

2014 Arvid Anderson Paper

Exploring the Road Ahead

“In the depth of winter, I finally learned that there was in me an invincible summer”

-Albert Camus

AFT Local 212 Holiday Greeting Card December 2014

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For those of us who have spent our lives engaged in the collective bargaining process, the passage of Act 10 in Wisconsin, virtually eliminating public sector collective bargaining for all but police, fire and transit employees, seems to be a pivotal moment in history. So as a labor lawyer, receiving the Arvid Anderson Award now may be the height of irony. But it also creates an opportunity to reflect on this history in the making.

I'd like to explore the road ahead together posing three questions. I'll provide my reflections and observations through a Wisconsin lens as a springboard for what I hope will lead to a robust discussion in which you share your thoughts on this radical shift in collective bargaining and your insights on how future labor management relations may unfold. The questions:

- 1. Is it likely that legislative measures to severely restrict or eliminate public sector collective bargaining will be adopted throughout the country?**
- 2. Are public employers likely to engage with unions absent a collective bargaining framework?**
- 3. What collective action will public employees take absent a collective bargaining framework?**

I. Is it Likely that Measures to Severely Restrict or Eliminate Public Sector Collective Bargaining Will be Adopted Throughout the Country?

In his book, *Unintimidated*,¹ Wisconsin governor Scott Walker introduces himself as a presidential candidate and identifies his move to end public sector collective bargaining as the lynchpin “reform” crucial to what he touts as Wisconsin’s economic success.² And, he sees this as the key measure other states must adopt:

The big government union bosses knew that if they did not stop our reforms in Wisconsin, the floodgates of change would open across the land. Other political leaders, emboldened by our success, would summon the courage to enact similar changes in their home states—and eventually in Washington, D.C.³

But are other states likely to follow his prescription? Let’s look at how Walker pitches his program. And also consider whether the actual consequences of his policies will become part of the debate.

One of Walker’s key themes is that collective bargaining is the enemy of good government. He says:

If we believe in local government, then the last thing we want to do is decimate the ability of local officials to effectively serve their citizens. We want local communities to keep our streets clean, keep our citizens safe, and give our children the best possible education. Collective bargaining makes those legitimate tasks much harder... Collective bargaining is the enemy of good government.⁴

This is a far cry from the vision Arvid Anderson promoted of labor management cooperation producing better services and communities. He served on Secretary of Labor Robert Reich’s task force in 1996 which produced a report showing numerous examples of public sector

¹ SCOTT WALKER & MARC THIESSEN, *UNINTIMIDATED, A GOVERNOR’S STORY AND A NATION’S CHALLENGE* (2014 edition).

² While reports of a projected deficit of more than \$2 billion for the upcoming biennium did not gain traction in the gubernatorial election, his claimed economic success is likely to receive greater scrutiny in a presidential race. “Will Wisconsin’s Finances Crush Walker’s Presidential Dreams?” Bloomberg, December 23, 2014, <http://www.bloomberg.com/politics/articles/2014-12-24/walkers-2016-dreams-clouded-by-wisconsin-finances-muni-credit>

³ UNINTIMIDATED, p. 6.

⁴ UNINTIMIDATED, pp. 23, 24.

unions playing an instrumental role in improving services and saving taxpayer dollars.⁵ Certainly, Walker's view conflicts with our own experiences, and studies of how collective bargaining and the employee involvement it encourages is critical to developing a high performing workplace.⁶

What Walker's message also obscures is the significant political consequence to ending collective bargaining and thereby weakening public sector unions. Unions have been the most organized opposition to the conservative agenda Walker and others seek to implement. That agenda includes:

- significantly reducing government investment in critical areas like education and health care
- weakening regulations designed to protect workers
- limiting voting rights of groups likely to support Democratic candidates.

