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What Do Unions Want?

When New York State's Public Employee Unions Turned Down the Right to Strike

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Abstract: In a 1977 package of proposed revisions of New York State's "Taylor Law," which governs public employee labor-management relations and prohibits work stoppages, unions were offered the right to strike, while managers would have gained the right to unilaterally change contract terms at expiration. In effect, this deal would have made state labor relations more similar to bargaining in private industry. Offered an expanded ability to strike, the municipal unions instead opted for defensive stability.

Nationwide, strikes are back in the repertoire of unions. Meanwhile a few New York public employee unions have begun discussing amending the Taylor Law, which levies heavy penalties for all work stoppages and slowdowns. So it is worth examining a pertinent moment when the New York State government almost restored the right to strike.

In 1977, then-Governor Hugh Carey proposed a package of Taylor Law revisions which offered virtually all unions relief from injunctions and fines, while employers would have gained the right to unilaterally change contract terms at contract expiration. In effect, this deal would have made state labor relations more similar to bargaining in private industry. Offered an expanded ability to strike, the municipal unions instead opted for defensive stability.

The story begins with efforts by state and municipal unions to win an "agency fee" for their work in behalf of represented workers who were not members. While the Supreme Court decision *Janus v. AFSCME* recently voided agency shop provisions, in 1977

the wind was blowing in the other direction, and *Abood v. Detroit Board of Education*, upheld (but also narrowed¹) a Michigan law giving such a right to unions.

In New York State, statute revision allowing agency fees followed the *Abood* ruling by just months. That agency shop was now “legal” smoothed passage of a bill unions had been seeking for many years. Agency shop was also a sort of *quid pro quo* for the unions’ wage and benefit concessions during the NYC fiscal crisis, which had begun two years earlier.

Agency fees were thus incorporated into New York State’s “Taylor Law,” as its labor relations statutes are generally known. Of course, what is most popularly known about the Taylor Law is that it prohibits public employee strikes and other job actions. Workers can be fined a day of pay for each day (or part of a day) off the job, along with the lost day of pay for not working – hence the popular terminology of “two-for-one.” Unions also face injunctions and then fines for non-compliance. They often have been stripped for some period of time of the right to “dues check-off,” where the employer automatically deducts member dues and agency fees from paychecks and forwards them to the union.²

For decades, various public employee unions have demanded restoration of the legal right to engage in work stoppages, or (for it amounts to much the same thing) an elimination of the various penalties. Yet a look back at those 1977 revisions reveals that unions very likely had the opportunity then to regain the right to strike except in unusual circumstances.

¹ In *Abood* and subsequent cases revisiting *Abood*, the court limited agency fee to the costs of “non-political” activities, such as grievance handling and collective bargaining. The centerpiece of *Janus* was the determination that all public employee union activities are, *a priori*, political.

² The full “Taylor Law” can be found at <https://www.perb.ny.gov/taylor-law/>. For this article’s purposes, the relevant portions are found in Section 210 Prohibition of Strikes.

The context to their decision is important. By the spring of 1977, the large New York City unions had been through two tumultuous years. Rumors of fiscal problems and layoffs began in spring 1975; that summer, unions agreed to defer the raises due them in 1974-76 contract agreements; mass layoffs began in the fall. By the time those layoffs reached their apogee, the NYC public employee workforce had shrunk from 266,000 to 210,000. The 1976 contracts all imposed a wage freeze for two years (with small cost-of-living increases entirely conditional on productivity gains), and cuts in health benefits.³ This was the genesis of “pattern bargaining” in New York, where a wage and benefit costs set with one union become the norm for all.

Three strikes against these early austerity measures were notable for their ineffectiveness. During that first summer, after sanitation workers had shouted down their long-time union leader John DeLury as he outlined concessions, the union nodded and winked at a “wildcat” over initial layoffs. Those were hastily cancelled, but when a new more draconian set of layoffs was initiated several months later, the workers emotional energy to fight back was apparently spent.

