unequivocally guaranteed employees the right “to organize and . . . bargain collectively,”113 and concomitant to this right, the right to picket and strike.114 As a result, the minority contended that section 716 must serve a dual purpose: “it [must] . . . guarantee the continued care of patients . . . and, at the same time . . . preserve the constitutional right of employees

109 23 N.Y.2d at 37, 241 N.E.2d at 897, 294 N.Y.S.2d at 704. Despite this valid policy consideration, this issue was not involved in the present controversy since Local 144 had already been certified as the majority union for the hospital’s maintenance employees.

110 Id. at 37, 241 N.E.2d at 897, 294 N.Y.S.2d at 704.

111 Id. citing NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967). See N.Y. LABOR LAW § 702(9) (McKinney 1965) which prohibits the Industrial Commissioner from exercising jurisdiction over matters within the authority of the Labor Board.

112 23 N.Y.2d at 38, 241 N.E.2d at 898, 294 N.Y.S.2d at 705. It is interesting to note that while the Court required “the establishment of its exclusive representation status under sections 705 and 707,” the legislature, in amending the statute, demands only that “an unfair labor practice charge for refusal to bargain . . . [be] filed with the state labor relations board.” N.Y. LABOR LAW § 716(8) (McKinney Supp. 1969), amending § 716 (McKinney 1965). This procedure has the laudatory result of removing the inherent delay resulting from the decision in Long Island College Hospital, i.e., the union need not wait for a successful determination regarding its representative status, but merely must file the charge.

113 N.Y. CONST., art. I, § 17.

114 The Supreme Court has often stated, although in a different context, that the right to picket and strike is an essential concomitant of the right to engage in collective bargaining. See, e.g., Bus Employees v. Missouri, 374 U.S. 74 (1963); Bus Employees v. Wisconsin Bd., 340 U.S. 383 (1951).
to bargain collectively through duly elected representatives.” Consequently, they concluded that the legislature intended that the determination of a representative unit in voluntary non-profitmaking hospitals rests solely with the Board and “the hospital has no right under section 716 to challenge the representative status of a certified union . . .”

**The Problem of Judicial Review**

Under well-established principles, an employer cannot procure direct review of a Board certification concerning the appropriateness of a bargaining unit. The method historically employed to obtain judicial scrutiny of such action, followed by the hospital in the instant case, is to refuse to bargain with a newly certified union, and to challenge the certification during the litigation of the subsequent Board order labeling such refusal an unfair labor practice. The union’s invocation of section 716 in *Long Island College Hospital,* and its failure to file the traditional unfair labor practice charge, was characterized by the hospitals as an attempt to obtain enforcement of a contested certification without judicial review. The unions, on the other hand, in rejecting this characterization, denied the existence of any

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115 23 N.Y.2d at 41, 241 N.E.2d at 899, 294 N.Y.S.2d at 707 (dissenting opinion).
116 Id. at 42, 241 N.E.2d at 900, 294 N.Y.S.2d at 708 (dissenting opinion).
117 See, e.g., Wallach’s v. SLRB, 277 N.Y. 345, 14 N.E.2d 381 (1938); Wyckoff Heights Hosp. v. Kraemer, 24 App. Div. 2d 873, 264 N.Y.S.2d 447 (2d Dep’t 1965). The denial of review is based upon the certification’s interlocutory nature. See K. HANSLowe, supra note 9, at 120-21. See also Benjamin, supra note 49, at 7. It is interesting to note that employees are also precluded from judicial review of a Board order denying certification, even though, as to them, the order would appear “final.” See, e.g., Cosmo’s Drive-In v. Townsend, 7 Misc. 2d 239, 165 N.Y.S.2d 422 (Sup. Ct. Richmond County 1957); Cody v. Kelley, 184 Misc. 150, 53 N.Y.S.2d 224 (Sup. Ct. N.Y. County 1945). The federal procedure, under a similar provision in the National Labor Relations Act, is the same. See, e.g., AFL v. NLRB, 308 U.S. 401 (1940); Madden v. Brotherhood & Union of Trainmen Employees, 147 F.2d 439 (4th Cir. 1945).
118 The employer is regarded as an “aggrieved” party only when the Board seeks judicial enforcement of its order compelling him to bargain with the newly-certified union. Benjamin, supra note 49, at 7; K. HANSLowe, supra note 9, at 120-21. The federal courts follow an identical procedure when NLRB certifications are involved. See, e.g., Boire v. Greyhound, 376 U.S. 473 (1964); Leedom v. Kyne, 358 U.S. 184 (1958).
119 It is interesting to note that at the time the union petitioned the Mediation Board to invoke the procedures of section 716 in *Long Island College Hospital,* it had made no contract proposals to the employer-hospital.
120 Second Reply Brief for Plaintiff-Appellant at 3. The hospital asserted that judicial review of a contested Board certification be a condition precedent to compulsory arbitration under section 716 where:

(i) the certification is the only evidence of the union’s representative status
(ii) the hospital has challenged certification in the only way it can and has raised serious doubts as to the certification’s validity and
(iii) the hospital has made timely application under CPLR article 75 for a stay of compulsory arbitration pending review of the certification.

Id.
right to judicial review of administrative action absent specific legislation providing for such review.\textsuperscript{121} However, despite the union's assertions, there has generally existed a presumption of reviewability of an administrative body's order whenever an employer's property rights may be affected.\textsuperscript{122} This presumption may be rebutted only by an \textit{affirmative} indication of legislative intent in favor of unreviewability, or for special reasons peculiar to the subject matter or circumstances involved.\textsuperscript{123} Applying this standard, the Court of Appeals concluded that neither the language of sections 715 and 716, nor common sense, suggest that voluntary hospitals should not possess the same right of judicial review of a Board certification possessed by other employers.\textsuperscript{124} On the other hand, the dissent contended that the legislature was the proper body to determine the form in which the remedy of review shall be exercised, and that in this instance, since the legislature had not mandated that judicial review be made available, the determination of a representative unit rested solely within the jurisdiction of the Board.\textsuperscript{125} However, acceptance of this hypothesis necessarily attaches to the Board's certification the characteristics of a final order, thus obviating the traditional objection to judicial review, \textit{i.e.}, the interlocutory nature of the decree.

Following the decision in \textit{Long Island College Hospital}, the legislature reconciled the hospitals' right to judicial review with the equally just demands of employees for prompt bargaining ... by requiring that judicial review, on the one hand, and bargaining, on the other hand, proceed simultaneously rather than consecutively. ...  

\textsuperscript{121} Brief for Local 1199 as Amicus Curiae at 18, 25.

\textsuperscript{122} For a discussion of why an employer may have the Labor Board's order to bargain collectively judicially reviewed, see Jaffe, \textit{The Right To Judicial Review} (pts. 1-2), 71 \textsc{Harv. L. Rev.} 401, 420-21, 800, 801-03 (1958).

\textsuperscript{123} See 4 Davis, \textsc{Administrative Law} § 28.07, at 30-32 (Supp. 1965).

