THE UNIVERSITY OF WISCONSIN, MADISON CAMPUS—TAA DISPUTE OF 1969-70: A CASE STUDY†

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Mediators often possess a particularly unique view of the labor disputes in which they become involved. As neutrals, they are able to evaluate the dispute settlement procedure and its results in a manner which normally escapes the interested parties. In this article, the mediators in the 1970 Teaching Assistant's Association dispute at the University of Wisconsin provide a lucid and comprehensive account of the key events, the reaction of the participants to these events, and an appraisal of the implications which this dispute, the manner in which it was handled, and the agreement that was finally produced may have for the future.

I. INTRODUCTION

This paper deals with the formation of the Teaching Assistant's Association (TAA) in 1966, its development into a collective bargaining agency, and its quest in 1969 for recognition by the University of Wisconsin (UW) as exclusive collective bargaining agent for the campus teaching assistants (TAs). It deals with the TAA attempts to negotiate a first collective bargaining contract, the impasse in bargaining, the resulting strike in March and April 1970, and the mediation process in which both authors participated. The paper also attempts to describe the national, state, and local climates which nurtured these developments. It concludes with an appraisal of the Madison campus experience and its implications for the future.

Our interest in the UW-TAA dispute stemmed from our connection with the Law School Center for Teaching and Research in Disputes Settlement.[1] Since its inception, the Center has experi-

† In the light of the confidentiality of the mediation process, we have cleared this article so far as it pertains to that process, with representatives of both parties.

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mented with the application of techniques used successfully in the settlement of labor-management disputes in the private sector of the economy to disputes of all kinds, including public employment disputes, and with the development of innovative procedures to supplement those techniques. We lived with this case on the campus. We understood the positions of both sides. We watched the buildup of the dispute. The dispute was a natural outgrowth of the nationwide movement toward collective bargaining in secondary education. It also reflected the super-charged atmosphere on campuses throughout the country, generated by such events as "sit-ins" and other forms of demonstration to support sociological or ideological demands.[2]

From the outset, it was obvious that this dispute was going to be "different." To begin with, collective bargaining for teachers, especially at the college or university level, was relatively new. Wisconsin had enacted a statute providing for collective bargaining for state employees, but its coverage was limited to "classified employees" which did not include TAs. The dispute involved employees having both teacher and graduate student status, many of whom planned eventually to join the ranks of faculty. Many Madison campus faculty members sympathized with the TAs' desire to have an effective part in academic decisionmaking, including educational planning. In the TA dispute, however, most faculty members aligned themselves with the Chancellor from a sense of loyalty or because they opposed the use of collective bargaining to resolve academic issues.

II. BACKGROUND

A. *Collective Bargaining in Public Employment*

Since the Railway Labor Act of 1926[3] and the Norris-LaGuardia Act of 1932,[4] Congress and state legislatures have repeatedly endorsed collective bargaining in *private* employment as the method best suited in a democracy to ensure labor peace and to protect the individual worker in the employment relationship. Until the en-

2. Another reason for our interest in this particular dispute was that the leading spokesmen for both sides included colleagues or former students of ours. Chancellor H. Edwin Young, a disciple of the late Professor Selig Perlman, is a noted negotiator and mediator in his own right. Professor James L. Stern, a member of the UW Bargaining Team, is Director of the Industrial Relations Research Institute and has a considerable background in collective bargaining. Professor Arlen Christenson, who served in the dispute as the Administration's legal advisor and negotiator, is a member of the University of Wisconsin Law School Faculty. James Marketti, who served as a spokesman for the TAA Bargaining committee, was a former student of ours. He was enrolled as an IRRI graduate student and was a former president of the Industrial Relations Graduate Student Association (IRGSA), a forerunner of the TAA.

3. 45 U.S.C. § 151 *et seq.* (1964).

4. 28 U.S.C. § 101.1 *et seq.* (1964).

actment of enabling legislation, beginning in 1959, there were only scattered instances of collective bargaining relations in the *public* sector.[5]

Executive Order No. 49, issued by New York City Mayor Robert Wagner in 1958, is the first instance of governmental authorization of collective bargaining for public employees. In substance, this Order authorized New York City public employees to bargain collectively with their employer "through their freely chosen representatives in the determination of the terms and conditions of their employment."[6] The Order did not cover teachers. One year later, in 1959, the Wisconsin Legislature enacted the first comprehensive statute giving to public employees (in this case, municipal employees) the right to bargain collectively. During the following half decade, the federal government and a number of states followed suit in varying degrees; a few states adopted laws *discouraging* public employee collective bargaining.[7] At the federal level, President Kennedy, on June 17, 1962, issued Executive Order No. 10988. This was supplemented on May 21, 1963, by a Presidential Memorandum entitled "Standards of Conduct for Employee Organizations and Code of Fair Labor Practices."[8]

Beginning in 1965, state legislatures in increasing numbers have authorized collective bargaining or negotiation in public employment. In many instances, the stimulus appears to have come from public employee strikes. At the present time, with the exception of two states (Hawaii and Pennsylvania), regardless of whether there are statutes authorizing collective bargaining, strikes are usually

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5. A. Anderson, *Legal Aspects of Collective Bargaining in Public Employment*, in DEVELOPMENTS IN PUBLIC EMPLOYEE RELATIONS 128 (K. Warner, ed. 1965); Smith, *State and Local Advisory Reports on Public Employment Labor Legislation: A Comparative Analysis*, 67 MICH. L. REV. 891 (1969).

In a 1969 conference on collective bargaining, the President of the AFSCME, Jerry Wurf, after noting that written agreements between his union and municipalities could be traced back 30 years to a contract with the City of Philadelphia signed in 1939, stated:

> Written agreements between our union and municipalities can be traced back 30 years, yet they have only recently begun to receive broad acceptance, and they are still occasionally rejected. It took 29 years from that first agreement with the City of Philadelphia, signed in 1939, before an industrial, union-oriented community like Cleveland would sign a collective bargaining contract with the union representing its workers. While the first written agreement came in Philadelphia, even that document excluded wages as a bargainable item. It took five more years before wages were included . . . .

J. Wurf, *Fundamental Issues in the Public Sector*, PART II, in COLLECTIVE BARGAINING TODAY 183 (1969).

6. Wurf, *supra* note 5, at 183.

7. For summary of legislation and judicial decisions in 29 states, authorizing or restricting public employment collective bargaining, see Anderson, *supra* note 5.

8. 28 Fed. Reg. 5127-32 (1963).

prohibited either by statute or common law.[9] In other respects also, the public employee has not yet been granted the full bargaining rights enjoyed by his counterpart in the private sector. Statutes often limit the subjects of bargaining and fall short of *requiring* the public employer to recognize or bargain exclusively with the representative chosen by its employees or to reduce to writing any agreement reached through collective bargaining. Recently, the State Labor Law Committee of the American Bar Association strongly endorsed the policy of collective bargaining in public employment, urging that representation machinery be established in *all* states to determine the wishes of employees and to resolve supervisory and unit questions.[10]

B. Collective Bargaining in the Field of Education

In the area of collective bargaining, *teachers* in municipal or state

9. L.M.R.S. Newsletter, July 1970, vol. 1, no. 4, published by the Labor-Management Relations Service of the United States Conference of Mayors, National League of Cities and National Association of Counties. Pennsylvania employee relations acts, both passed in 1970, authorize strikes, but only after unsuccessful recourse to impasse procedures provided for in the statute and where the strike will not endanger public health, safety or welfare.

10. The L.M.R.S. Newsletter, Oct. 1970, vol. 1, no. 7, at 1, reported as follows:

> The State Labor Law Committee of the American Bar Association in its annual report has emphasized the growth in state legislation giving public employees the right to collective negotiations and has urged inactive states to follow suit. The report stated:
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> "1969-70 brought a significant increase in state legislation vesting in public employees the privilege to participate in determination of their working conditions beyond the constitutional right of petition. As of May 1970, 40 states have legislation authorizing some union activity by public employees, although in the majority of states it is limited in scope. . . . Two states have legislation prohibiting union activity in the public sector, and eight states have no legislation at all. The public employees in Georgia suffered a setback when the Georgia Supreme Court declared a statute applicable to one county and one city unconstitutional."
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> The report, signed by attorneys representing labor unions, management clients and public agencies, said that "state and local governments should act to establish appropriate representation machinery to determine the wishes of employees and to resolve supervisory questions, unit determination questions, and the like. . . . Experience has demonstrated that such machinery is essential if disputes over representation are to be resolved peacefully. Many strikes occurred in 1969 as a result of disputes over recognition and representation. Such disputes can have a national impact, such as occurred in Memphis, Tenn., and in the strike involving Charleston, S.C.'s public hospitals and hospital workers.
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> In the opinion of the committee, necessary representation machinery should be established by all states so that there should be no need for any employee organization in public employment to engage in a work stoppage over issues of recognition and representation. The question to be faced in the 1970's is whether the states will assume their rightful responsibility in this area or whether, because of a lack of state action, it will become necessary for Congress to assume this burden at the national level."