That September, Albert Shanker briefly lost his fabled iron control over the United Federation of Teachers. UFT was the only major city union with an expiring contract that year. A tentative agreement was already unpopular. Then, layoffs of thousands of low-seniority teachers meant that when school opened thousands of others were transferred into those jobs in largely minority and impoverished school districts, while class sizes reached 40 and even 50 in some cases. A raucous Delegates meeting rejected the contract

³ The various cuts and concessions and the three brief strikes are discussed in Kim Phillips-Fein, *Fear City* (New York: Metropolitan Books, 2017) and Joshua Freeman, *Working Class New York* (New York: The New Press, 2001).

and sent teachers out on strike. When they returned to work a week later, they had won no relief, but were a paycheck lighter – money the City had “saved.” To rub salt in the wound, the newly created Emergency Financial Control Board initially rejected the contract Shanker had finally gotten approved, demanding the freezing of all “steps” – the routinized gradual increases in salary that reward the increased competence that comes with years of teaching experience.

A third strike over layoffs, of DC37 health workers at the City’s municipal hospitals, was even more calamitous. The strike was hastily called off after thousands of workers crossed their union’s picket lines.

What is apparent across-the-board was the crisis the unions as institutions faced. They were philosophically inclined to muddle through the crisis and hope for better days ahead, rather than wage a challenging political-ideological fight; but layoffs meant plummeting dues revenues, while concessions led to increasing unrest among their remaining members.⁴

Along with declining numbers of represented workers came an even more precipitous drop in membership. One way for disgruntled workers to express their resentment about concessions was to resign their membership. The savings – generally around 1% of salary – were small, so for workers, this action was primarily symbolic; but for the unions, the lost dues of thousands of former members added up quickly. Based on statistics published in New York’s Civil Service newspaper, *The Chief* that year, I estimate that approximately 30% of the represented workers of CSEA, the main state union, and 15-

⁴ Michael Spear, *Crisis in Urban Liberalism*, unpublished dissertation, 2005. Spear argues that, faced with a Hobson’s choice, unions opted for layoffs over more wage concessions: laid-off workers were no longer angry “members.”

20% of the workers represented by New York City's largest union, DC37, were not members.⁵

In Albany, the unions argued that they had acted as good citizens, propping up the city's finances while the banks had dumped their municipal bonds and fled, and now they needed the protection of the agency fee. If members were forced to pay effectively the same rate to the union whether a member or not, leaders would be freed from member pressure to take a more recalcitrant position against concessions.⁶ As the editor of *The Chief* stated bluntly,

another benefit, to both labor and management, is that an agency shop will help unions be more objective in dealing with employers and better able to pursue a more responsible course of action. That is particularly true during a financial crisis like the city has experienced for the past three years. Unions, even with their own financial solvency at stake agreed to no-raise contracts, wage increase deferrals and fringe benefit givebacks so the city could avoid bankruptcy and meet its payroll. The Beame administration's support of the agency shop bill was, in part, predicated on protecting the solvency of unions so they, in turn, would be strong enough to resist membership pressure for immediate gains and could concentrate instead on protecting the long-range interests of their members.... The agency shop will bring greater stability to labor-management relations and will result in more statesmanship on the part of union leaders who are free from the fear of economic blackmail by their members and the possible destruction of their unions.⁷

Early in 1977, discussion began anew in Albany on providing this protection and accelerated after the *Abood* decision.

⁵ "Agency Shop Fee Collections to Start With D.C. 37 Units," *The Chief*, August 26, 1977. The uniformed services had much higher membership rates and accordingly derived less benefit from agency fees.

⁶ Since agency shop fees may not be used for political purposes such as Albany lobbying, the agency fee should be fractionally less than member dues. In New York State, however, agency fee payers were charged the full amount of member dues and, at the end of each year, had to apply for a refund of the "political" portion of what they had paid. In practice, few did.