In Wisconsin we can already see the impact of weakening unions who had served as a check on this agenda.⁷ Since 2011:

- Wisconsin cut spending for schools at a higher rate than any other state⁸ and refused federal Medicaid funding leaving an estimated 87,000 low wage families without access to the State's Badger Care program designed to serve this very population.⁹ At the same time the legislature expanded the voucher program, previously limited to two cities, state-wide.
- In 2013 the legislature passed harsh measures restricting eligibility for unemployment benefits without the recommendation of the Unemployment

⁵ U.S. Department of Labor, Working Together for Public Service, <http://www.dol.gov/dol/aboutdol/history/reich/reports/worktogether/toc.htm>

⁶ Martin H. Malin, *Life After Act 10?: Is There a Future for Collective Representation of Wisconsin Public Employees?*, 96 Marq.L.Rev. 623, 630-638 (2012); <http://scholarship.law.marquette.edu/mulr/vol96/iss2/7>

⁷ "In 2014 Union households voted overwhelmingly against Walker, 65% to 34% — a bigger margin than in 2010 or 2012. But according to exit polls, the size of the union vote was down. Union households represented 21% of all voters, compared to 26% in 2010 and 32% in 2012. Polling by the Marquette University Law School also showed a decline in 2014 in the share of registered voters who belong to union households, and that is consistent with the impact of Act 10 on decreased union enrollment." *Milwaukee Journal Sentinel*, Craig Gilbert, November 8, 2014. <http://www.jsonline.com/blogs/news/282036481.html>

⁸ <http://www.politifact.com/wisconsin/statements/2014/sep/07/greater-wisconsin-political-fund/scott-walker-cut-school-funding-more-any-governor/>

⁹ http://legis.wisconsin.gov/senate/erpenbach/PressReleases/Documents/2014_08_14%20LFB_Paper_321.pdf

Insurance Advisory Council. The legislature has deferred to the Council on amendments to the law since the Council was established in 1939 with equal representation from management and labor.¹⁰

- While 29 states have increased the minimum wage, many indexing increases, the Wisconsin legislature has refused to enact an increase.¹¹
- With the beginning of a new legislative session we are anticipating another round of measures that will negatively impact working people, including plans to prohibit union security clauses in private sector labor contracts.
- The Republican-controlled legislature adopted a redistricting plan that virtually eliminates competitive elections in the state. It also passed what was then the most restrictive voter ID law in the country to reduce the number of low-income, young and minority voters able to participate in elections.¹²

Will these broader consequences be exposed as other states consider whether to follow Walker's lead? Since 2011 several states have enacted laws restricting collective bargaining, including prohibitions on fair share and dues deductions.¹³ But Walker urges a bolder approach that effectively eliminates collective bargaining for most public workers. Will other states follow?

¹⁰ <http://www.wisaficio.org/index.cfm?action=print&articleid=F5F06A58-0DF0-45E7-8410-A0F3AFA5838D>

¹¹ As of Jan. 1, 2015, 29 states and D.C. will have minimum wages above the federal minimum wage; four states – Alaska (indexed), Arkansas, Nebraska and South Dakota (indexed) - approved minimum wage increases through ballot measures in the 2014 general election; Illinois voters approved an advisory measure. The legislatures in Connecticut, Delaware, Hawaii, Maryland, Massachusetts, Michigan, Minnesota, Rhode Island, Vermont, West Virginia and D.C. enacted increases during the 2014 session. Minimum wages will go up in nine states on Jan. 1, 2015 because of indexed increases in their state law: Arizona, Colorado, Florida, Missouri, Montana, New Jersey, Ohio, Oregon, and Washington. <http://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx>

¹² For a compelling (and scathing) discussion exposing the political purpose behind Wisconsin's Voter ID law, see Judge Richard Posner's dissent from denial of rehearing *en banc* in *Frank v. Walker*, 2014 WL 5326463, October 10, 2014.

¹³ Currently, bills affecting public sector collective bargaining have been introduced in **Missouri** (including one that would refer to a ballot measure requirement that public sector unions undergo a certification election every two years); **New Mexico** (SB 93 would prohibit payroll deduction of dues for public sector employees); **Indiana** (SB302 allowing teachers who are not union members to enter into individual contracts rather subject to the collective bargaining agreement; [SB 234](#) allowing school employers to deduct union dues at the request of the school employee, rather than current law which requires employers to deduct at the request of employee; [SB 538](#) allowing investigation into majority status of school employee unions and new certification elections; policing of collective bargaining agreements for conformity to collective bargaining requirements with actions on non-conforming

In August, 2014, Noam Scheiber of *New Republic* identified Scott Walker's race for governor as the second most important election in the country after the race to determine control of the U.S. Senate.¹⁴ He posited that Walker's re-election coupled with Republican control of Congress would embolden Republicans to

double-down on Walker's slash and burn tactics on a national level. What Walker has done in Wisconsin, after all, doesn't just make it harder for union members to bargain for higher wages –something conservatives see as a worthy end in itself. He's effectively defunded a key Democratic constituency, something Republican partisans around the country are keen to replicate.