\textsuperscript{124} 23 \textsc{N.Y.2d} at 36-37, 241 \textsc{N.E.2d} at 896, 294 \textsc{N.Y.S.2d} at 703. Judicial review of final agency action will not be denied to an "aggrieved party" unless there is persuasive indicia that such was the purpose of the legislation, \textit{citing} Abbot Labs v. Gardner, 387 \textsc{U.S.} 136, 140 (1967); Jeanpierre v. Arbury, 4 \textsc{N.Y.2d} 238, 240, 149 \textsc{N.E.2d} 882, 883, 173 \textsc{N.Y.S.2d} 597, 598 (1958). Since Board certifications are generally subject to judicial review in a subsequent unfair labor practice proceeding, the presumption in favor of reviewability should attach in favor of the employer-hospital.

\textsuperscript{125} 23 \textsc{N.Y.2d} at 43, 241 \textsc{N.E.2d} at 901, 294 \textsc{N.Y.S.2d} at 709 (dissenting opinion). Judge Burke analogized the provisions of section 716 with those of the Railway Labor Act, 45 \textsc{U.S.C.} §§ 151-58 (1964), which authorize the National Mediation Board to investigate disputes concerning representation, to designate those affected thereby, to determine the choice of the employees, and to certify the proper representative. The certifications granted thereunder need not be judicially reviewed. \textit{See, e.g.}, Brotherhood of Ry. & Steamship Clerks v. Association for Benefit of Non-Contract Employees, 380 \textsc{U.S.} 650 (1965); Switchman's Union v. National Mediation Bd., 320 \textsc{U.S.} 297 (1943); United States v. Feaster, 376 \textsc{F.2d} 147 (5th Cir. 1967); Ruby v. American Airlines, 323 \textsc{F.2d} 248 (2d Cir. 1963).
The bill protects the hospitals' right to judicial review by requiring that the union file an unfair practice charge before it can have access to compulsory fact-finding and arbitration under section 716.128

The amendment had its genesis in the Court's constitutional concern with a procedure which would "affect property rights through compulsory arbitration, prior to full judicial review of the hospitals' challenge to the certification of representatives."127

CURING THE MALADY

As a result of the restrictive interpretation of section 716 in Long Island College Hospital, the judiciary will be compelled to adjudicate yet another perplexing problem. The issue which must be resolved is whether the unions which previously attempted to invoke section 716's compulsory arbitration provisions in lieu of filing the traditional refusal to bargain charges, will now, as a result of the delay, be barred from invoking the "traditional" procedures.

The first case to deal with this issue was SLRB v. Wyckoff Heights Hospital.128 Local 1199 had invoked the procedures of section 716 to resolve a representation dispute similar to that involved in Long Island College Hospital. Following the decision of the Court of Appeals limiting the disputes encompassed by section 716 to economic matters, the union filed an unfair practice charge alleging an unlawful refusal to bargain.129 In the hearing before the trial examiner, the hospital stated that it would neither recognize nor bargain with Local 1199, but "would seek judicial review with respect to the designated bargaining unit."130 Since no defenses were raised by the hospital, the Board ordered the employer "to cease and desist from refusing to bargain with the Union."131 In the subsequent enforcement proceeding the

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126 Memorandum at 2437.
127 Id. at 2436-37. See N.Y. LABOR LAW § 716(8) (McKinney Supp. 1969), amending § 716 (McKinney 1965). Additionally, the right to judicial review is perhaps necessary to preclude an abuse of discretion in view of the fact that members of the Board are appointed. The New York State Labor Relations Board is composed of three members appointed by the governor with the advice and consent of the Senate. The term of office is six years, and the governor is empowered to remove a member only for inefficiency, neglect of duty, misconduct or malfeasance. N.Y. LABOR LAW § 702 (McKinney 1965).

Such a policy would correspond to the practice of the federal courts which have on several occasions reversed, or refused to enforce, unit determinations of the National Labor Relations Board. See, e.g., NLRB v. WGOK, Inc., 384 F.2d 500 (5th Cir. 1967); NLRB v. Tallahassee Coca-Cola Bottling Co., 381 F.2d 863 (5th Cir. 1967); NLRB v. Cumberland Farms, Inc., 370 F.2d 54 (1st Cir. 1966); NLRB v. KVP Sutherland Paper Co., 356 F.2d 671 (6th Cir. 1966); NLRB v. Frisch's Big Boy III-Mar, Inc., 356 F.2d 895 (7th Cir. 1966).

129 Id. at 287, 298 N.Y.S.2d at 580.
130 Id. at 286-87, 298 N.Y.S.2d at 580.
131 Id. at 287, 298 N.Y.S.2d at 580.
hospital cross-moved to set the order aside on several grounds: (a) that a unit consisting solely of pharmacists was not an appropriate unit; (b) laches; and (c) that there were changed circumstances affecting the validity of the order. The court, in enforcing the order, held pursuant to section 707(2) that the hospital was barred from asserting objections it had not urged before the Board in the unfair labor practice proceeding. Despite this holding, the court, in dicta, dealt with the various defenses urged by the hospital. It stated that in cases where the administrative agency had made an initial determination regarding the appropriateness of a unit, the function of the court was limited to an examination of whether the Board’s decision had “warrant in the record and a reasonable basis in law.” Applying this test, a unit limited to pharmacists by the Board would receive judicial approval and be considered appropriate for purposes of enforcement. Justice Swartzwald also stated that the defense of laches, based on the union’s delay in filing the charge, did not constitute sufficient cause for refusing an enforcement order. Since the SLRA does not contain a six-month statute of limitations as provided in the NLRA, the court concluded that in the absence thereof, it lacked the power to create and enforce such a limitation. The court also reiterated the well-established rule that changed circumstances and events occurring subsequent to the unfair labor practice are immaterial in an application to the court to enforce a Board order.

This dicta is relevant to the disposition of a controversy involving Roosevelt Hospital and Local 144. While the hospital participated in the arbitration ordered pursuant to section 716, it also preserved its right to challenge the unit certification pending the disposition of Long Island College Hospital. The subsequent decision by the Court of Appeals rendered the arbitration agreement awarded in Roosevelt Hospi-

132 The provision provides in pertinent part that:
no objection that has not been urged before the board . . . shall be considered by the court, unless the failure . . . to urge such objection shall be excused because of extraordinary circumstances. . . .
N.Y. LABOR LAW § 707(2) (McKinney 1965) (emphasis added). The court added that the reliance by the hospital on the opinion of the Board’s attorney that the assertion of the defenses before the Board would be futile, did not constitute “extraordinary circumstances.”