⁷ Frank Prial, "Union Security: Agency Shop," *The Chief*, August 12, 1977.

Meanwhile, however, Governor Hugh Carey put forward a far more ambitious revision of the Taylor Law. “After ten years of experience,” Carey announced, “the time had come to make changes in the law that guides governmental relations with its employees.” Donald Wollett, Carey’s Employee Relations Director, criticized the “overregulated” nature of public employee labor relations.⁸

Along with the agency fee (an approximation of the closed shop), Carey proposed other modifications which would have made public employee collective bargaining more akin to NLRA-NLRB private industry law. Employers would have been mandated to bargain in good faith and penalties could be imposed on them by New York State’s Public Employee Relations Board for improper practices. While strikes would have remained illegal, injunctions and contempt proceedings against unions would have been barred except when a strike threatened “substantial and irreparable injury to public health, safety or welfare.” AFSCME District Council 37, New York’s largest municipal union, thought this meant police, fire, hospitals and sewage treatment. Fines against individuals would be waived if the courts found that employer action had “provoked” a work stoppage. Today, that may seem unlikely, but in 1977, despite the Taylor Law penalties, workers often walked off their job or engaged in slowdowns when management unilaterally changed the terms of work or assigned work they deemed unsafe. DC37 reported two such incidents just that year.⁹

Carey’s proposal to eliminate the “*Triborough Doctrine*,” would have made that type of employer-initiated contractual change more likely. Since 1972, *Triborough* had barred

⁸ “Carey Proposes Nine Taylor Law Changes,” *The Chief*, March 25, 1977; Michael Rosenbaum, “Carey’s Plan to Cut Taylor Law Curbs,” *New York Post*, March 15, 1977.

⁹ Norman Adler, “Plums and Poison,” *Public Employee Press*, March 25, 1977. Since 1974, unresolved police and fire bargaining disputes had been subject to binding interest arbitration, so a mechanism – perhaps faulty – existed to resolve ongoing disputes. For a full list of all Carey’s proposals, see “Carey Proposes Nine Taylor Law Changes,” *The Chief*, March 25, 1977.

employers from unilaterally changing contract terms when a contract expired and bargaining had reached an impasse.¹⁰ In a sense, *Triborough* had become part of a quid pro quo: no precipitous action from either union or management. The necessity of bargaining to agreement had been enforced on both parties. Now Carey suggested its elimination.

Initial union response was mixed to negative. Victor Gotbaum, head of DC 37, complained that excellent proposals were coupled with “counterproductive” ones, but cautiously hoped that negotiations might purge “the anti-labor aspects.” But the Civil Service Employees Association, the largest state union, declared its “oppos[ition to] this bill as a whole. The state-wide Teachers’ Association objected to Carey’s “carrot and stick approach.”¹¹

Of course, Carey’s package did not wholly resemble its NLRA counterpart: there was less carrot. Most notably, it left penalties on workers in place where a work stoppage was union-initiated. Yet workers had struck repeatedly in the previous ten years despite this provision, and those strikes had often “paid” for themselves. Our best comparative example comes from a few years later. In 1980, New York’s transit workers struck; their municipal counterparts did not. The latter signed contracts worth 16% over two years (at a time of double-digit inflation) while transit workers won 22%. That extra money paid off the fines in less than two years.¹² What kept the municipals on the sidelines was the fear of

¹⁰ New York State Public Employee law is administered and defined by the Public Employee Relations Board, equivalent in many of its functions to the NLRB. *DC37 and Local 1396, AFSME, AFL-CIO v. Triborough Bridge and Tunnel Authority* was its ruling. 5 PERB ¶3037 (July 28, 1972), affirming, 5 PERB ¶ 4505 (1972). Subsequently, in 1982, the ruling was incorporated into the Taylor Law statute. See, “The Triborough Doctrine and Statute: A Catalyst or Hindrance to Harmonious Labor Relations?,” <http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=82098>, for a fuller discussion.