systems have lagged far behind other public employee groups. This is partly due to the teachers' reluctance to accept the fact that they not only have a professional status but an employee status as well in their relationship with governing boards. Influential also, have been the public attitudes or platitudes that teaching is its own reward (the "Mr. Chips" concept), that the prime duty of teachers is to the students, that the fixing of salaries is the prerogative of the administrator and the public boards, and, most important, that unionism, collective bargaining, and strikes, however beneficial for the "working class," are of no concern to professionals.[11]

1. TEACHER ORGANIZATIONS

Early teacher organizations in the United States were of the professional advancement type, such as historical and language associations. The Wisconsin Education Association (WEA), founded in 1853, was probably the earliest. It was followed in 1857 by the National Education Association (NEA), which was chartered by Congress. Both were strictly professional associations concerned with raising educational standards for secondary schools. They traditionally viewed their dealings with school boards or administrators as "professional negotiation," not "collective bargaining." They put their emphasis on supplying their members with facts and general information to "guide them in effective actions with their . . . governing boards." The NEA, with a present membership of over one million, is far and away the largest teacher association in the nation.[12]

In the past few years, there has been a shift away from the traditional NEA philosophy and practice of "professional negotiations" —sometimes referred to as "collective begging" and "organized supplication"—and toward the direction of collective bargaining and union type tactics.[13] The NEA itself has become increasingly militant over the past few years, even up to the point of supporting strikes.[14]

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11. *See* J. Barbash, *Academicians as Bargainers with the University*, in ISSUES IN INDUSTRIAL SOCIETY, vol. 1, no. 3 (1970).

12. A. Wolpert, *Speaking for Professional Negotiations*, in NEGOTIATING WITH TEACHERS (pub. by School Management Magazine 1968).

13. *See* D. WOLLETT & R. CHANIN, THE LAW AND PRACTICE OF TEACHER NEGOTIATIONS, part 1, at 1:5 (BNA 1970) which states:

> Collective negotiations envisions something very different. The process is one of proposal and counterproposal, of action and reaction, of give and take—resulting finally in "deal" or "no deal," in mutual agreement or stalemate. The process also assumes parity of legal standing between the parties and rough parity of power. Bilateral determination of the terms and conditions of employment through the process of negotiations means that neither party has the ability to impose its will on the other, and that each is able, in law and in fact, to veto the proposals of the other.

14. In Glass, *Work Stoppages and Teachers: History and Prospect*, 90 MONTHLY LAB. REV. 43 (Aug. 1967) it was noted that "[a]ffiliates of the

The American Association of University Professors (AAUP) was established in 1915, primarily to protect the academic freedom of college teachers. Its principal activity has been to set up educational standards in institutions of higher education and to assure their maintenance through a system of censure. The AAUP has also taken an interest in faculty salaries. It regularly publishes charts called "Standard Scales of Compensation," which show average and minimum rates for tenured and nontenured college teachers. In 1968, the AAUP began to expand its policies and activities to encompass collective bargaining.[15]

The organization of the American Federation of Teachers (AFT) in 1916 was an important factor in the development of collective bargaining for teachers. From the outset, the AFT was a union-type organization, seeking primarily to represent teachers in collective bargaining. In 1919, it received a charter from the American Federation of Labor (AFL). While originally it sought to enlist only secondary and elementary school teachers, it enlarged its aims during the great depression of the thirties to cover college and university faculties. On October 20, 1930, AFT Local 223 was set up to represent faculty members on the University of Wisconsin campus. Although its views were given consideration, Local 223 was never formally recognized by the university. AFT membership in 1970 is said to be approximately 165,000.[16]

It is generally accepted that collective bargaining for teachers was first enforced by an AFT affiliate in New York City during 1960-62. At that time, Mayor Wagner's Executive Order No. 49 was in effect,[17] but it did not apply to teachers. The Condon-Wadlin Act of 1947, as amended, prohibited strikes by public employees on pain of severe penalties. In spite of the prohibition, the New York City teachers pressed their demand, by means of a strike, for "recognition" of their representatives for the purpose of collective bargaining.[18]

National Education Association which had not been involved in a single stoppage in the 12-year period, 1952-63, and none in 1965, participated in 11 during 1966 . . . ." *Id.* at 44.

15. *See AAUP Revises Policy on Collective Bargaining*, ACADEME, Feb. 1970, vol. 4, no. 1, at 1. For a general discussion see *Faculty Organizations in Higher Education*, in EMPLOYMENT RELATIONS IN HIGHER EDUCATION (S. Elam & M. Moskow, eds. 1969).

16. For histories of the AFT and NEA, see WOLLETT & CHANIN, *supra* note 13, at 2:1 *et seq.*

17. *See* text accompanying note 6, *supra*.

18. *See* Klaus, *The Evolution of a Collective Bargaining Relationship in Public Education*, 67 MICH. L. REV. 1033-34 n.3 (1969).

In noting the difficulties experienced by teachers in achieving the right to bargain collectively, Albert Shanker, President, United Federation of Teachers (UFT), New York, New York, stated in May 1969:

> Eight years ago the United Federation of Teachers of New York City had 2,400 members. Today we have over 50,000. We represent 70,000 professional employees of The Board of Education of New

2. THE GROWTH OF COLLECTIVE ACTIVITY

Prior to the New York City experience, school boards sometimes discussed terms and conditions of employment with their teachers, but the ultimate decision was made unilaterally.[19] Local teacher organizations played little part and there were extremely few written contracts. This has been changing since the New York City teacher strike in 1960. In some states, the change to collective bargaining through an exclusive representative has been accomplished under statutory authority or mandate, but even at this date the majority of school boards are not legally required to negotiate with the representative of their teachers and most teachers are hired solely under individual contracts, in which they agree to follow regulations unilaterally adopted by school boards.[20]

Even in the absence of statute, some progress has been made toward collective bargaining. Both the NEA and the AFT have sought means to give the teacher an effective voice in determining the terms and conditions of his employment. Both organizations began in the early 1960's to press for state legislation requiring bilateral teacher-school board negotiations in harmony with their particular concepts. The NEA sought unit definitions which would include administrators or, in the alternative, sought to have the unit makeup left to local option; the AFT sought statutes closely paralleling those covering private employment. Both organizations sought a broad definition of subjects of bargaining. Both also pursued their objectives by encouraging voluntary agreements between teacher organizations and local boards or state education systems to negotiate bilaterally. While many such agreements have established a framework for negotiations, they are usually less comprehensive and effective than statutory systems.[21]

Among the weaknesses in many such voluntary contractual ar-

> York. We are the largest local union of any kind in the entire world. We got that way through a series of confrontations. We did not do it by being reasonable. We did not do it by writing books. . . . Since that time, eight or nine years ago, when collective bargaining was considered to be not only illegal but contrary to the very notion of government, we have through confrontation brought about a situation where one third of the states in the United States have legislation requiring school boards to meet and to negotiate and enter into written agreements. Even then practically everything was gained through confrontation.

Fundamental Issues in the Public Sector, PART I, in COLLECTIVE BARGAINING TODAY 173 (1969). *See also* M. Lieberman, *Collective Negotiations by Teachers*, in PUBLIC EMPLOYEE RELATIONS LIBRARY, no. 5, part 1 (1968).

19. *See* WOLLETT & CHANIN, *supra* note 13, at 1:5.

20. *See* Lieberman, *supra* note 18, at 1.

21. WOLLETT & CHANIN, *supra* note 13, at 1:6 *et seq.* *See* Lieberman, *supra* note 18, at 1:7 in which it is reported that in 1967-68 there were 2,212 school systems with some sort of procedural agreement establishing a system of collective negotiations under which substantive terms and conditions of employment may be worked out.

rangements are the following: (1) they fail to provide an adequate procedure for the selection of representatives; (2) they do not specify the subjects of required bargaining; and (3) they do not provide for dispute settlement procedures.[22] Another important objection to reliance on such voluntary agreements between teachers and school boards is that they are often achieved only by means of demonstrations, strikes, and other mass pressures by teacher organizations. Despite statutory or common law prohibition of strikes, much of the movement toward collective bargaining by teachers has been accomplished through "confrontation." Pointing to the important role played by the AFT in this movement, Charles Cogan, President of AFT, said:

> We in the AFT claim credit for the intensity and the extensiveness of this movement: not only for the fact of collective bargaining, but also for the *tactics* and methods used by the teacher organizations as well. These are extremely different from what they used to be in the good old days. We now have demonstrations, picketing, publicity on a large scale, strikes and sanctions. And these are things that we more or less take for granted these days. It is indeed a revolution of great consequence.
>
> What do the teachers want? Why this revolution? The teachers want to have a real voice in the decision-making process.
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> [W]e are saying today, that we want to share in the control of the school system to the extent that we, as teachers, are affected by the conditions that exist. This means a realignment of power. It is no longer a matter of power coming down from the top and handed down through a bureaucracy but a matter of equal powers getting together at the bargaining table and trying to resolve their differences.
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> . . . .
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> Exactly what do teachers want? Here, we go into the scope of the collective bargaining agreement.[23]

During the years 1940 through 1955, there was a total of only 77 public school teacher strikes. During the period including 1956 through 1965, there were only 30. In spite of legal prohibitions, such strikes increased dramatically in the following four years. In 1966 alone, there were 30 public school teacher strikes and the fol-

22. As stated by Arvid Anderson, Chairman of the Office of Collective Bargaining in New York City, at the U.S. Conference of Mayor's 1970 Annual Meeting in Denver:

> The record of public employee bargaining and public employee organizations tells us that the absence of statutes protecting the negotiation and bargaining process has not meant the absence of public employee disputes, but only the absence of orderly procedures to deal with such problems.