59 Misc. 2d at 287, 298 N.Y.S.2d at 580.


134 Id. at 289, 298 N.Y.S.2d at 582. The NLRA provides that no complaint shall issue based upon any unfair labor practice charge occurring more than six months prior to the filing of the charge. 29 U.S.C. § 160(b) (1964).


tal a nullity, since the Industrial Commissioner lacked jurisdiction to deal with the controversy until the representative status of the union had been judicially approved.137 The union thereafter filed an unfair labor practice charge with the Board in order both to establish itself as the exclusive bargaining representative of the hospital’s employees and to fulfill the conditions precedent to the invocation of section 716. The Board, following the rationale of Wyckoff Heights Hospital, certified the union and ordered Roosevelt Hospital to cease and desist from refusing to bargain collectively with it.137a If this certification is upheld by the courts (and in view of the limited judicial scrutiny indicated in Wyckoff Heights Hospital it appears that it will be) the hospital will be required to bargain with the union. Although such a “dispute” would be within the compulsory arbitration procedures of section 716, to require submission of the dispute to a second arbitration involving essentially the same issues previously arbitrated, would only result in further delay.138 If such stalling tactics are utilized by the hospital, it must remain aware of the resultant inherent possibility of a strike. It is suggested that the better solution would be commencement of negotiations with the terms of the prior award as the initial proposal, or, at least, the acceptance of this prior package.

THE CONSTITUTIONAL STATUS OF SECTION 716

Although the controversial provisions of section 716 withstood constitutional attack by the hospitals in the lower courts,139 the Court

137 As a result of the decision in Long Island College Hospital, the union’s petition to confirm the arbitration award was dismissed. For a discussion of this dismissal see Roosevelt Hosp., 52 S.L.R.B. No. 86 (1969).


138 Under the recent amendments expediting review procedures in this area, the resultant delay should be negligible. Section 716(6)(a) expedites review in the following manner:

A petition under section seven hundred seven of this article involving a non-profitmaking hospital or residential care center shall be filed directly with the appellate division of the supreme court in the department embracing the specified supreme court, and shall be heard upon the certified transcript of the record in the proceeding before the board, without requirement of printing. Such petition shall be heard in a summary manner and have precedence over all other cases in such court. An appeal may be taken to the court of appeals in the same manner and subject to the same limitations not inconsistent herewith as is now provided in the civil practice law and rules and a preference shall be granted in the hearing thereof on motion of any party thereto.


By eliminating the necessity of initial review by the supreme court and providing for direct review as a priority matter, by the Appellate Division, [the procedure conforms] to the procedure used in Workmen’s Compensation cases and [is] comparable to the Federal practice providing review by the Circuit Court of Appeal, rather than the District Courts, of unfair practice orders of the National Labor Relations Board.

Memorandum at 2437.

139 Prior to the decision by the Court of Appeals, both Long Island College Hospital
of Appeals' interpretation in *Long Island College Hospital* raised serious doubts concerning its vulnerability to an assault by the unions. The main assertions by the opponents of the statute concerned: (1) an improper delegation of power by the legislature; (2) an absence of adequate standards to guide the administrators of the statute's provisions; (3) a denial of equal protection of the laws; and (4) an improper restraint of the right to strike and picket.

A constitutional attack premised upon an improper delegation of power to an administrative body would be entirely untenable at this time. The "problem" of adequate standards can also be summarily dismissed in view of the recent inclusion of specific standards to guide the fact-finders and arbitrators appointed pursuant to the statute.

and the Greater New York Hospital Association challenged the statute's constitutionality. See Briefs for Plaintiff-Appellant I and II; Brief on Behalf of Greater New York Hosp. Ass'n, Inc. as Amicus Curiae.

140 Local 144 filed a Jurisdictional Statement with the Supreme Court of the United States seeking an appeal. However, the Court dismissed the petition for want of a properly presented federal question. — U.S. — (1969).

Another constitutional problem would arise if the dissent's interpretation of "disputes" were adopted. Absent a final determination of a group's representative status, section 716 could be invoked by a minority union to obtain mediation, fact-finding and arbitration. The arbitration board, in order to make a meaningful award respecting the demands of a minority group, would necessarily be required to determine the appropriate unit to which wages, hours, union security, seniority, and other economic matters should be made applicable. An award based upon such a unit determination would be rendered in a bilateral arbitration proceeding, absent other essential and necessary parties (other employees and unions) having a vital interest in such an award, and would give rise to serious questions of due process. Indeed, the Court itself recognized this inherent danger. 23 N.Y.2d at 37, 241 N.E.2d at 897, 294 N.Y.S.2d at 704.


The fact-finders and arbitrators appointed pursuant to subdivision three of this section may consider the following standards in arriving at a final arbitration decision in disputes referred to them:

- (a) the interest and welfare of the public;
- (b) changes in the cost of living as they affect employees' purchasing power;
- (c) comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceedings, and the wages, hours and conditions of employment of employees doing the same, similar or comparable work or work requiring the same, similar or comparable skills and expenditures of energy and effort, giving consideration to such factors as are peculiar to the industry involved;
- (d) comparison of wages, hours and conditions of employment as reflected in non-profitmaking hospitals and residential care centers in other comparable areas;
- (e) the security and tenure of employment with due regard for the effect of technological changes thereon as well as the effect of any unique skills, required training, other attributes developed in the industry and required for the job;
While the standards established by the legislature in the amended section 716 are admittedly broad, this discretion was necessary to meet the needs of an area in which flexibility and adaptability are essential.\footnote{A successful attack premised on these theories is highly unlikely in view of the landmark decision sustaining §§ 179.35-59 of the Minnesota Labor Relations Act, the model for the 1963 amendments. Fairview Hosp. Ass'n v. Public Bldg. Serv. Employees Union, Local 113, 241 Minn. 523, 64 N.W.2d 16 (1954). The court, in a well-reasoned opinion, upheld the validity of the statute by drawing administrative guidelines from a section of the Act which recited the state's public policy in the area of labor relations.}

The Court of Appeals' decision, however, does raise serious questions in view of the equal protection clause of the fourteenth amendment. The issue presented is whether employees of voluntary hospitals are denied equal protection of the laws because of the restraint placed upon them by the no-strike and compulsory arbitration provisions of the SLRA, while employees in proprietary hospitals are neither restrained from striking, nor compelled to submit to compulsory arbitration.\footnote{A similar argument was made by the employer-hospital in Park Ave. Clinical Hosp. v. Kramer, 48 Misc. 2d 826, 266 N.Y.S.2d 147 (Sup. Ct. Monroe County 1966). The hospital contended that the sections of the SLRA in question were unconstitutional since charitable hospitals are the only class of employers subject to them, that the employer is subjected to a law prohibiting strikes, picketing and lockouts and providing for compulsory arbitration, while profitmaking hospitals were excluded, and as a result, it is denied the equal protection guaranteed by both federal and state constitutions. Special term rejected this}

This issue necessarily requires a brief examination of the legislature's power to establish statutory distinctions.

\begin{itemize}
\item [(f)] economic factors of the respective parties which are relevant to the arbitration decision;
\item [(g)] such other factors not confined to the foregoing which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining arbitration or otherwise between the parties or in the industry.
\end{itemize}

\textit{See} Mount St. Mary's Hosp. v. Catherwood, — App. Div. 2d —, 305 N.Y.S.2d 143 (4th Dept 1969), where the court rejected a constitutional attack on section 716 based upon the absence of sufficient standards. The inclusion of subsection (e) could justify a limitation of section 707(2)'s professional proviso, since these employees' interests would not necessarily have to be sacrificed if they were merged into a larger unit.