¹¹ “Controversy Starts: Carey Proposes Nine Taylor Law Changes,” *The Chief*, March 25, 1977.

¹² Marc Kagan, “An Early Challenge to the Age of Austerity and Inequality: Re-Examining New York City’s Transit Strike From the Bottom-Up,” unpublished paper, 2015.

penalties levied against the union – fines and loss of check-off.¹³ Those would have been substantially mitigated by Carey’s offer – which was, after all, the opening legislative gambit from an employer, perhaps subject to negotiation that, as DC 37 Political Director Norman Adler said, might have made the package “a more palatable offering for labor.”¹⁴

Moreover, the impact of Carey’s proposed stick was, oddly, less onerous, because, as the legislative session ground on, *Triborough’s* beneficial effects for unions were circumscribed by the NYS Court of Appeals. That spring, it ruled that “steps” and other ongoing contractual provisions which automatically raised employer costs might be eliminated by the employer after contract expiration. The value of *Triborough* to the unions – and therefore the “cost” of its elimination – was now lessened.¹⁵

Ultimately, however, the unions decided to focus their efforts solely on winning the agency shop. Carey’s package stalled; after a brief flurry of reportage in both the major media and the union press, it was MIA. Only the agency shop fee and an authorization for PERB to issue improper employer practice rulings became law.

What happened? Why did these proposals sink like a stone? It may be that the unions were unsuccessful in moving Carey off his opening offer and that 2-for-1 remained a sticking point. But more likely is that for most of the state and municipal unions, *Triborough*, even in its newly limited form, was worth more than the right to strike. That’s

¹³ Those also weighed heavily on the leadership of TWU Local 100, which went on strike only because union dissidents had temporarily seized control of the union’s Executive Board and rejected the 16% proposal. The union lost its check-off for only 4 months after its leader, John Lawe, argued to PERB that he had tried to prevent the strike. After its 2005 strike, the same union was fined \$2.5 million and lost its check-off for seventeen months.

¹⁴ Adler.

¹⁵ “The Triborough Doctrine and Statute: A Catalyst or Hindrance to Harmonious Labor Relations?,” Rather than “trade in” this now more limited right, unions worked toward a legislative solution. In 1982, the Triborough Doctrine became the “Triborough Amendment” to the Taylor Law. “Steps” were again shielded, but the price the unions paid was a provision that if a union went on strike, it lost all of its Triborough protections (along with the all the pre-existing Taylor Law strike penalties).

the opinion of Al Viani, one of Gotbaum's top aides, about DC 37's perspective. He contrasted the strike power of transit or sanitation workers to create havoc with the far more limited power of most DC 37 members – clericals, zookeepers, librarians, social workers. The trade-off, he said, wasn't worth it.¹⁶

Context matters too. Perhaps Gotbaum's attitude would have been different in the late 1960s, or even as late as 1971, when he sent his bridge tenders out on strike (leaving the draw bridges open) to try to win pension changes. But in 1977, the municipals had been through two years of brutal concessions. Viani was rightly proud of *Triborough*, which had its genesis as his idea, an improper practice charge to PERB. Though in 1975 the City had to ask its unions to defer a scheduled mid-contract raise, in 1976, *Triborough* meant the City had to negotiate concessions and work rule changes, not just unilaterally implement them. Perhaps 1977 wasn't such a good time to get rid of such a life preserver.

What about today? Keeping *Triborough* and the severe penalties for work stoppages has led to a situation in which expired contracts now stay in place for years at a time, and where working with an expired contract has become a norm. In 2011, Governor Andrew Cuomo won a three-year wage freeze and health benefit concessions from the two main state public employee unions by threatening thousands of layoffs – that threat was his “legal” way around *Triborough* protections.¹⁷

In New York City, Mayor Bloomberg demanded a similar “pattern,” but did not wield the layoff threat, perhaps believing the municipal unions might call his bluff. Under those conditions, neither side had an incentive to bargain, and, increasingly, the term-limited

¹⁶ Author's conversation with Al Viani, July 12, 2019.