L.M.R.S. Newsletter, Aug. 1970, vol. 1, no. 5, at 2.

23. NEGOTIATING WITH TEACHERS, *supra* note 12, at 9-10.

lowing three years brought 81, 94, and 185 respectively.[24] Wisconsin, in contrast to the national scene, reported no teacher strikes for either 1966 or 1968, one for 1967, and seven for 1969.[25]

The main issues underlying most teacher strikes (some of which occurred without previous "recognition") were economic. However, the "recognition" issue also played a significant part as there were nine teacher work stoppages over this issue in 1966.[26] None of the Wisconsin strikes involved the issue of "recognition." This would be expected in view of the fact that the Wisconsin Employment Relations Act, which requires "recognition," applies to secondary school teachers.[27]

There has been an increasing demand by teachers for a part of the decisionmaking power over educational planning. This type of demand is symptomatic of the times. It was noted by Arvid Anderson:

> The largely peaceful revolution caused by collective bargaining is exemplified by the changes which have occurred in education. The National Educational Association has totally changed its policy towards bargaining and now even advocates the right to strike, under limited conditions.
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> The impact of collective bargaining on our society is . . . evidenced by the fact that a number of public employee organizations look upon collective bargaining as a means for effectuating social change, as well as a procedure for improving wages, hours and fringe benefits. I refer to the demand of teachers who want to bargain about the school curriculum or class size; welfare workers who want to bargain about the level of benefits of welfare recipients; interns who want to bargain about the quality of medical services offered; nurses who wish to bargain about the number of duty stations; policemen who want to regulate the number of men on a patrol or their authority to make arrests, and air controllers who demand the right to bargain about their equipment and workload.[28]

Sheila C. White, economist in the BLS Office of Manpower Employment Statistics, has expressed a similar view:

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24. The 1967-69 figures cover both public and private school teachers.

25. Data furnished by the Division of Industrial Relations of the Bureau of Labor Statistics, U.S. Dep't of Labor.

26. *See* H. Roberts, *Work Stoppages and Teachers, History and Prospect*, LABOR-MANAGEMENT RELATIONS IN PUBLIC SERVICE, part 6 (Ind. Rel. Cent., U. of Hawaii Sept. 1968); S. White, *Work Stoppages of Government Employees*, 92 MONTHLY LAB. REV. 29 *et seq.* (Dec. 1969).

27. Where there is no covering statute, it is to be expected that the "recognition" issue may be important, as in the case of the 1968 Memphis Sanitation Workers Strike, in which the Rev. Martin Luther King lost his life.

See COX & BOK, CASES ON LABOR LAW 960 *et. seq.* (7th ed. 1969).

28. L.M.R.S. Newsletter, Aug. 1970, vol. 1, No. 5, at 2.

> During the past 3 years, nearly half (44 percent) of all work stoppage by government employees have involved teachers and other employees of public schools and libraries. *Teachers have sought not only higher salaries but also the right to participate in decisions on how, what, and where they were to teach, and in determining the best allocation of usually limited school budgets.* The majority of the workers involved and most of the time lost because of disputes over matters of administration from 1966 to 1968 is attributable to teachers' stoppages.[29] (emphasis added)

This new type of demand made by teachers during the latter half of the past decade is also noted in an article written by the president of the NEA, Helen Pate Bain:

> Voters often misunderstand why teachers walk out. Salary is not the only reason. In Livonia, Mich., for example, site of the first strike of the 1970-71 school year, teachers sought to abolish a restrictive civil rights clause. In two Massachusetts communities earlier this year teachers struck to get more help for remedial reading, art, music, a better staffed library system and special programs for non-English-speaking students.
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> In Los Angeles, teachers walked out last spring because they believed it was more important to have smaller classes, better textbooks, new courses, more teachers for Mexican-American students and free breakfasts for ghetto children than to pocket a 5 percent wage hike. And in Kalamazoo, Mich., teachers went on strike because they were denied an equal voice in revising the curriculum and some 1000 teachers dramatized their plight in a door-to-door campaign.
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> The National Education Association recommends several procedures to resolve the kind of impasse which might lead to a strike: mediation, advisory fact finding, and political action. When these fail, teachers may have no choice but to strike as a means of calling public attention to their frustrations and the deplorable conditions in their schools.
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> Teachers' strikes reflect the times. And teachers are increasingly militant on behalf of quality education. They are more "dedicated" to fighting the trend of spending 40.1 cents of every Federal dollar for defense and only 3.8 cents for education. But most states still hold that public employees, including teachers, do not have the right to strike.[30]

In 1967 and 1968, the proliferation of teacher strikes caused disruption and concern throughout the nation. UFT teachers in New

29. 92 MONTHLY LAB. REV., no. 12, at 29, 31 (Dec. 1969).

30. THE MERRIMAC, Oct. 1970, vol. 3, no. 1, at 5 (pub. by Madison Teachers. Inc.).

York City resigned en masse in September 1967, to support their demands. As has been stated:

> The growing militancy of teachers hit a new high as back-to-school time came in September, 1967. A wave of teacher strikes kept classrooms closed in communities from Florida to Michigan. The strikes reflected not only widespread teacher dissatisfaction with salaries and teaching conditions; they indicated continuing competition for the allegiance of teachers between the small town and rural-oriented National Education Association (NEA), with more than 1,000,000 members and the urban-oriented, 140,000-member American Federation of Teachers (AFT), an AFL-CIO affiliate.
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> At year's end it was not clear where the new aggressiveness of the nation's teachers would lead, but there seemed little doubt that kindly Mr. Chips was dead.[31]

In Florida, where there is no statutory obligation to bargain, there were scattered strikes at the beginning of the 1967 fall term. The FEA threatened a statewide walkout if demands for higher pay and improvement in the school system were not met. More than 25,000 of the state's elementary and secondary school teachers staged a work stoppage. The FEA insisted that pay was not the issue, but rather the quality of education which allegedly had declined due to overcrowding of classrooms, out-of-date textbooks, obsolete equipment, inadequate buildings, and an inadequate expenditure on public education. While public opinion on the whole ran against the teachers, they were supported in some cases by students and in one case by a group of Florida State University professors who collected money to aid the jobless teachers. The *National Observer* viewed the Florida strike as part of a larger picture throughout the entire country, saying:

> Last week in Albuquerque, 2,500 of the city's 2,900 teachers walked off their jobs, which forced closing of the city's 108 public schools. The teachers, demanding a special legislative session for education problems, object to low salaries and to the present system for allocating state education funds. The New Mexico Education Association promises to extend the walkout state-wide this week unless the special session is called. In Pittsburgh, the Federation of Teachers set a Feb. 29 strike deadline unless the city Board of Education approves a collective bargaining election. Teachers in South Dakota, in their drive for higher pay, are on the verge of employing sanctions against the school system but are unlikely to strike; some 4,500 teachers massed on the Capitol steps in Pierre last month in protest of low salaries. Teacher unrest is also reported in Idaho and Oklahoma.[32]

31. *See* READERS DIGEST ALMANAC AND YEARBOOK (1968).
32. National Observer, Feb. 26, 1968, at 3, col. 1.

The interest of teachers in acquiring a greater share in educational decisionmaking and in administrative decisions affecting education spread to the college level, influencing the AFT to renew its efforts (begun in the early 1930's) to organize college faculties for collective bargaining.[33] Much of the AFT organizational activity focused on the newly established junior or community colleges. This was a natural step since these are post-secondary public education institutions which are often closely connected with secondary schools and state colleges. During the years 1966-68, the AFT attempted to organize such institutions in California (unsuccessfully) and Chicago (successfully), even in the absence of legislation requiring collective bargaining.

The most noteworthy and successful organizational attempts were at City University of New York (CUNY), which, at the time, had seven senior and six community colleges. It should be stated, however, that the New York Employee's Fair Employment Act (the Taylor Law) was in effect, guaranteeing to state employees the right to bargain collectively. Following organization and an election, the AFT was chosen to represent temporary and part-time teachers (TAs and lecturers). Tenured and tenure-track faculty selected the Legislative Conference, an independent organization of faculty mmbers (subsequently affiliated with the NEA) to represent them.