Even absent these new guidelines, both federal and New York law allowed the judiciary to "read in" guidelines in order to sustain the validity of an enabling act. In In re Lipsett v. Gillette, 12 N.Y.2d 162, 187 N.E.2d 782, 227 N.Y.S.2d 326 (1962), the New York Court of Appeals sustained the validity of an ordinance authorizing a city manager to recognize an appropriate unit, although the statute contained no guidelines or standards to guide the official, stating that a requirement of fairness and reasonableness should be implied. The Supreme Court of the United States has applied a similar procedure in sustaining federal statutes. See, \textit{e.g.}, NLRB v. Radio Broadcasters, Local 1212, 364 U.S. 573 (1960); Lichter \textit{d.b.a.} S. Fireproofing Co. v. United States, 334 U.S. 742 (1948); Fahay \textit{v.} Mallonee, 332 U.S. 245 (1947). The federal approach was clearly stated in Brotherhood of Locomotive Firemen & Enginemen \textit{v.} Chicago \& Q. R.R., 225 F. Supp. 11, 22 (D.D.C. 1964), wherein the court held that guidelines need not be defined with the accuracy and precision of a mathematical formula which can be applied automatically. . . . It is sufficient if Congress indicates a general criterion or an aim to serve as a guide to the administrative agency.

For a direct attack upon the legislature's initial omission of guidelines, see Reilley, \textit{supra} note 1, at 485-89.
While the legislature may create statutory classifications, the power cannot be exercised arbitrarily, i.e., without a reasonable basis. Although the courts have previously upheld a legislative classification between proprietary and voluntary hospitals, for both licensing and tax purposes, a distinction between the right of apparently similarly situated employees to strike might appear, at first blush, to be arbitrary and capricious. However, courts have recognized "that a state cannot function without classifying its citizens for various purposes and treating some differently from others." And, one could cogently argue that the public nature of the services rendered by these institutions adequately distinguishes them from other industries, while their charitable nature provides a sufficient basis for isolating them from proprietary hospitals.

The statute could also be upheld by reliance upon the "under-inclusion" theory of equal protection. This doctrine authorizes legislation which "benefits or burdens persons in a manner that furthers a legitimate public purpose but does not confer this same benefit or place this same burden on others who are similarly situated." Accordingly, the Supreme Court has, in many instances, repulsed an equal protection challenge to a statutory scheme of this type on the theory that "the legislature is free to remedy parts of a mischief or to recognize degrees of evil and to strike at the harm where it thinks it most acute." This apparent inequity can be justified on two grounds. First, administrative necessity may limit what a state can accomplish.

145 Id. at 1084.
147 Id. The Supreme Court has often stated that regulatory legislation need not extend to all classes it could properly reach. See, e.g., Williamson v. Lee Optical, Inc., 348 U.S. 483 (1954); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Mutual Loan Co. v. Martell, 222 U.S. 225 (1911). Indeed, the Court in the Williamson case limited the prohibition of the equal protection clause to "invidious discrimination." 348 U.S. at 489.
To demand that a state either solve all aspects of a particular problem, or offer no solution at all, might preclude a gradual legislative attack upon an apparent evil. Secondly, requiring expanded coverage of an experimental policy might severely limit the imagination of the legislature.\textsuperscript{161} A toleration of genuine under-inclusion can "liberate the decision maker, whether legislature or court, from the constraint of wholly principled decision making."\textsuperscript{162} Thus, section 716's prohibition of strikes and imposition of compulsory arbitration may be regarded as a gradual or piecemeal attempt, both desirable and legitimate, to prevent all work stoppages harmful to the public interest.

As a result of the Court's decision, the statute's suspension of the "right"\textsuperscript{163} to strike may also be constitutionally suspect.\textsuperscript{164} Labor realized at an early date that an employee's unitary prostration could be converted into might through coalition. In combination, they possessed "the ultimate sanction that gives meaning to the bargaining process"\textsuperscript{156} — the strike. The implementation of this weapon is no longer regarded as an unlawful conspiracy directed at injuring the employer's business.\textsuperscript{158} Instead, it is arguable that the freedom to strike is constitutionally protected by the fifth and fourteenth amendments.\textsuperscript{157} One commentator has contended that the right to suspend services is

surely an exercise of "liberty" in the constitutional sense; and although the point is not clear on the decisions, the concept seems broad enough to include freedom of association. . . . A constitution which assures the owner of property an opportunity to obtain a reasonable return on his capital must recognize the

\textsuperscript{161} See Developments in the Law, supra note 148, at 1085.
\textsuperscript{162} Id. at 1086.
\textsuperscript{163} It is not clear whether this "right" is a statutory, constitutional or common-law right. In the Fairview Hospital Association case, the Minnesota Supreme Court reasoned that the right of employees to withdraw their services in an effort to secure various demands was "a common-law right or remedy, a workman's means of protecting his occupation. . . ." 241 Minn. at 535, 64 N.W.2d at 25. Professor Cox, on the other hand, has asserted that the "right" to strike is constitutionally protected under the fifth and fourteenth amendments. Cox, Strikes, Picketing and the Constitution, 4 Vand. L. Rev. 574, 579-81 (1951), Another commentator, however, while agreeing that such a "right" might exist in the abstract, explicitly states that it is not constitutionally based. Herlong, Transportation Strikes: A Proposal for Corrective Legislation, 36 Fordham L. Rev. 175, 187 (1967).
\textsuperscript{164} For a state constitutional attack, see Reilley, supra note 1. Mr. Reilley contends that the New York State Constitution specifically guarantees the right of employees to bargain collectively, N.Y. Const. art. 1, § 17, and since the right to strike is concomitant to this right, it cannot be abrogated by mere legislative edict.
\textsuperscript{158} Sigal, National Emergency Strikes and Public Interest, 27 N.C.L. Rev. 218, 216 (1949).
\textsuperscript{157} People v. Melvin, 2 Wheeler's Crim. Cases 262 (1810).
\textsuperscript{154} See Cox, supra note 153, at 579-81.
worker's interest in the conditions under which he labors and the price he receives for his work.\textsuperscript{168}

Certainly, an employee's ability to secure increased wages and more favorable working conditions in the industrial organization of 1969 necessitates "association and collective bargaining, backed by freedom to strike."\textsuperscript{169} Admittedly, however, the right to strike is not absolute, and where there exists a legitimate state interest in maintaining the continued operation of an essential service, it may be suspended.\textsuperscript{160} Yet, it is submitted that when the legislature undertakes the imposition of such a restriction, it must provide the employees affected with an adequate alternative.\textsuperscript{161} Although it prima facie appears that compulsory arbitration provides the requisite reasonable alternative,\textsuperscript{162} \textit{Long Island College Hospital} raised doubts concerning the adequacy of the alternative. Since the compulsory binding arbitration authorized by section 716 was not operative absent a "dispute" within the meaning of that section, it would have been possible for a hospital to compel a union, certified by the Board, and clearly the proper representative, to prosecute an unfair labor practice charge against the hospital prior to the implementation of that section. This could have resulted in an unjustifiable delay of over two years, causing irreparable harm to both the individual employees and the union. During the interim the organizational efforts of the union could be negated since the workers understandably lose confidence in a Local which will not be bargaining for them in the near future.\textsuperscript{163} Indeed, one striking union leader had already asserted that the delays inherent in the statutory framework caused avoidance of the compulsory arbitration procedures.\textsuperscript{164} Although

\textsuperscript{168} Id. at 579-80.