¹⁷ Spear was right (see f. 3) that concessions were more dangerous to a leadership's longevity than layoffs. Workers angered about concessions ousted the leadership of the Public Employees Federation at the next union election.

Mayor seemed to lose all interest in reaching agreements. When Bill de Blasio became Mayor in January 2014, virtually every municipal contract was four or more years expired. Although for political reasons he was eager to end this stalemate, the unions found their bargaining position was weak. Their members had been working for years at the old rates, belying the notion that raises were “necessary.” Even a few percent of lump sum retroactive pay, would seem like a lot of money. de Blasio was a hero on the cheap.¹⁸

“A union which gives up the right to strike, said Stanley Aronowitz, “is no union.”¹⁹ Of course, New York State’s public employee unions did not technically give up the *ability* to strike when they walked away from Hugh Carey’s offer in 1977, as was shown by the 1980 and 2005 transit strikes. Nor can we say for sure whether their members would have better or worse off in the long run to give up *Triborough*.

Yet the rarity of public employee strikes in the years since indicates the impact of the harsh penalties, and the impact of their disinclination in 1977 to remove some of them. Moreover, the lethargy with which these unions now approach negotiations intensifies their worst bureaucratic and top-down tendencies. If the “pattern” is all that can be achieved, if the aspiration for more (or different) is so circumscribed by anti-strike law as to be almost meaningless, then the inclination toward service unionism is intensified.

Today, for the first time in decades, one New York union representing public employees – the New York State Nurses Association – is openly advocating for the abolition of the no-strike provisions of the Taylor Law. Other unions are pondering the possibility

¹⁸ Contracts varied slightly, but most workers received 10-11% raises stretched out over a seven-year contract term, with most of the years retroactive.

¹⁹ Chapter meeting, Professional Staff Congress, Graduate Center chapter, October 2015.

that the labor movement desperately needs more offensive weapons.²⁰ Yet for similar reasons as in 1977, most affected unions are ambivalent or even opposed, believing the likely loss of *Triborough* would be ruinous to efforts to hold the line against concession demands from employers. On a larger canvas, the balance of forces in this debate reflects the general reluctance of the labor movement to take risks, rationalizing policies which have led to the drip drip drip of slow decline.

We don't know yet whether the glimmers of Chicago, West Virginia, Arizona, and Los Angeles, are a false dawn or the real thing. *If* Democrats take power in Washington in 2021, and *if* the types of labor law reform that Senators Sanders and Warren are proposing could be enacted, even in part – big ifs – unions and their members will face a momentous choice. If all they really want is faster elections and stronger sanctions on employers, some changes in the NLRA might actually make it easier to win recognition without really rousing their potential members. They could coast to some uptick in numbers, and change little. Alternatively, they could wake up – or be shaken from their slumber by pressure from excited and impatient workers - and try to seize the opportunity. Then they would respond to new rules by encouraging shop floor militancy, aggressively wielding the strike weapon, building the solidarity necessary for secondary strikes, and trying to change the grievance-based culture of labor relations.

In the meantime, we can look to New York for some early signals. In 1977, the negotiations that torpedoed Carey's proposals, or similarly-framed alternatives, took place behind closed doors. Labor unions and their members would be better off today if the

²⁰ New York State Nurses Association, NYSNA 2018 Convention Approved Resolutions, "All Public Sector Nurses, Along with Other Public Sector Employees, Should Have the Legal Right to Strike," https://www.nysna.org/sites/default/files/attach/435/2018/12/convention_approved_resolutions.pdf

public employee labor movement had an open discussion, not just about the utility of *Triborough*, but whether a union that has effectively given up its right to strike (or, in the private sector, the inclination to do so), can ever be a bottom-up union, an organizing union, a real union.