If Wisconsin represents the green light for importing this strategy elsewhere, the Ohio experience demonstrates successful popular resistance to such sweeping changes. Ohio's 2011 law which severely curtailed public employee bargaining rights was subject to challenge by voters.¹⁵ Unions and community groups organized a ballot initiative "with 10,000 volunteers circulating petitions in all 88 counties. Over 1.3 million Ohioans — more than five times the number required to put the initiative on the ballot — signed the petitions."¹⁶ The campaign offered the perfect organizing opportunity to educate voters about the value of collective bargaining and expose the law as an attack on public employees who were providing vital community services. Voters repealed the measure by a 22% margin.¹⁷ That Ohio did not exempt police and fire employees also increased the resistance and fueled voters' backlash.

Other efforts to restrict public sector collective bargaining were successfully resisted in ballot measures this past November.¹⁸ Voters in Missouri defeated a constitutional amendment which would have required that teacher performance evaluations be used to determine whether a teacher should be dismissed, retained, demoted or promoted and prevented teachers from bargaining over the terms of these evaluations.¹⁹ In Anchorage, Alaska voters repealed a city ordinance that had removed city employees' right to strike, limited annual pay increases,

agreements); **Kentucky SB 1**, passed Senate, prohibiting union security agreements for private and public-sector workers.

¹⁴ Noam Scheiber, *Scott Walker's Race for Governor Could Shape U.S. Politics for Years to Come*, *New Republic* (8-25-2014).

¹⁵ Wisconsin law does not provide for referenda to repeal state laws.

¹⁶ <http://campaignstops.blogs.nytimes.com/2011/11/10/how-obama-can-win-ohio-again/>

¹⁷ *Id.*

¹⁸ <http://www.adn.com/article/20141104/anchorage-voters-favor-unions-repealing-mayor-sullivans-labor-law-rewrite>

¹⁹ [http://ballotpedia.org/Missouri_Teacher_Performance_Evaluation,_Amendment_3_\(2014\)](http://ballotpedia.org/Missouri_Teacher_Performance_Evaluation,_Amendment_3_(2014))

outlawed performance bonuses or incentives in future contracts and set up a system for outsourcing some work done by city employees. Voters' resistance to these measures could pose an obstacle to their widespread adoption.

Let's consider, however, if Wisconsin-like measures do spread and we are operating in a world without public sector bargaining, what will labor management relations look like?

II. Are Public Employers Likely to Engage with Unions Absent a Collective Bargaining Framework?

In his 2012 article *Life After Act 10: Is there a Future for Collective Representation of Wisconsin Public Employees?* Marty Malin echoes the work of Arvid Anderson and the Reich task force urging Wisconsin public employers to continue to engage with their workers through their union representatives as it is key to a high performing workplace. "Unilaterally imposed terms breed resistance while collaboratively developed policies bring benefits to employees and the public."²⁰ Drawing on the experience of states that only permit or even prohibit collective bargaining, he lays out a number of options to consider: bargain anyway, members only bargaining, and various meet and confer models.

How is this playing out in Wisconsin?

In Wisconsin, there is only one mandatory subject of bargaining referred to as "total base wages."²¹ An employer is prohibited from bargaining on any other subject. Employer are free to meet and confer with the union on any subject and adopt policies after those discussions.

In the wake of Act 10, there has been a range of employer responses to meeting and conferring on subjects that would have been mandatory or permissive in the past. At one end of the spectrum are those employers who recognize the value of resolving issues in partnership and have sought to continue that relationship in a robust meet and confer process that resembles how they operated previously. In those relationships, the employee handbooks that replaced collective bargaining agreements often contain most of the provisions of the former labor agreement. At the other end are those employers who refuse to engage with the unions, have developed their handbooks independent of union involvement and implement changes without notice or discussion with the employees' representatives.

²⁰ See supra, p. 634.