\textsuperscript{169} Id. at 580.


\textsuperscript{161} In the \textit{Fairview Hospital Association} case, the Minnesota Supreme Court characterized a suspension of this "right" as a "taking" of property within the fourteenth amendment necessitating an "adequate substitute remedy" to satisfy the demands of due process. 241 Minn. at 533-41, 64 N.W.2d at 24-26. Professor Cox also requires satisfaction of the demands of substantive due process, but applies a balancing test to determine the validity of the suspension. Cox, \textit{supra} note 153, at 581.

\textsuperscript{162} Professor Cox himself asserts that the compulsory arbitration decisions are "sound enough on the 'due process' issue," referring to various state court cases sustaining state laws prohibiting strikes and providing for compulsory arbitration in the public utilities area. Cox, \textit{supra} note 153, at 581-82, \textit{citing} Wisconsin Employment Relations Bd. v. Amalgamated Ass'n, 257 Wis. 48, 42 N.W.2d 471 (1950), \textit{rev'd on other grounds}, 340 U.S. 383 (1951); New Jersey Bell Tel. Co. v. Communications Workers of America, 5 N.J. 354, 75 A.2d 721 (1950).


\textsuperscript{164} N.Y. Times, Jan. 14, 1969, at 44, cols. 4-5.
the Court of Appeals, in an attempt to exonerate the statute, attributed the delay in the instant case to the union, it remained clear that the provisions of section 716 were totally unacceptable to the unions. Therefore, in order to assure "that the newly certified union [would] ... be able to commence bargaining without delay," the legislature amended section 716 to allow unions to invoke the fact-finding, and/or compulsory arbitration procedures available pursuant to the section upon filing a refusal to bargain charge with the Board. It is submitted that the removal of the inherent delay restores the appropriateness of the substitute and insures the constitutionality of the provision against an assault on this ground.

Prior to its amendment, the statute appeared most vulnerable to an attack based upon an improper limitation of free speech. The issue, as presented by the union, was whether a state [may] constitutionally prohibit employees of voluntary hospitals from ... picketing or effectively publicizing their disputes with their employers, and require them instead to submit to fact-finding or compulsory arbitration ... even though [such procedures] may be deferred for a period of years from the onset of the dispute?

The Supreme Court has held that peaceful picketing is protected against state action by the first and fourteenth amendments. This

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165 Memorandum at 2435.

Where the validity of a certification of representatives issued by the state labor relations board has been questioned by a refusal to bargain by a non-profit-making hospital or a residential care center, the provisions of subdivision three of this section pertaining to fact-finding and arbitration shall not apply unless and until an unfair labor practice charge for refusal to bargain has been filed with the state labor relations board. If such unfair labor practice charge has been filed, (1) no application made pursuant to section seventy-five hundred three of the civil practice law and rules, or otherwise, shall be granted to stay fact-finding or arbitration under this section; (2) the court shall consolidate the petitions and applications filed pursuant to subdivisions six-a and six-b of this section; and (3) no arbitration award made pursuant to this subdivision shall become effective until there has been a final determination that the labor organization has the right to exclusive representation of the employees in the unit with respect to which such award was made, pursuant to section seven hundred five and seven hundred seven of this article, provided that nothing herein shall be interpreted to limit the discretion of the arbitrators to make such award retroactive.

Id. (emphasis added).
167 Jurisdictional Statement to the Supreme Court of the United States by Local 144 at 4.
168 Cox, supra note 158, at 591-602, and cases discussed therein. Again however, it is generally conceded that this right is not absolute, e.g., id.; Cox, supra note 160, at 26. It is interesting to note that the corresponding sections of the Minnesota act do not contain this prohibition, MINN. STAT. ANN. §§ 179.35-39 (1947). Also, under New York's common law, peaceful picketing was permitted. See, e.g., Prospect Heights Hosp., Inc. v. Davis, 26 Misc. 2d 762, 201 N.Y.S.2d 890 (1960); Society of New York Hosp. v. Hanson, 185 Misc.
protection resulted from an assimilation of picketing into the first amendment freedom of speech guarantee.169 Thus, in enacting the ban on picketing by employees of voluntary hospitals, the legislature attempted to balance this suspension by enacting section 713. This section provides that hospital employees, although denied the right to strike and picket, may truthfully advise the public that a grievance or dispute, as defined in section 716, exists at their hospital.170 The distinguished Fact-Finding Commission anticipated the potential vice which would result from a limited interpretation of the term “dispute”:

If a hospital’s refusal to negotiate with a certified union does not give rise to a “dispute” within . . . Section 716, a serious problem arises under Section 713’s saving clause . . . [This definition] read in light of Section 713, would seem to mean that an employer’s refusal to negotiate with a certified union may not be publicized. The constitutional difficulty posed by such an interpretation is obvious.171

The Court of Appeals’ interpretation literally required the hospital employees to “stand mute” until the proceedings required as “conditions precedent” to the invocation of section 716 were fulfilled.172 Now, however, the amendments provide that the refusal to bargain proceedings progress concurrently with, rather than precedent to, a section 716 fact-finding and arbitration,173 thus eliminating a constitutionally obnoxious stalling defect within the statutory framework.

II. COMPULSORY ARBITRATION

The Results from the Laboratory

Despite the statutory prohibitions and procedures, the evil persists. It is, of course, true that voluntary hospital employees no longer

937, 59 N.Y.S.2d 91, aff’d, 272 App. Div. 978, 73 N.Y.S.2d 835 (1947). In the Hanson case the court recognized picketing’s constitutional free speech aspects and refused to enjoin its peaceful continuance. 185 Misc. at 945, 59 N.Y.S.2d at 91.

It is interesting to note that picketing, as a permissible method of attaining legitimate objectives, is not as historically rooted as the “right” to strike. For a discussion of the judiciary’s attitude towards picketing as an “inherently coercive and unlawful” device, regardless of its violent or peaceful surroundings, see Cox, supra note 153, at 591-92.

169 In Thornhill v. Alabama, 310 U.S. 80 (1940), the Supreme Court struck down an Alabama statute because of its broad ban on picketing. The Court stressed the speech aspects of this practice and its first amendment protections.

170 N.Y. LABOR LAW § 713 (McKinney 1965).

171 Jurisdictional Statement to the Supreme Court of the United States by Local 144 at 14.

172 23 N.Y.2d at 38, 141 N.E.2d at 898, 294 N.Y.S.2d at 705.

are compelled to subsist on substandard wages or work under intolerable conditions. However, during section 716's brief history, threats of strikes, numerous minor work stoppages, and several prolonged strikes have continued to plague voluntary hospitals. The initial bitterness existing between the hospitals and their employees, in addition to engulfing the state's most influential newspaper, has disrupted relations between various hospitals. Additionally, a number of voluntary hospital employees have been compelled to seek welfare assistance. It is extremely difficult, however, to place censure upon one party. The unions, to be sure, have ignored injunctions and failed to utilize the procedures of section 716. On the other hand, the hospitals have continued to frustrate good faith bargaining by employing diversionary tactics. In any event, it is clear that compulsory arbitration has not been given a sufficient opportunity to establish its effectiveness. However, in view of the recent amendments removing the defects inherent within the framework, it is submitted that increased utilization of the compulsory procedures should be forthcoming which will aptly illustrate the utility of this conciliation device.