In 1969, under a covering statute, the faculties of several New Jersey State colleges were organized and selected the New Jersey Educational Association as their collective bargaining representative. Negotiations have been conducted on two levels—with the New Jersey State Board of Higher Education on a statewide basis and with local campus officials on local issues. Agreement has recently been reached on a contract at Central Michigan University. Although faculty groups at Michigan institutions of higher learning have sought to represent "teaching fellows" (TAs) for collective bargaining purposes, they have been challenged on the grounds that: (1) TAs are not public employees, but rather students performing employee-type duties in their educational program; and (2) any TA unit must include students with similar interests, such as research assistants.[34]

As noted previously, the AAUP is presently active in seeking to represent faculties of higher educational institutions for collective

33. *See* Barbash, *Academicians as Bargainers with the University*, in ISSUES IN INDUSTRIAL SOCIETY, vol. 1, no. 3, at 22 (1970); Brown, *Collective Bargaining in Higher Education*, 67 MICH. L. REV. 1067 (1969); Oberer, *Faculty Participation in Academic Decision Making*, Ch. 4, in EMPLOYMENT RELATIONS IN HIGHER EDUCATION (S. Elam & M. Moskow, eds. 1969).

34. *See* Paper entitled: *Recent Developments in Collective Bargaining in Higher Education*, presented by William F. McHugh, Special Counsel, State University of New York, at annual meeting of the National Association of College and University Attorneys, San Diego, Cal., June 1970.

bargaining purposes. It apparently is not solely concerned with economic issues, but aims to include issues of academic freedom, faculty governance, and educational concerns.[35]

In Wisconsin, recent attention has been devoted to the tentative majority report of the Governor's Advisory Committee on State Employment Relations, dated October 20, 1970, which states in part:

> While the answer the committee has arrived at does not recommend collective bargaining as structured in this report, the committee does recognize the unavoidability of collective bargaining if solutions are not found for at least two problems: (1) compensation; and (2) faculty participation in university governance.

3. THE UNIVERSITY OF WISCONSIN CAMPUS SCENE

In retrospect, it can be said that there occurred on the University of Wisconsin campus a gradual buildup of tensions leading to the TA crisis of April 1970. In May 1966, a sit-in was staged at the University of Wisconsin to protest the draft. Some 35 TAs met to express their concern because of their role in determining grades for students which would, in turn, have a bearing on these students' draft status. This small group continued to meet and adopted the name TAA. The TAA did not seek at first to bargain collectively, but simply to process grievances on an ad hoc basis. Prior to 1969, its activities paralleled the various "crises" at the University, such as the DOW Chemical protest in October 1967, which was supported by some 400 TAs. Other matters fanning the flame of unrest on the campus included the expulsion of several black students from the Oshkosh campus and the subsequent rejection of their request for admission to the UW-Madison. There were demonstrations against the Vietnam War and against campus involvement in technological research, which was considered by protestors as supportive of the war machine. An appraisal of the general TAA unrest and dissatisfaction was expressed as follows:

> Ultimately, our union exists because in our community of the knowledge-industry, like in all other aspects of the American economy, wealth and power are concentrated in the hands of a few non-workers. The Administration is a management which has manipulated the University not for the well-being of teaching assistants, or students, or secretaries, or janitors, but rather for the commercial interests of a capitalistic state. A situation which creates an underprivileged mass ruled by an over-privileged minority has a built-in dialectic destined to reach confrontation. The TAA is the organization leading TAs in their demand for decision-making power no less than financial rights too long denied them.

35. ACADEME, vol. 4, no. 4, Oct. 1970, at 1.

> If America is to be changed, it should be obvious that our generation is going to have to do the changing. If America has been polluted by divisive capitalism and by working class opportunism, then we do best to build a leftist and ideological union. We do right by opposing through our contract demands, union education and direct action the racism and imperialism which drain our national resources as they divide our working class. What parody of progress it would be for us to march backwards eating bread and dusty butter as we drag the polluted and competitive present into a lost socialist and democratic future.[36]

In August 1966, Chancellor Robben W. Fleming, at the request of the University Committee, appointed a committee of 12, headed by Professor E.R. Mulvihill, to make a thorough examination of the University's TA system with recommendations for its improvement.[37] Members of the committee included representatives of each division of the College of Letters and Science plus representatives from the Wisconsin Student Association and the TAs. One of the TA representatives had received a graduate school award for teaching excellence and the other was active in the TAA.

The Mulvihill Report,[38] dated February 5, 1968, stated that during the decade ending 1965, the number of TAs on the campus had increased 155 percent; that in 1965, 76 percent of the instructional hours given within the College of Letters and Science (as distinguished from the number of hours of instruction received by students, since students attend large lecture sessions) was given by TAs; and that many lower division courses, especially in English, Mathematics, and Languages, were entirely in the charge of TAs. In leading up to its specific recommendations, the Report declared:

> Many of our recommendations call for bold changes in the current TA system and all of our suggestions seem urgent . . . . Even in those areas where the problems are most acute, many members of the academic community . . . are either unconcerned or unmindful of alternatives. This is particularly unfortunate because the TA is pivotal to some of the most important aspects of the academic enterprise. If one is anxious to enhance the quality of undergraduate instruction, the TA is clearly crucial. . . . [I]nsofar as we are all interested in establishing a community of scholars with free communication and an ability to solve its problems equitably, the TAs pose a challenge that goes to the very core of the matter. In all of this, the teaching assistant offers a window on our current state of affairs. The view from that window has concerned us, and the time has come to do more than draw the shades.

36. T.A.A. Newsletter, Oct. 6, 1969, vol. 3, no. 2.
37. University of Wisconsin Memo, Aug. 1966, vol. XIX, no. 3, at 1.
38. University of Wisconsin (Madison Campus) Faculty Doc. 183, Feb. 5, 1968, entitled: *Report of Committee on Teaching Assistant System.*

Among the Mulvihill Committee's recommendations were the following: encouragement of TA initiative and creativity; flexibility in course content and method consistent with the aims of the course and pedagogical responsibility; reevaluation of work loads and reduction to a level enabling TAs to provide the highest quality instruction; appropriate compensation where TAs teach two or more courses with different preparations; relief of TAs from nonteaching tasks by secretarial or student help; increased priority for office space where TAs work closely with students; improvement of channels of communication between the TA and his department, especially concerning his appointment, by providing a "straightforward mechanism"; establishment by each department of "a Graduate Student-Faculty Committee, with equal numbers of faculty and elected students including proportional TA representation"; and establishment of dismissal procedures with provision for appeals, whereby due process might be afforded.

The Mulvihill Report made the following additional comments:

> It is not enough to rely upon periodically appointed committees like this one to monitor the TA system responsibly. Many of the matters that have concerned us have arisen since the last study of the TA system in 1959. The faculty as a whole has been largely unresponsive to the implications for the TA system of increasing enrollments, changing curricula, expanded responsibilities, and outmoded administrative procedures. Although there have been many changes in the TA system, most of these have been stopgap measures and at the departmental level, lurching defensively from one crisis to another.
>
> We began this report with a statement of concern and have sought to recommend a wide variety of changes that should alleviate some of the most important problems and tensions in the current academic community. We have confidence in our recommendations—all of which were unanimously agreed to in the Committee's final meeting—but we are much less confident about their implementation. With full realization that changes will have to be instituted at the departmental level, with the prodding of the Dean and the proposed continuing College TA-Faculty Committee, we feel it appropriate to end with a plea for special attention and all due haste. *We would like to regard the fall of 1968 as the target date for many of our recommendations.* (emphasis added)

It is also interesting to note the following recommendation:

> As a long range goal, the University (and departments within it) should make every effort to develop programs in which graduate students would be guaranteed financial support for extended periods (*normally four years*), ... The program would have to be flexible, so that it would be adapted to the different conditions in the various departments. (emphasis added)

The importance of the questions raised in the Mulvihill Report is reflected in the November 15, 1968 issue of "Memo," an organ of the University of Wisconsin Central Administration. It states:

> SEVERAL BROAD-SCOPE QUESTIONS involving the teaching process and faculty government are under study this fall by faculty groups on the University's campuses. . . . SHOULD STUDENT REPRESENTATION ON FACULTY COMMITTEES BE INCREASED? . . . SHOULD THE POSITION OF TEACHING ASSISTANT BE ELIMINATED?