²¹ Wis. Stat. §111.70(4)(mb) *Prohibited subjects of bargaining; general municipal employees.* The municipal employer is prohibited from bargaining collectively with a collective bargaining unit containing a general municipal employee with respect to any of the following:

1. Any factor or condition of employment except wages, which includes only total base wages and excludes any other compensation, which includes, but is not limited to, overtime, premium pay, merit pay, performance pay, supplemental compensation, pay schedules, and automatic pay progressions.

In the middle are employers who meet with the unions on some issues and act without meaningful consultation in regard to most areas that were previously subject to negotiation. On what issues do they engage? What we've seen in the education setting is greater cooperation in areas in which school administration recognizes the need for employee input and acceptance for successful implementation. The new evaluation process --educator effectiveness, as it is known in Wisconsin, is an example.

Employers also consider whether the union has recertified through the annual certification elections that are now required and are more likely to engage if the union is certified.²² If the union has not participated in these elections, employers may still engage if there are some indicia of majority support.

Even in the areas where employers seek employee input through the certified union, we are also seeing instances of school administrators selecting teachers to participate on committees, rather than working with union representatives who are no longer the exclusive bargaining representatives for anything other than base wages. Unions are responding, making the case that teachers selected by their peers provide a deeper understanding of the shared concerns of teachers, have access to research and data on similar efforts in other districts, and that the union provides the best transmission vehicle for helping implement and support the decisions reached in such committees.

We also see efforts to impede labor management cooperation through legal challenges in the names of disgruntled union members. Two such lawsuits in state court have been brought by the Wisconsin Institute for Law and Liberty (WILL), one against the Milwaukee Area Technical College Board and AFT Wisconsin Local 212, and the other against the Kenosha Education Association, the Kenosha Unified School District, SEIU Local 168 and AFSCME District Council 40, Local 2383. In these two lawsuits WILL goes so far as to claim the parties violated the state's analog to the Sherman Anti-trust Act, reaching back to a theory put to rest more than eighty years ago with the passage of the Clayton Act.²³

What about engagement in the one area of bargaining required under Wisconsin law – total base wages?

A certified union can bargain total base wage up to the cost of living. Overtime, premium pay, merit pay, performance pay, supplemental compensation, pay schedules, and automatic pay

²² In order to maintain certified status for purposes of base wage bargaining, 51% of the bargaining unit members must vote for union representation in annual certification elections. Wis. Stat. §111.70(4)(d)3b

²³ *LaCroix v. Kenosha Educ. Ass'n*, Case No. 13-CV-1899 (Kenosha County Cir. Ct.); *Marone v. Milwaukee Area Technical College Dist.*, Case No. 13cv4154 (Milwaukee County Cir. Ct.).

progressions are excluded from wage bargaining.²⁴ Increases above the CPI can only be approved through referendum.²⁵ There is no mechanism for impasse resolution.

What we've seen are public employers coming to the table with their "proposals" making little or no movement and then implementing. Many public employers are refusing to agree to the full CPI increases. Many are not providing any base wage increase at all, sometimes unilaterally granting bonuses.

Denying employees even the cost of living increases permitted by law exposes the sham of the sliver of bargaining rights that were left under Act 10. The compounding effect of such action leaves employees falling further and further behind. As one union representative put it, when employees start feeling this, they'll either leave or stand up.

Which brings us to the next question:

III. What Collective Action Will Public Employees Take Absent a Collective Bargaining Framework?

As my law partner Tim Hawks says, "If workers waited to confront their employers over their wages and conditions until after labor laws were enacted, we would have neither labor laws nor unions."

Since the passage of Act 10 Wisconsin public employees are increasingly engaging in a range of collective activities to appeal directly to elected officials. For example, in Milwaukee the school district refused to grant any base building increase for the last two years, unilaterally providing a lump sum bonus below the CPI. This past Fall, when the district announced it would not grant a base raise increase to employees for a third year, the Milwaukee Teachers' Education Association began a campaign to "Raise up Educational Assistants." Recognizing the broad concern about income inequality, this campaign focuses on the lowest paid school employees. The MTEA invited school board members to spend a day shadowing an EA – to "walk in their shoes." A number of members did this and seemed to gain new insight and respect for the job these employees do. The union followed this up with a spirited rally at the school board urging action on a cost of living increase. The fight continues, and it's increasingly clear to members that without this type of collective action, few or any wage gains will occur.