175 See, e.g., id., July 2, 1968, at 1, col. 2, at 20, cols. 4-7; id., Feb. 2, 1968, at 22, col. 2.
176 See, e.g., id., Feb. 20, 1969, at 93, col. 6 (Adelphi Hosp.); id., Jan. 7, 1969, at 19, col. 5 (Wyckoff Heights Hosp.); id., July 19, 1966, at 1, col. 5, at 23, cols. 3-6 (Montefiore Hosp.); id., July 16, 1966, at 1, col. 2, at 11, cols. 4-5 (Beth Israel Hosp.); id., July 15, 1966, at 1, col. 6, at 17, cols. 3-4 (Long Island Jewish Hosp.); id. (Queens General Hosp.); id. (Mt. Sinai Hosp.). Yet, the Memorandum of the State Executive Department labelled the experience under section 716 “good.” Memorandum at 2486.
177 In an editorial during the 1966 strikes, the Times labeled these work stoppages “immoral, illegal and indefensible.” Id., July 15, 1966, at 30, col. 1. In another such column entitled “The Hospitals Surrender,” the paper asserted that “[t]he indispensable foundation of order has been struck from under the voluntary hospitals.” Id., July 20, 1966, at 40, col. 2. Similar condemnation of the unions’ “irresponsible” action was consistent during any of these strikes based upon the parties’ failure to employ the available legal machinery.
178 Following the settlement of the 1966 strikes, Montefiore Hospital charged Mt. Sinai Hospital with a “sell out” because it was “unwilling to take the beating . . . and fight for the principle . . .” Id., July 19, 1966, at 1, col. 5, at 23, cols. 3-6.
179 In the Adelphi Hospital strike many of the strikers were compelled to request welfare assistance. Id., Feb. 20, 1969, at 93, col. 6. This same strike prompted the director of Adelphi Hospital to call the strikers “mad lunatics,” id., and also resulted in the arrest of a New York State Assemblyman who marched with the strikers, id., Feb. 22, 1969, at 59, cols. 3-4.
181 The absence of litigation under these procedures is clear indicia of this avoidance.
182 Mr. Peter Ottley, President of Local 144, stated in a letter to the Times that the strikes in voluntary hospitals were “caused by the intransigent attitude of the hospitals . . . and the remedies of the law [which] may be defied by a cynical employer’s maneuvering for a period of years. . . .” N.Y. Times, Jan. 14, 1969, at 44, col. 4-5.
Is Compulsory Arbitration the Answer?

The failure of section 716 to either eliminate or substantially reduce work stoppages at voluntary hospitals would seem to evidence the deficiencies of compulsory arbitration as a viable conciliation device. However, the very real dangers inherent in the strike as a vehicle for asserting collective demands categorically mandates its prohibition. Nevertheless, this prohibition need not be inordinate and only those services which directly affect the health and welfare of the


When those engaged in the collective bargaining process begin to build records instead of exploring mutual problems, both the likelihood of a solution and its value, if achieved, are substantially decreased.

Id., at 415-16. One solution suggested to alleviate this harmful result has been to limit the scope of the award to the final proposals submitted by the parties thereby compelling the disputants to "realistically appraise [their] . . . positions, and present the arbitrator with [their] . . . minimum of acceptability and maximum concession." Note, Legality and Propriety of Agreements to Arbitrate Major and Minor Disputes in Public Employment, 54 CORNELL L. REV. 129, 142 (1968), citing Howlett, Resolution of Impasses In Employee Relations In Public Education, in EMPLOYER EMPLOYEE RELATIONS IN THE PUBLIC SCHOOLS 126 (R. Doherty ed. 1967). The inflexibility intrinsic under such a system necessarily contemplates responsible participants. Does the behavior of these parties in the past warrant such confidence?

The example cited by most critics is the experience under the War Labor Board where the compulsory procedures were often implemented. However, despite the compulsory nature of the processes, the parties involved voluntarily agreed to the tribunal and the system actually was more comparable to voluntary arbitration, Updegraff, Wartime Arbitration of Labor Disputes, 29 IOWA L. REV. 328, 335-36 (1944), where frequent implementation is clearly appropriate. Therefore, Congressman Herlong of Florida has labelled this allegation "a myth contradicted . . . by experience," Herlong, supra note 153, at 185, and the New York State Joint Legislative Committee on Industrial and Labor Conditions characterized the argument as "essentially speculative" when it contemplated the implementation of section 716. Joint Leg. Comm. Rep. on Ind. & Lab. Conditions, N.Y. LEGIS. Doc. No. 38, at 65 (1963). Additionally, this objection overlooks the condition precedent to this system, i.e., the prohibition of strikes. Note, supra, at 142. Once it is conceded that such a ban is necessary, the system must provide a viable alternative or the employer could remain adamant and destroy any semblance of bargaining. Such conduct would produce the very strikes sought to be prevented.

citizenry\(^{184}\) should be insulated from the strike and its concomitant dislocations. If a ban against such strikes is to be statutorily\(^ {185}\) imposed,\(^ {186}\) the vicissitudes of industrial relations clearly demand the availability of some alternative process.\(^ {187}\) Despite existing inadequacies,

\(^{184}\) Two other areas necessitating a prohibition of strikes are police and fire departments. The recent strike by Montreal police clearly illustrates the disastrous consequences resulting from a termination of this essential service. The toll included 6 banks, over one hundred lootings, 12 fires, approximately three million dollars in property damage, and even more disturbing, the loss of 2 human lives. *Time*, Oct. 17, 1969, at 47, cols. 2-3. It should be noted, however, that the debacle in Montreal is an exception to the normal rule of stability under Canada's laudable system. See generally Arthurs, *Collective Bargaining in the Public Service of Canada: Bold Experiment or Act of Folly*, 67 Mich. L. Rev. 971 (1969); Arthurs, *Public Interest Labor Disputes In Canada: A Legislative Perspective*, 17 Buffalo L. Rev. 39 (1967).

The inherent danger in the United States is even more grave in view of the movement to organize a *national* union of policemen. *Newsweek*, Mar. 3, 1969, at 66, col. 3. Also, the International Association of Fire Fighters, an AFL-CIO affiliate, deleted a no-strike clause from its constitution in the fall of 1968. *Id.* This restrictive scope would calm another anxiety commonly expressed by labor, *i.e.*, the probability that an initial inroad by this process would result in demands for its imposition in areas not necessarily "vital." *Joint Leg. Comm. Rep. on Ind. & Lab. Conditions*, N.Y. Legis. Doc. No. 38, at 65 (1963). On the contrary, the proposed solution is limited to those areas where economic warfare is barred by overriding policy decisions. And, these categories would be statutorily restricted to the aforementioned services.