Regarding the latter question, the Chairman of the University Committee-Center System, was reported to have proposed:

> Graduate students who are given responsibility for instruction of undergraduate students shall be hired as full time faculty every other semester and shall be given the rank of instructor . . . [and] be considered faculty members with the rights and privileges now granted to faculty who now hold the rank of instructor.[39]

In response to the on-going study of the Mulvihill Committee, the University Codification Committee drafted a document entitled "Chapter 10D, Teaching Assistants." It was presented to the faculty in March 1968 and then referred back to the Codification Committee. A group designated by the Committee held open hearings on it. At a faculty meeting on December 2, 1968, the revised chapter 10D,[40] which incorporated many suggestions presented by TAs during the hearings, was presented and approved. Chapter 10D covered teaching assistant appointments, complaint and dismissal procedures, and academic freedom. In the case of both educational planning and complaint procedures, the system proposed by chapter 10D to govern the relations between faculty and TAs was essentially one of consultation through joint committees composed of faculty and TAs, with the ultimate power of decision, however, resting exclusively with the faculty, subject only to appeal to the Dean or the Chancellor. Chapter 10D also covered conditions of appointment and dismissal procedures. A request that a TA be allowed to speak at the meeting, presumably in opposition to chapter 10D, was denied on a divided vote. A subsequent motion, which was carried, required that a committee bring to the next faculty meeting a motion for a further section of chapter 10D which should provide for regular teaching assistant meetings chaired by the Chancellor and empowered to "draw up motions to be referred to the faculty." The University Committee presented the motion called for at the next faculty meeting, but recommended that it be rejected. This was done by adoption of a substitute motion providing merely that

39. University of Wisconsin Memo, Nov. 1968, vol. XXI, no. 10, at 15.

40. University of Wisconsin (Madison Campus) Faculty Doc. 238, Dec. 2, 1968, entitled: *Chapter 10D, Teaching Assistants.*

progress reports be collected on the departmental implementation of chapter 10D. The TAA voted later to reject the procedures and to seek its objectives through the process of collective bargaining.[41]

The preceding is intended to present the circumstances surrounding the UW-TAA dispute and to provide the background necessary for a clear understanding of the issues involved in that dispute, which is next to be considered.

III. THE TAA DISPUTE (1969-70)

The term "collective bargaining" as used in the field of labor-management relations, both public and private, means a procedure or system of negotiations between an employer and representatives of his employees, the latter usually called a union, designed to determine wages, hours, and other terms and conditions of employment.[42]

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41. Daily Cardinal, Feb. 27, 1969, at 1, col. 1.

42. Prior to the enactment of the Railway Labor Act of 1926, employees and employers had no legal duty to bargain. The practice, however, did exist. In 1944, the U.S. Supreme Court in ORT v. Railway Express Agency, 321 U.S. 342 (1944) took the position that when Congress enacted the Railway Labor Act, it meant "to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States." *Id.* at 346.

The earliest statutory definition of collective bargaining at the federal level appears in section 8(d) of the NLRA, 29 U.S.C. § 141 *et seq.* (1964), as amended in 1947. Section 8(d) reads as follows:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

Subchapter I of the Wisconsin Employment Relations Act, WIS. STAT. § 111.01 *et seq.* (1967), entitled "Employment Peace Act" which governs labor-management relations in private employment was enacted in 1939. It defines collective bargaining as follows:

> Collective bargaining is the negotiating by an employer and a majority of his employees in a collective bargaining unit (or their representatives) concerning representation or terms and conditions of employment of such employes in a mutually genuine effort to reach an agreement with reference to the subject under negotiation.

WIS. STAT. § 111.02(5) (1967). WIS. STAT. § 111.70(2) (1967), subchapter IV of the Employment Relations Act, added in 1959, states:

> RIGHTS OF MUNICIPAL EMPLOYES. Municipal employes shall have the right of self-organization, to affiliate with labor organizations of their own choosing and the right to be represented by labor organizations of their own choice in conferences and negotiations with their municipal employers or their representatives on questions of wages, hours and conditions of employment, and such employes shall have the right to refrain from any and all such activities.

WIS. STAT. § 111.81(2) (1967), subchapter V of the Act, added in 1966, defines collective bargaining as follows:

Collective bargaining involves two steps. The first step is "recognition," that is, acceptance by an employer of the labor organization as the exclusive representative of all the employees in an appropriate bargaining unit for the purposes of collective bargaining on the subjects of wages, hours, and other terms and conditions of employment. Such recognition may come about by voluntary agreement with or without legislative authority or guidelines. The second step is the negotiation of an agreement on the above subjects designed to govern the relations between the parties for a stated period and to handle questions as to the interpretation or application of the agreement.

A. The TAA Demand for Recognition

In February 1969, the TAA, which had not previously functioned as a collective bargaining agency, was galvanized into action by a threat of the State Legislature, ultimately withdrawn, to cut in half the out-of-state tuition remission received by teaching, research, and project assistants. The TAA spearheaded student opposition. Out of 1,500 voting members, 1,350 voted to strike in protest. At this time, the TAA determined that its goal could be achieved best through collective bargaining, and, therefore, determined to seek "recognition" from the Administration of the University of Wisconsin as exclusive representative of all the 1,850 campus TAs. Authorization cards were obtained from a majority of these TAs. On Thursday, March 20, 1969, the TAA reported this fact to Chancellor H. Edwin Young and requested "recognition."

This request raised the following questions: Since the TAs were not granted the right to bargain by federal or state statute or any other authority, was the Chancellor legally free to bargain at all with the TAA? Would he do so and under what conditions? Where would the parties look for their guidance or criteria on such questions as the approprite unit and the scope of bargaining? What consideration should be accorded the fact that the University departments are considered to have autonomy in certain areas? In the event of a stalemate in negotiating a procedural agreement, how would it be resolved? By mediation? Fact Finding? Arbitration? How would disagreements over the meaning of such an agreement, if negotiated, be resolved? If a procedural agreement were negotiated, how would it be enforced?

The Chancellor's reply, dated March 24, did not answer the request for recognition directly. Instead, it proposed consideration of three possible alternatives: adoption of subchapter V of chapter 111

"Collective bargaining" means the negotiating by the state as an employer, by its officers and agents, and a majority of its employes, by their representatives in an appropriate collective bargaining unit, concerning terms and conditions of employment of all employes in said unit in a mutually genuine effort to reach an agreement with reference to the subject under negotiation.

of the *Wisconsin Statutes*; adoption of a procedure similar to that in Federal Executive Order 10988 (1962); or the procedure set forth in proposed chapter 10D of the Rules and Regulations of the University.[43] The TAA rejected all of these alternatives because of their limitations and insisted on a procedure which would enable them ultimately to reach an agreement through the traditional processes of collective bargaining, without qualification as to the subjects of bargaining. In its demand for recognition as exclusive bargaining agent, the TAA was supported by labor leaders generally, including the president of the state AFL-CIO.

Our understanding of the TAA position is as follows. First, it opposed the "consultation" approach embodied in chapter 10D. Rather, it sought to participate in academic decisions as a matter of right. Second, it would not agree to a limitation on the scope or subjects of bargaining, such as contained in subchapter V,[44] which would bar its basic demand for a share in the decisionmaking power over the subject of educational planning. In this respect, the TAA reflected the position taken in increasing degree by teachers generally and their organizations, including the AFT and, more recently, the NEA and AAUP.

Our understanding of the Chancellor's position is as follows. First, he believed in the collective bargaining process, which hinges on "recognition." Second, he felt that he could not reject the request for recognition without inviting the opposition of the labor movement. Third, he knew that an important segment of the faculty was strongly opposed to collective bargaining on academic matters such as educational planning. Fourth, he knew that the closer he could come to a procedural agreement which followed the legislatively endorsed pattern of subchapter V,[45] the greater the likelihood of approval by the faculty, the Regents, and the public. These factors had to be taken into consideration in fashioning the ground rules which the Chancellor felt would be wise before proceeding to negotiations on substantive matters.

In a document received by the Administration on April 1, 1969, the TAA set down its proposals on "recognition" and on the "structure of collective bargaining." The proposal included a suggestion as to which matters should be bargained at the University level and which at the departmental level. The latter category was to include the matter of "course content." In his reply, dated April 4, 1969, Chancellor Young commented on the reference to "course content" in words that left no doubt as to the importance of "educational planning." The reply stated:

> Your proposal specifies that course content would be one

43. *See* text accompanying note 40, *supra*.
44. WIS. STAT. § 111.91 (1967).
45. *See* WIS. STAT. § 111.89 (1967).

of the items subject to negotiation but would be "negotiated at the departmental level." It also asks that the University agree to bargain *only* with TAA on terms and conditions of teaching employment. If these two paragraphs mean what they seem to mean, they would represent a very significant change from present practice. I am not sure what kinds of decisions on course content you had intended would be subject to negotiation, but quite a few people will wish to have a voice in any decision that would take from the individual teacher—whether professor or teaching assistant—the authority he now has over course content.

Without ample consultation with Departments I think it would also be quite improper for me to consider any other points of agreement that would radically alter the way they work with their graduate assistants. What you propose may not involve any major changes of this kind, but the point needs to be clarified.

You can also understand why it is impossible for me to agree to steps on this campus that affect the whole University without first spelling out what those effects might be on other campuses and consulting with the general University administration.

All of these questions involve procedures that are as yet unclear. As you know, there is a well-developed body of law covering the operations of unions recognized to represent employees in private industries, Federal employees, and Wisconsin public employees specified in 111.70-.94. When the TAA seeks recognition, the question naturally arises of what comparable legislation or rules would govern your structure, operations, and range of permissible activities. Most people agree that such rules are necessary and desirable in the interest both of the employer and the union and its members.[46]

As negotiations on a procedural contract progressed, it became evident that subchapter V[47] would play an important role. The Chancellor pressed for a procedural agreement containing all of the restrictions of the statutory model; the TAA sought modifications which would be consistent with its objectives. The no-strike issue is an example. Section 111.84(2)(e) of subchapter V provides:

(2) It is an unfair labor practice for a state employe individually or in concert with others:

. . . .