As working conditions are now prohibited subjects of bargaining, where hot issues cannot be resolved with management through meet and confer, they are also likely to prompt collective action by employees.

²⁴ Wis. Stat. §111.70(4)(mb).

²⁵ To date, public employers have not exercised this prerogative. We have heard rumblings of some employers recognizing the need to attract and retain educators by providing increases greater than the cost of living who may utilize the referendum option.

One of the most successful of these happened in Madison, Wisconsin a few years ago when the administration reduced planning time for elementary school teachers. More than 350 teachers attended a school board meeting; 21 teachers presented powerful and often emotional testimony connecting the need for this time with their students' ability to be successful learners. Negotiations followed resulting in the district restoring the planning time.

Other unions have also mobilized and made direct appeals to local officials following the loss of rights provided in collective bargaining agreements. Municipal employees represented by AFSCME have successfully waged campaigns with various city councils and county boards to incorporate a "just cause" standard into their grievance procedures.²⁶

Where these governing bodies or management consistently adopt an anti-employee stance, public employees have become engaged in local election campaigns. For example, after battling an intransigent management in Stevens Point, Wisconsin, teachers worked with community groups to elect pro-education Board candidates and change the anti-employee climate there. AFSCME D.C. 40, representing municipal employees in Wisconsin, has been increasingly active in local election campaigns since the passage of Act 10, and more successful each year. In the Spring, 2014 elections, they endorsed candidates in more than 200 races, winning approximately 76% of these races.

A Resurgence of Strikes?

With the elimination of collective bargaining which, after all, was sold as a means for establishing labor peace, what is the likelihood that public employees will strike?

Yes, public employee strikes are illegal in Wisconsin, with stiffened penalties under Act 10. Yet, historically the greatest number of strikes occurred in states where striking was illegal.²⁷ This has led Joe Burns, union negotiator and labor lawyer, to urge public employee unions to consider the strike as a means to regain a measure of power.

The successful 2012 strike by the Chicago Teachers Union inspired many union leaders. The union spent more than a year talking to its members, setting up contract action committees in every school, and getting teachers everywhere involved in the contract fight. It had established strong ties to parents and community organizations forged in years of joining together to fight school closures. By the time the strike occurred, the teachers' solidarity and strong public support enabled them to achieve a settlement providing annual wage increases, and important

²⁶ Wisconsin law now requires only that municipal employers have a procedure to allow grievances regarding discipline, termination and workplace safety in which the governing body of the local government unit makes the final determination. Wis. Stat. §66.0509(1m)

²⁷JOE BURNS, STRIKE BACK –USING THE MILITANT TACTICS OF LABOR'S PAST TO REIGNITE PUBLIC SECTOR UNIONISM TODAY (2014) (citing Richard Kearney, Labor Relations in the Public Sector, p. 236 (4th ed. 2008)).

improvements in teachers' working conditions. CTU President Karen Lewis says "the most important thing we won is some respect... What we tried to show is that the union and teachers are one; we're not separate entities."²⁸

Teachers also struck in Medford, Oregon last year for 16 days. And unions in Portland, Oregon and St. Paul, Minnesota were preparing for strikes there when settlements were reached that included class size reductions. As in Chicago, teachers in these cities were involved with the community, building relationships with parents and students on shared concerns. That support was crucial in convincing the school districts to accede to some of the teachers' demands.²⁹

Collective Action Aimed at Raising Standards for All Employees.

Teachers are not the only ones striking. Public employees and their unions have been inspired by and are supporting fast food workers in their strikes for higher wages.³⁰ Many understand that the gains they achieved through collective bargaining will continue to be in jeopardy if the floor is not raised for all employees.