There are, however, areas where prolonged work stoppages may so injuriously affect the public interest that the necessity of their termination is raised to the plane of the abovementioned categories. For example, it is conceivable that a strike "by fuel oil delivery men during a flu epidemic in mid-winter," Anderson, *Compulsory Arbitration Under State Statutes* (preliminary outline), N.Y.U. 22d Conf. on Lab. 1 (1969), may require forced settlement. However, in this area an ad hoc compulsory arbitration solution appears most suitable. *See* Farmer, *supra* note 183, at 405-06. Representative Herlong, in discussing a similar solution on the federal level, categorizes this as the "arsenal of weapons" approach. His theory however, permits a variety of alternatives from which the President could choose rather than automatically imposing compulsory settlement. Herlong, *supra* note 193, at 178-82. See generally Note, *Ad Hoc Compulsory Arbitration Statutes: The New Device for settling National Emergency Labor Disputes*, 1968 Duke L.J. 903. Although such a remedy places the invocation decision in the discretion of a chief executive or a legislative body, both politically motivated creatures sensitive to the pressures of public opinion, the inclusion of a minimum allowable strike period, coupled with the utilization of a pre-existing statutory arbitration board, prevents any prejudicial abuse of discretion. Under such a system, disputants cannot forecast an award, or even the implementation of the compulsory procedures, thus insuring the insecurity necessary to encourage voluntary resolution of their differences. Farmer, *supra* note 183, at 406.

\(^{185}\) The vehicle by which strikes should be prohibited (statute or case law) is even open to debate. One commentator has asserted that the very enactment of prohibitory legislation spurs rather than discourages work stoppages. Morris, *Public Policy and the Law Relating to Collective Bargaining In The Public Sector*, 22 Sw. L.J. 585 (1968).


\(^{187}\) Shenton, *Compulsory Arbitration in the Public Service*, 17 Lab. L.J. 138, 147 (1966). In suggesting a method of arbitration in public employment, it has been urged that invocation powers be limited to the unions. However, since under the New York State Labor Relations Act lockouts are also prohibited, N.Y. Labor Law § 713 (McKinney 1965), both parties should have access to these procedures. *Note, supra* note 183, at 143.
compulsory arbitration would seem to be the most reasonable solution to the current dilemma.

Compulsory arbitration imports a system whereby the disputants are statutorily compelled to submit any controversy to final settlement by some third party. As an adjunct to such a process, the traditional modes of self-help, including the strike and lockout, are generally prohibited. The imposition of arbitration by operation of law is favored by various factors. Manifestly, as work stoppages are undesirable, the settlement of labor disputes is generally conducive to harmonious industrial relations. A no-strike provision, however, as the quid pro quo of industrial arbitration, would seem to mandate a degree of statutory coercion, inasmuch as absent such compulsion the disputants would be likely to avoid binding arbitration as a remedial device. Clinically, the solution appears both functional, and in view of the alternatives, most desirable.

188 Criticism has been directed at the wisdom of allowing a third party to settle disputes which the parties themselves are unable to resolve. See, e.g., Anderson, supra note 184, at 3-4; Sanders, Types of Labor Disputes and Approaches to Their Settlement, 12 LAW & CONTEMP. PROB. 211, 217 (1947). However, where the parties to a dispute involving vital services have reached a stalemate, the general welfare demands a coerced settlement.

Related to this objection of third party intervention is the argument that compulsion itself is obnoxious to our democratic society. Anderson, supra note 184, at 1. However, in pressing a policy directed at shielding the public from the harmful effects emanating from a strike, “the self interests of the unions and employers involved in the dispute pale in comparison.” Note, supra note 184, at 912. One commentator has even asserted a “productivity” argument, reasoning that where a system of compulsion supplants a system of volition, “we destroy man’s drive resulting in individual bankruptcy and national setback.” Fitzpatrick, supra note 183, at 353.


At this point it would be helpful to clarify the various disputes which may arise. “Rights” disputes generally concern disagreements regarding the interpretation of a viable contract. “Interest” disputes generally concern demands made prior to entering into an agreement, e.g., wages. The overwhelming majority of public sector strikes concern interest disputes. Williams, supra, at 589. Note, supra note 183, at 142.

180 Even Mr. Kheel admits “compulsory arbitration is the only logical, if not practical, alternative. It does provide, at least in theory, for a ‘final’ solution of conflicts when an impasse is reached.” Kheel, supra note 183, at 937.

181 The closest analogous area to the system under consideration is the public service. The experience there however is unrewarding. The Taylor Law (Public Employee’s Fair Employment Act), N.Y. CIV. SERV. LAW §§ 200-12 (McKinney Supp. 1966), and its dispute settlement machinery have “relegated [the Act] like the corresponding provisions of Condon-Wadlin and like ‘prohibition’ under the Volstead Act, to the assemblage of laws which have been more honored in their breach than in their observance.” Morris, supra note 185, at 586. For a survey of the recent outbreak of strikes in the public sector, see TIME, Mar. 11, 1968, at 34.

Although this area is beyond the scope of this note, the attempt to enforce a no-strike provision supplies a sufficient nexus to analogize. In an attempt to secure compliance, the legislature has adopted the practice of imposing stiff penalties upon the recalcitrant union and its individual members. The Republican leaders in the legislature have recently,
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Despite such clinical plaudits, certain adjustments within the SLRA are required to insure maximum compliance with its procedures. Voluntary settlement should be encouraged at the expense of compulsory arbitration. Indeed, third party settlement should be discouraged where voluntary settlement remains available.\(^{103}\) Accordingly, as a fiscal burden, costs should be assessed among those disputants who refuse to resolve their differences voluntarily. As an additional sanction, awards should be adjusted to reflect intransigent attitudes. Positively, however, complete confidence in the equities of the system must be encouraged.\(^{104}\) The legislature is to be commended for its recent adjustments in the procedures of the Act, eliminating delay (inherent under Long Island College Hospital) in favor of expeditious settlement of all disputes.\(^{105}\) The availability of retroactive application of an order\(^{106}\) should serve to discourage bad faith delaying tactics.

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\(^{103}\) “with full cooperation from the Governor's office—put the whip to the G.O.P. majority to force passage of a hodgepodge measure . . . with Draconian new penalties against individual strikers and unions.” N.Y. Times, Mar. 11, 1969, at 46, col. 2. The punitive mood reflected by the legislature merely repeats the errors which made the Condon-Wadlin Act an “unenforceable deterrent to strikes through all its twenty years on the . . . books.” Id., Mar. 4, 1969, at 42, col. 2.