(e) To engage in, induce or encourage any state ememployes to engage in a strike, or a concerted refusal to

46. *See* Letter from Chancellor Edwin Young to Mr. Robert L. Muehlenkamp, President, TAA, April 4, 1969.

47. WIS. STATS. §§ 111.80-.94 (1967).

> work or perform their usual duties as an employe of the state.

The Chancellor insisted that any agreement reached must contain a provision prohibiting strikes or work stoppages of any kind for any reason by the TAA or its members. The TAA objected to any contractual limitations on the right to strike. The negotiations reached a point at which this was the sole remaining issue blocking a procedural agreement. Counsel for the TAA, in the best tradition of his profession, rose to the occasion by undertaking to mediate among his own constituents. Specifically, he proposed retention of the following language:

> II. The *collective bargaining relationship* between the parties shall be governed by Section 111.80-.94 Wisconsin Statutes except as hereinafter modified.[48] (emphasis added)

The underlying intent of the TAA in proposing to retain this language, as the Administration immediately sensed, was to limit the restriction on strikes in section 111.84 to the collective bargaining relationship itself, leaving the TAA free to take an activist role on political (not collective bargaining related) issues considered ideologically or sociologically important on campus. It may be questioned why a substantive issue such as the no-strike provision should have been introduced into a procedural framework for bargaining. The answer is that there is often no sharp distinction between the procedural and substantive; more important, it points up the imperative nature of the strike issue.

On April 26, 1969, with the no-strike issue resolved, agreement was reached on a document entitled "Proposed Procedure for Obtaining Recognition and Structure for Collective Bargaining." The agreement provided for an election to be supervised by the Wisconsin Employment Relations Commission (WERC) to determine whether the campus TAs wished to be represented by the TAA for bargaining, first, at the campus level and second, at the departmental level.[49]

The results of the representation election which took place on May 15-16, 1969, were as follows:

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48. *See* April 26, 1969 Agreement, entitled: *Proposed Procedure for Obtaining Recognition and Structure for Collective Bargaining, infra* note 50.

49. The April 26 Agreement provided:

> III. The University will base any recognition of the TAA on the results of an election conducted under the supervision of the WERC under the following conditions:
>
> a) Teaching Assistants at the University of Wisconsin—Madison will be given the choice of voting (1) for the TAA as exclusive bargaining representative or (2) for "no union."
>
> b) If the majority of TA's voting vote for the union then the TAA shall be recognized as exclusive bargaining representative of all TAs at the University of Wisconsin-Madison for matters to be bargained at the University Level.
>
> c) The TAA shall be recognized as exclusive bargaining agent for matters to be bargained at the department level only in those Departments where the TAA receives a majority of the votes of Teaching Assistants voting in the Department.

Number of campus TAs eligible to vote—1,835
Number of ballots cast—1,209
Votes favoring the TAA as bargaining agent—931
Votes for no union—278

The TAA obtained a majority vote in 53 of 81 departments. Most of the remaining 28 departments contained four or fewer teaching assistants, many of whom did not vote at all. The only departments with a significant number of TAs which rejected the TAA were Business, Chemistry, Chemical Engineering, Geology, and Law.

The April 26th procedural agreement was a product of give and take.[50] Compromise was essential in view of the strong feelings and

50. The April 26, 1969, Agreement reads as follows:

PROPOSED PROCEDURE FOR OBTAINING RECOGNITION AND STRUCTURE FOR COLLECTIVE BARGAINING

I. The bargaining teams for the Chancellor and for the TAA agree to move at once to seek the approvals needed to put into effect the procedures outlined below under which the TAA can obtain recognition for collective bargaining between the Teaching Assistants and the University of Wisconsin-Madison.

II. The collective bargaining relationship between the parties shall be governed by Section 111.80-.94 Wisconsin statutes except as hereinafter modified.

III. The University will base any recognition of the TAA on the results of an election conducted under the supervision of the WERC under the following conditions:
   a) Teaching Assistants at the University of Wisconsin-Madison will be given the choice of voting (1) for the TAA as exclusive bargaining representative or (2) for "no union."
   b) If the majority of TAs voting vote for the union then the TAA shall be recognized as the exclusive bargaining representative of all TAs at the University of Wisconsin-Madison for matters to be bargained at the University level.
   c) The TAA shall be recognized as exclusive bargaining agent for matters to be bargained at the departmental level only in those Departments where the TAA receives a majority of the votes of Teaching Assistants voting in the Department.

IV. The course of negotiations has shown that within the subject of wages are included several wage-related issues. Some of these are subjects on which collective bargaining is appropriate, some are not.
   a) *Definition of work load.* Even though the length of the basic work week is set by State law, the definition of what teaching responsibilities constitute what fraction of a full-time work load is mutually acceptable as a subject for bargaining on a campus-wide basis with due provision for flexibility from discipline to discipline.
   b) *Stipends, fee remissions, etc.* Teaching Assistant stipends and such other elements of Teaching Assistant remuneration as are established at an all-University or legislative level cannot be susceptible to collective bargaining culminating in a legally binding agreement. They are subjects, however, on which the University welcomes detailed discussion with appropriate Teaching Assistant representatives.

   We propose that the level of stipends and such other items of remuneration whose rates are set beyond the campus level be excluded from collective bargaining, but that the parties agree to meet and discuss these questions in a good faith effort to arrive at a joint recommendation to be presented to the appropriate decision-making bodies. In the event of failure to reach agreement both parties will be free to submit their own independent recommendations.

V. In all other aspects the collective

cogent arguments on both sides. The Administration succeeded in getting an agreement incorporating many provisions of subchapter V, including the "management rights" section, the "prohibited practices" section, and the "subjects of collective bargaining" section with some limitation. The TAA, for its part, obtained an agreement that it would be "recognized" as exclusive representative of the TAs if it won the election—a significant accomplishment in itself. Of high importance, it obtained an agreement which made it possible to expand the "subjects of bargaining" listed in the statute to include workloads, educational planning, and certain "wage-related issues," and to eliminate entirely section 111.91(2) which provides:

> (2) Nothing herein shall require the employer to bargain in relation to statutory and rule-provided prerogatives of promotion, layoff, position classification, compensation and fringe benefits, examinations, discipline, merit salary determination policy and other actions provided for by law and rules governing civil service.

Protection against rigid interpretation of the adopted statutory provision "subjects of collective bargaining" was provided in the structure agreement by means of the following language:

> Questions will inevitably arise concerning the interpretation of the language of Sec. 111.91 as applied to situations peculiar to the relationship between the TAA and the University. If the parties cannot reach agreement on such

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bargaining relationship between the parties shall be governed by the terms of the State Employment Labor Relations Act for public employees (Secs. 111.80 et. seq.) except as modified by this or subsequent agreement of the parties. Questions will inevitably arise concerning the interpretation of the language of Sec. 111.91 as applied to situations peculiar to the relationship between the TAA and the University. If the parties cannot reach agreement on such questions, the dispute shall be submitted to binding arbitration.

VI. Other matters which are not subject to bargaining may be appropriate for discussion and agreement between Teaching Assistants, as individuals or intradepartmental groups, and Faculty, as individuals or intradepartmental groups. Nothing herein is intended to prevent such discussions and agreements, and such activity should be encouraged.

VII. The administration is prepared to discuss any issue of interest to the TAA, whether the subject is included as a subject of bargaining under Sec. 111.91 or not.

VIII. It is in the interest of the University and of the Teaching Assistant to make sure that there are mechanisms in each Department to give him an opportunity to participate in a meaningful way in the educational planning for courses in which he shares a responsibility. To insure that there are such mechanisms and that they operate effectively is a proper subject for collective bargaining.

IX. Sec. 111.91(2) Wisconsin statutes shall be eliminated as inappropriate.

Teaching Assistants Association (TAA)

Robert L. Muehlenkamp
Henry W. Haslach
Richard W. Rhey
Richard K. Williams
Robert Peter Ebert

University of Wisconsin-Madison Campus

B. E. Kearl
David Berman
E. R. Mulvihill
Arlen Christianson
James L. Stern

questions, the dispute shall be submitted to binding arbitration.

On the subject of strikes, the TAA won at least the opportunity to argue: (1) that in view of paragraph II of the agreement, the prohibition of strikes applied only to the "collective bargaining relationship between the parties"; and (2) that in any event, the only sanctions were those contained in the "prohibited practices" sections of the statute (sections 111.84[2][e] and 111.85), which could not apply to the TAA because they were unclassified employees and, therefore, not subject to the statutory jurisdiction of the WERC. Although both parties appeared to find the agreement something that could be lived with, the official reaction of the TAA and the Chancellor varied considerably.[51]

The successful conclusion of a procedural agreement to fill the

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51. The T.A.A. comments on certain provisions of the agreement were as follows:

> IV (b: "Stipends, fee remissions, etc." We define wages as outside the "collective bargaining relationship" because the University can't be a party to a final contract on the entire instructional budget, but can only make recommendations to the Legislature; and, for the present, we don't want to deal directly with the Legislature.
>
> (a: "Definition of Work Load") This section, however, says the crucial issues effecting TAA wages will be *bargained* about.
>
> V Section 111.91 lists the subjects state employees can bargain over: "grievance procedures; application of seniority rights as affecting the matters contained herein; work schedules relating to assigned hours and days of the week and shift assignments; scheduling of vacations and other time off; use of sick leave; application and interpretation of established work rules; health and safety practices, intradepartmental transfers". We have included no. 2(a) above, and no. 6 below. We also got a clause removed from the end of 111.91 (see no. 7 below) which excluded other issues: *This is extremely important*: it means we can expand the list whenever we can prove to the University it should be expanded.
>
> The binding arbitration applies only to what 111.91 means in the University context.
>
> VIII CRUCIAL. This means that the University must bargain with the Union about guidelines or models on how TAs should participate in the courses they teach. This is our really substantive "job control" clause, and is a pioneering (no rhetoric), though necessary (all Unions should have it) provision.