Unions have also been engaged in the grassroots campaigns for ballot initiatives that raise the minimum wage and enact paid sick leave measures. At the same time Republicans swept elections in the Fall, voters passed measures in Alaska, Arkansas, Nebraska, and South Dakota to raise the minimum wage, and advisory referenda passed in Illinois and 13 cities and counties in Wisconsin. Voters also approved paid sick leave laws in Massachusetts, Montclair Township and Trenton New Jersey, and Oakland, California.³¹ These efforts represent a form of collective

²⁸ Jody Sokolower, *Lessons in Social Unionism: An Interview with Chicago Teachers Union President Karen Lewis*, RETHINKING SCHOOLS, Winter 2012-2013,

http://www.rethinkingschools.org/archive/27_02/27_02_sokolower.shtml

²⁹ "The Portland Association of Teachers (PAT), came within days of a strike before reaching an agreement February 18 with Portland Public Schools that includes the hiring of 150 new teachers to reduce class sizes and curtailing the extent that teacher evaluations hinge on student test scores... In St. Paul, teachers secured an expansion of the city's pre-kindergarten program and smaller class sizes in high-poverty schools, in order to allow teachers to give individual attention to students who need it the most."

http://inthesetimes.com/article/16402/teachers_strikes_catching_fire

³⁰ <http://www.nytimes.com/2014/09/05/business/economy/fast-food-workers-seeking-higher-wages-are-arrested-during-sit-ins.html>

http://www.nytimes.com/2014/12/05/business/in-fast-food-workers-fight-for-15-an-hour-a-strong-voice-in-terrace-wise.html?_r=0

³¹ <http://familyvaluesatwork.org/media/historic-election-voters-speak-send-resounding-victory-paid-sick-days-nationwide>

action not tied to collective bargaining and tap into wide-scale public concern over stagnant and low wages. Continuing the referenda momentum, state federations of labor will hold “Raising Wages” summits in the first four presidential primary states—Iowa, Nevada, New Hampshire and South Carolina—beginning in Iowa this spring.

Collective Action in Building Political Power.

In considering the role of mandatory collective bargaining in creating strong public unions, the experience of the Alabama Education Association (AEA) is significant. Here in a state where there is no duty to bargain and union security provisions are prohibited, the union maintained an 85% membership and has been a political powerhouse for decades.³² In 2012 it was able to wield enough influence to help defeat a bill to authorize charter schools, efforts to end teacher tenure and the use of student achievement data in layoff decisions.³³

The AEA developed during the civil rights struggle unifying the white and African American teacher unions, protecting education funding against cuts from segregationist Governor George Wallace and securing a living wage for school employees.³⁴ Its defense of civil rights is similar to efforts of some unions who are forming coalitions with civil rights organizations to oppose racial inequality and to support immigration reform. Harkening back to the role labor played in the social integration of immigrants in the earlier part of the last century, the AFL-CIO is offering citizenship clinics, social activities, and supporting workers’ centers in new forms of collective action.

Conclusion

For decades most of us have worked within a well-defined legal framework for public employee collective bargaining. Even if pieces of that framework remain in some states, the road ahead looks to be a very different one. I suspect if Arvid Anderson were here he would challenge us all to find ways to keep the goals of collective bargaining, if not its legal framework, alive and relevant in this next era. He might suggest that we will need academics who continue to draw on the lessons of history and current events to demonstrate how labor and management, working together, can make government better serve communities. We will need attorneys representing public employers who provide their clients practical advice that includes

³²[How Strong Are U.S. Teacher Unions?](http://edex.s3-us-west-2.amazonaws.com/publication/pdfs/20121029-Union-Strength-Full-Report_7_0.pdf) A State-by-State Comparison by Amber M. Winkler, Janie Scull & Dara Zeehandelaar, Thomas B. Fordham Institute, October, 2012, pp. 37, 61-66.

³³ Ibid, p. 63; The future power of the union may be influenced by the 2011 law prohibiting payroll deduction of union dues. The AEA challenge resulted in an injunction for several years, but the law was ruled constitutional in 2014 and has now been implemented.

³⁴ Ibid, p.63.

the benefits of continuing engagement with unions. We will need union attorneys to defend employees taking collective action and to help unions communicate effectively --to employers and the broader community -- the value of employees having an organized voice. And we will need neutrals as facilitators of the emerging new relationships to help the parties find common ground and shared purpose. The challenge is before us. I urge us to accept it and carry on Arvid Anderson's legacy.ⁱ

ⁱ I gratefully acknowledge the insights and assistance of my colleagues Tim Hawks and Michele Sumara, Karen Royster, director of Institute for Wisconsin's Future from 1995-2012, and my husband, Roger Quindel, who as a union activist and then a local elected official sat on both sides of the bargaining table.