The operating difficulties encountered by the Taylor Law in its application to the “power-drunk unions of municipal employees” in New York City alone, should have made it clear that to produce a workable amendment would require careful evaluation. Instead, the legislature enacted a “punitive abomination” without awaiting any report from their Select Committee headed by Senator Thomas Laverne, id., Mar. 11, 1969, at 46, col. 2. A statute “overweighed in the direction of penalties may give legislators an outlet for their frustration but it will never bring civil peace.” Id., Mar. 4, 1969, at 42, col. 2. The amendments permit unlimited fines against striking governmental unions, unlimited suspension of dues check-off privileges, the loss of two days’ pay per individual strike for each day on strike, and a year’s probation with loss of job tenure. N.Y. Civil Serv. Laws §§ 200-12 (McKinney Supp. 1969), as amended, Laws of New York, 192d Sess., ch. 24, §§ 1-8 (McKinney 1969).

Joseph Zaretzki, State Senate minority leader, categorized the amendments as “a union-busting bill . . . the sole intent [of which] is to bust a union which cannot get justice from government.” N.Y. Times, Mar. 8, 1969, at 1, col. 4, at 13, cols. 1-2. Union officials were even more critical, classifying the measures as “‘repressive’ and conducive to delays and frustrations in future negotiations. . . .” Id., Mar. 9, 1969, at 1, col. 2, at 65, cols. 3-4. However, not all the comment has been so critical. See, e.g., Assembly Majority Leader John E. Kingston’s laudatory comments on the effect of the stiffer penalties, Newsday, Sept. 9, 1969, at 28, cols. 1-2.

Although seizure has been suggested as a solution, Herlong, supra note 153, at 177, this device merely provides a temporary solution following an unlawful strike. Id. at 178. A labor court, on the other hand, e.g., Fleming, The Labor Court Idea, 65 Mich. L. Rev. 1551 (1967); Sanders, supra note 188, at 217, is essentially compulsory arbitration wherein the third party role is satisfied by a judicial body rather than an arbitrator. Id.


\(^{105}\) “Nothing herein shall be interpreted to limit the discretion of the arbitrators to make such award retroactive.” Id. § 716(8)(3).

Yet, it is submitted that an additional amendment is needed to solidify the confidence already implanted, *i.e.*, the appointment of a permanent arbitration board with life tenure. Such a body would not only remove political pressures, but would also provide that requisite degree of expertise essential to the just and expeditious settlement of all disputes. A competent arbitrator must necessarily "disabuse the mind of the illusion of a David (the worker) versus Goliath (the employer) situation." In most commercial cases, the employer is merely the conduit of the expenses assessed, since the consumer, in the final analysis, absorbs all the costs. The situation in voluntary hospitals, however, involves far more complex considerations often requiring expert scrutiny:

In the first place, there is the rather fundamental difference in their economics. A nonprofit institution has no true proprietors, no profit and makes no distribution to owners. By and large such a hospital spends whatever it takes in and often spends more. . . . Thus the issue in bargaining for a voluntary hospital is essentially one of distributing limited resources not between operating expenses and the rewards of ownership, but among various conflicting potential operating expenses. . . . [W]ages and benefits for one group . . . compete as a claim on income with the various things which the hospital wants or needs to operate . . . and with wages and benefits for other employees.

Hopefully, this further equitable treatment would discourage the unions' historical disregard of the legal processes, thus eliminating the necessity of enforcement sanctions. However, in view of the dynamics of industrial relations, violations are to be anticipated. And, although harsh sanctions have proven generally unavailing vis-à-vis strike prohibitions, the presence of reasonable alternatives would seem to favor the imposition of more extreme remedies upon those who chose to disregard the machinery of the Act. Indeed, under the new amendments the courts are granted a great deal of latitude in imposing sanctions on recalcitrant parties.
III. Conclusion

The public interest in preventing strikes in all hospitals is rather apparent. A suspension of services in these vital facilities truly presents a "clear and present danger" to the very lives of the state’s inhabitants. Unlike the area of public employment, the prohibition of all strikes affecting these institutions is critical. These considerations necessitate a statutory prohibition against strikes in this area, which, in turn, requires a suitable alternative to resolve labor disputes between deadlocked parties in a hospital-union controversy.

Regardless of whether section 716 represented a quid pro quo when enacted, i.e., a termination of the right to strike in exchange for binding compulsory arbitration, it has the potential to provide industrial peace in an area previously confronted with some of the most bitter and harmful strikes in New York’s history. The inclusion of a practical substitute will encourage increased reliance upon collective bargaining to settle labor disputes in this area. In order to secure compliance with the no-strike provision, it is necessary to instill in the

propriate, to restrain or enjoin any violation of the provisions of this section or section seven hundred thirteen and to grant such other and further equitable relief as may be appropriate. The provisions of section eight hundred seven of this chapter shall not apply to an action or proceeding instituted pursuant to this section or section seven hundred thirteen.

N.Y. LABOR LAW § 716(6)(c) (McKinney Supp. 1969) (emphasis added). The amendments also contain a unique provision requiring "the hospital or union to seek an injunction against a strike or lockout, respectively," and, if these parties fail to act and such action "poses a threat to the health of the community . . . the chief executive officer of the community in which the hospital is located shall seek such an injunction . . . ." Memorandum at 2436. The statute provides:

Notwithstanding the provisions of section eight hundred seven of the labor law, where it appears that there may have been a violation of section seven hundred thirteen of this article, the chief executive officer of the non-profit-making hospital or residential care center involved, or, in the case of a lockout, any affected employee or his certified representative, shall forthwith apply to the supreme court for an injunction against such violation. If such chief executive officer, or employee or his representative, fails or refuses to act as aforesaid, and if the chief executive officer of the city or village in which such hospital or center is located, or the chief executive officer of a town with respect to such hospital or center located in the area of the town outside any village therein, shall, in his discretion, determine that the violation constitutes a threat to the public health, safety and welfare of such city, village or town, as the case may be, such chief executive officer shall so advise in writing the chief legal officer of such city, village or town who shall forthwith apply to the supreme court for an injunction against such violation. If an order of the court enjoining or restraining such violation does not receive compliance, such chief executive officer, employee or his representative, or chief legal officer, as the case may be, shall forthwith apply to the supreme court to punish such violation under section seven hundred fifty of the judiciary law. As used in this paragraph, the term "chief executive officer" shall mean (i) in the case of cities, the mayor, except in those cities having a city manager, it shall mean such city manager; (ii) in the case of villages, the mayor, except in those villages having a president or manager, it shall mean such latter officer; and (iii) in the case of towns, the supervisor or presiding supervisor.


203 See discussion note 192 supra.
unions confidence in the procedures of section 716. It is possible for
the legislature to aid in this task by extending the no-strike prohibition
and binding compulsory arbitration of the 1963 amendments to the
employees of proprietary hospitals. These employees are in reality
"similarly situated," and the public interest involved is identical. How-
ever, any extension of compulsory arbitration should be accompanied
by procedures similar to those outlined herein.

Finally, it must be remembered that real progress toward labor-
management peace necessitates a bilateral equity, involving both the
public and the individual employees. It is unjust to require workers to
conduct themselves in a responsible manner during the heated times
of a labor dispute, unless a similar responsibility is imposed upon our
elected representatives. Thus, the legislature must abandon the repres-
sive attitude pervading the recent amendments to the Taylor Law,\textsuperscript{204}
and adopt a more equitable policy to insure both compliance and re-
spect for its laws.

\textsuperscript{204} Id.