The Chancellor, in a letter dated April 28, 1969, stated in part:

> In the opinion of the two bargaining teams the enclosed document outlines a fair way of testing the TAA claim of majority status and of undertaking collective bargaining if that claim is upheld. Basically what is proposed is that if recognized the TAA should operate under rules similar to those governing other unions of state employees.
>
> You will note that an early step in this procedure will be an election in which all Teaching Assistants will be eligible to vote. Both sides have agreed to do everything possible to encourage a full turnout of eligible voters. We feel bound by Wis. Statute 111.84 in this respect, and I do not need to emphasize that under that statute it would be improper for an employer or any of his agents "to interfere with, restrain or coerce state employees" in the exercise of their rights of self-organization and collective bargaining through representatives of their own choosing.

gap caused by the failure of our statutes to cover teaching assistants was a considerable achievement. It distinguishes the University of Wisconsin case from others such as CUNY,[52] in which the teaching assistants and lecturers were covered by the Taylor Law. The difficult task of reaching agreement on *substantive* issues still remained.

B. Collective Bargaining Negotiations on Substantive Issues

Almost immediately, the TAA charged the Administration with "bad faith bargaining." The matter was brought to a head in a July 16, 1969, memorandum issued to all departmental chairmen and faculty by the Administration's bargaining committee. The memorandum advised against bargaining at the departmental level until further notice. The TAA filed an unfair labor practice complaint with the WERC charging that the issuance of the memorandum amounted to a failure to bargain in good faith. The WERC dismissed the complaint for lack of jurisdiction, but indicated its willingness to provide arbitration services if requested by the parties.[53]

The negotiations continued until January 8, 1970, at which time they were halted by the TAA, which claimed that no progress was being made. Although a number of issues had been discussed up to this time, it was clear that the basic dispute was over the "educational planning" issue. On this issue, the April 26, 1969 structure agreement provided as follows:

> VIII. It is in the interest of the University and of the Teaching Assistant to make sure that there are mechanisms in each Department to give him an opportunity to participate in a meaningful way in the educational planning for courses in which he shares a responsibility. To insure that there are such mechanisms and that they operate effectively is a proper subject for collective bargaining.

Thereafter, the parties exchanged proposals. The initial TAA proposal was as follows:

> Both teaching assistants and students shall have a portion of the decision-making power over the educational planning. Mechanisms to insure that power shall be negotiated between the Union and the departments at the departmental level. . . .[54]

The initial Administration proposal was as follows:

> It is in the interest of the University and of the Teaching Assistant to make sure that there are mechanisms in each Department to give him an opportunity to participate in

52. *See* text accompanying notes 33-34, *supra.*

53. The position of the TAA here appears inconsistent with its position on the issue of WERC jurisdiction over strikes as a "prohibited practice."

54. TAA contract proposals as of Dec. 4, 1969.

> a meaningful way in the educational planning for courses in which he shares a responsibility. In departments where the TAA is the exclusive bargaining agent these mechanisms shall be bargained with the TAA. In the other departments the mechanisms shall be developed by the faculty in consultation with the affected Teaching Assistants.[55]

The TAA's objection to the Administration's proposal was that it did not guarantee effective TA and student sharing of the *decision-making power.* The TAA demand constituted an attack on the traditional power structure within the academic system. It was, therefore, not difficult to foresee an impasse on this issue.

The stalemate in negotiations continued through February. In an effort to prod the Administration, the TAA conducted a ballot, beginning on Tuesday, March 3, 1970, on a proposal to strike on the 16th of March unless a contract had been agreed upon by that time. On March 9, the TAA announced that 69 percent of its 970 members had voted in favor of the proposal. The same afternoon, the TAA requested the Chancellor to renew negotiations. The Chancellor was ready and willing. The March 10th issue of the Administration's *Campus Report* printed what was entitled "An Appeal," signed by the Chancellor, asking the TAA to reconsider its strike decision and return to the conference table to reach a settlement.[56]

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55. Memorandum of Jan. 12, 1970, to Faculty Members and Graduate Students.

56. The text read:

> I am sympathetic to the goals of the TAA to participate with the faculty in the improvement of the quality of education on the Madison campus. It was for that reason that I agreed voluntarily last spring to enter into a procedure under which the TAA could become the spokesmen for the teaching assistants and thereby insure effective discussion of such issues. In addition, I agreed to extend to the TAA bargaining rights similar to those that the Legislature had given civil service employees. In return, however, the TAA signed a document agreeing to be bound by rules governing bargaining by other state employees. These rules state that it is illegal "[t]o engage in, induce or encourage any state employees to engage in a strike, or a concerted refusal to work or perform their usual duties as an employee of the state." I regret that the TAA is on the verge of breaking its commitments. I hope that it and individual teaching assistants will reconsider the strike decision and return to the conference table and bargain in good faith with the aim of reaching a settlement. A strike by the TAA is a violation of their agreement; it is a violation of the individual contracts of the teaching assistants. Its purpose is to force the University to bow to power, not to reason. I assure you we will not be intimidated by threats of force and will fulfill our commitments to the citizens of the state to maintain the programs of the University.
>
> Further progress can be made, however, if the TAA returns to the bargaining table and attempts to resolve the remaining issues. I have suggested to the University negotiating team that they should explore additional possibilities of providing greater economic security for teaching assistants. For example, some departments may be able and willing to provide 3-year appointments. I will urge them to consider this possibility subject to safeguards providing for satisfactory performance.
>
> . . . .

At the time negotiations were resumed (March 11, 1970), the key issues were educational planning, length and conditions of TA appointments, workloads, grievance and review procedures, and evaluation of TAs. Other important but less critical issues included a TAA demand for a health plan and for a clause recognizing the University's "explicit and de facto discrimination" against women, the poor, the working class, and certain racial and ethnic minorities and calling for joint development of programs to end that discrimination. The respective positions of the parties were set forth in documents circulated to their constituencies. The TAA document, set forth below, summarized the TAA position and the TAA *understanding* of the Administration's position, as follows:[57]

TAA	UW
Educational Planning: departmentally negotiated mechanisms which implement the rights of TA's and students to share in decision-making power in their course planning.	Educational Planning: departmentally negotiated mechanisms which provide no student participation and no guarantee of decision-making power for the mechanisms: The status quo.
Length of Appointment: duration of the TA's graduate program; dismissal for cause (poor teaching performance) with burden of proof on the TA Review Committee (see Evaluations).	Length of Appointment: one year appointments, dismissal is absolute management right for any cause whatsoever, the status quo.
Evaluations: mandatory annual student evaluations; annual evaluations by ⅓ faculty, ⅓ student, ⅓ TA Review Committee; 24 hour notice before visitation for purpose of evaluation; termination of appointment only for cause; all TA files would be open to inspection by TA's.	Evaluations: no mandatory student evaluations; no evaluations committee; no limitations on visitations for purpose of evaluation; the right not to rehire TAs annually for any reason it chooses; closed files, the status quo.
Grievance Procedure: unfair and inequitable treatment (*i.e.* grievance over issues not explicitly covered in the contract; *i.e.* most grievances) cases shall be decided by a Workers Review Council made up of members of the entire University community (proportional to their numbers on campus) and a representa-	Grievance Procedure: unfair and inequitable treatment cases shall be decided by a Faculty Review Board consisting entirely of five tenured faculty members.

A strike will accomplish nothing which could not be negotiated in collective bargaining. My hope is that the TAA leadership will reconsider.

Campus Report, March 10, 1970, vol. 6, no. 3 at 1.

57. Summary of TAA-UW Contract, Positions on the Six Key Issues, March 11, 1970.

tive of the Wisconsin state legislature.

Health Plan: University contributes $20 per TA per month to a TAA Employee Benefit Fund operating under Wis. Statutes to provide benefits for all TAs and their families.	Health Plan: to be discussed (not bargained) at some future time "between the TAA and the appropriate University committee."
Work Loads: ½ time appointments for all TAs (unless special arrangements negotiated departmentally); classroom maximums on numbers of students ranging from 12 to 40 depending on the type of class; reduction in contact hours constituting ½ appointment; departmental bargaining on pay for teaching related activities (makeup labs, coordinator duties, evaluating papers, etc.); approx. $1 million increase in instructional budget required to meet these needs.	Work Loads: no change in current work load conditions; a study to be made by departments to implement changes by Sept. 1970—"This determination shall be made by the department in consultation with, and subject to concurrence by," both the dean of the appropriate college and the TAA; "gross, persistent or recurring deviations" from their norm shall go through their grievance procedure; no additional funds needed.
Human Rights: TAA and UW recognize "explicit and de facto discrimination" against women, the poor, the working class, and certain racial and ethnic minorities; TAA and UW develop separately and together programs which will end this discrimination.	Human Rights: TAA and UW agree that their respective policies and practices will not violate rights of any employee; no programs to be bargained for implementing this.

The "no-strike" issue, though not listed, remained very much alive. The TAA document reads:

> In addition to these six proposals there are many other instances of repressive and restrictive clauses in the University's demands which space doesn't permit us to go into here. Two examples: their language on "strikes and lockouts", which would make a teacher participating in an ecology teach-in, for example, subject to discipline, discharge, suspension, fines, injunctions, suits for damages, etc.; and their language on transfers which makes a TA's grievance into a "request" to the department chairman.

On the following day, Wednesday, March 11, 1970, the first bargaining meeting in two months took place. At that meeting, Neil Bucklew, the Administration's Chief Negotiator, is reported to have said:

> We're exploring such concepts as three-year appointments with a one-year probationary period. In the workload area, we are talking about a size limit for class sections, based on a course average. . . .
>
> We are talking about students having a role in the de-

> partment's evaluation of the TA. And we are proposing a health insurance plan similar to the one for faculty and civil service employes . . . .[58]

Further negotiating sessions took place on Thursday, Friday, and Saturday. While these sessions were occurring, the TAA announced:

> While remaining hopeful of a settlement before Sunday night, our picket signs have been printed, our picket captains have finished their school, and we are ready to walk out on Monday morning . . . .[59]

As the strike deadline approached, statements were issued on behalf of the Administration indicating that it intended to keep the campus open for classes and to ask for the National Guard should the police be unable to control the situation. The TAA criticized the announcement as provocative and irresponsible. The TAA on its part, vowed to shut the university down in the event of a strike but promised that picketing would be peaceful. The University announced that striking teachers would not be paid and would be held accountable for any damages caused by illegal strike action. The TAA announced that 1,500 undergraduate students were prepared to man the picket lines. It was also reported that members of the United Faculty would support the TAA.[60]

On March 11th, John Schmitt, President of the State AFL-CIO, met with the Chancellor.[61] President Schmitt did not say whether

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58. Wisconsin State Journal, March 12, 1970, § 6, at 1, col. 1.
59. Wisconsin State Journal, March 14, 1970, § 3, at 1, col. 5.
60. Thursday, the TAA picked up the support of the United Faculty, a group of about 100 professors.

"Members of the United Faculty will not replace teaching assistants . . . and will not offer extra lectures or laboratories" during a strike, the group said.

"We will not participate in surveillance of our teaching assistants or other students during the strike. We will not report information on participants in the strike to the administration," they said.

Wisconsin State Journal, March 13, 1970, § 3, at 1, col. 1.

61. Following that meeting, President Schmitt was quoted in the Capital Times as saying:

> We requested that the University sit down and bargain with the TAA in an attempt to arrive at a collective bargaining agreement similar to agreements with the University and other unions on this campus.
>
> This, the University has agreed to do.
>
> Hopefully, there will be no need for the TAA to strike.

The Times continued:

> Regarding the important "educational planning" demand of the TAA which calls for student and TA participation in the decision-making process involving courses they are in, Schmitt could offer no help.
>
> "In this case," he said, "the University can, with the TAs, and note I said with the TAs, decide or talk about curricula."
>
> The students, however, would be left out of such participation. "I'm realistic," Schmitt stressed, "and the TAs have got to be

the state AFL-CIO would support a strike if one occurred. Local 1 of the American Federation of State, County, and Municipal Employees (AFSCME) and Madison Local 695 of the Teamsters said they would. However, Local 171 of the Wisconsin State Employees Association, a branch of the AFSCME consisting of University of Wisconsin campus employees, said it would not. A local newspaper reported the situation as follows:

> While the faculty, students and teaching assistants marshal into line on one side or another, it becomes apparent that much of the work being done is taking place behind closed doors and with the effort of those on the dispute's periphery.
>
> The quest for labor support of the TAA, and the administration's efforts to have that support denied, is reported to be huge.
>
> There have been rumors that some of labor's more influential friends at the University of Wisconsin have urged Schmitt to keep the AFL-CIO out of the TAA dispute.
>
> One of those rumored to have contacted the state labor leader is Prof. Nathan Feinsinger, whose national reputation as a labor mediator is admired by all the unions in the AFL-CIO.
>
> Feinsinger, however, told the Capital Times, that he has "absolutely not" been in contact with Schmitt "or anyone else" in an effort to persuade the state organization not to recognize the strike.[62]

C. *Mediation*

It has already been noted that Professor Roe sat in as an "observer" at some of the sessions leading up to the April 26, 1969 structure agreement. After the initial collective bargaining session which she also attended as an observer, the parties barred all "outsiders" from future collective bargaining sessions, apparently wishing to forestall any possible outside intervention by mediation or otherwise. We were informed later that each side felt that Professor Roe was partial to the other side. Most mediators would regard this as a tribute to their impartiality. Thereafter, we had virtually no contact with the parties until after the January 8, 1970 halt in negotiations and after the second semester of the University had begun in February 1970. There were, however, sporadic conversations and occasional discussions in Professor Feinsinger's office with representatives of the TAA or of the Administration, separately.

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realistic, especially on their first contract. The University has limited funds."

The Capital Times, March 12, 1970, at 1, 4.

62. *Id.* at 1.

After the start of the March 3, 1970 strike vote, some of the TAA representatives had second thoughts as to the desirability of mediation. At that time, negotiations had been suspended nearly two months. This left a vacuum. Several TAA representatives made an unofficial call at Professor Feinsinger's office. The discussion centered around how to "get the show back on the road." It was determined that it might be helpful if a representative group of the TAA were to meet informally with us to continue the discussion. Such a meeting was held in the law school quarters of the Disputes Settlement Center. Various ideas were exchanged at this and succeeding meetings.

A majority of the group was not as yet prepared to accept the idea of mediation, but all were ready to resume negotiations. Our main object was to get the dispute off "dead center," no matter what name was given to the procedure. In this effort, the assistance of Attorney David Uelmen (partner of Mr. David Loeffler, who was serving as counsel for the TAA) and Mr. Donald Eaton (President of Madison Teamsters Local 695, a TAA supporter) proved invaluable. Their main contribution was to persuade the TAA representatives that an "all or nothing" approach to collective bargaining was unrealistic and to suggest possible alternatives to the TAA proposals then on the table, particularly with respect to educational planning.

During this period, the Administration was kept informed of our activities. Professor Christenson appeared occasionally in response to our request that he explain the Administration's position on particular issues. It is our recollection that we did not meet with TAA represenatives during the week of March 8th when negotiations were resumed.

In the eyes of the TAA, the negotiations between the parties which had resumed on Wednesday, March 11, appeared destined for failure. On Friday, March 13, 1970, we received a call from Mr. Uelmen inquiring whether Professor Feinsinger would be willing to mediate the UW-TAA dispute. We answered that we doubted that the TAA would want this, because we had received reports of criticism by the TAA, based on rumors recently circulating among TAs that certain University professors (referring to Professor Feinsinger) had attempted to persuade the AFL-CIO not to lend its support to the TAA.[63] Mr. Uelmen replied that representatives of the TAA were at that moment sitting in his office and had authorized him to make the request. Professor Feinsinger accepted, with the understanding that Professor Roe would team up with him as usual and on the condition that Mr. Uelmen himself would take an active part as representative of the TAA. We felt the latter to be very important because we had been involved in many complicated situa-

63. *See* text accompanying note 62, *supra.*

tions in which Mr. Uelmen had been helpful in achieving a settlement; he was a man of wide experience and highly regarded for his expertise. It also seemed possible that the situation would benefit from the insertion of a "new face." He reluctantly agreed.

We immediately began to take an active part in the case, operating at first from behind the scenes. Negotiations between the parties were continued in Madison on that afternoon, as previously scheduled, and continued on Saturday and through Sunday, March 15th, up to the hour at which the TAA membership was scheduled to vote on the Administration's "final" proposal.

Up to the time of Mr. Uelmen's call, we had understood that the Administration would not negotiate with the TAA if it went on strike and that it did not want mediation or intervention of any kind by any third party. The Administration never officially abandoned either position. However, from the beginning, the Chancellor's *actions* made it clear that he would cooperate with the mediator.[64]

We were informed during this period by a representative of the TAA that there were two factions in the TAA leadership, one of which would refuse any offer short of total TAA demands and would prefer a strike. We were also informed that a TAA representative had urged the Chancellor to put on the table the very best offer the Administration could make on the ground that there would be a good chance of its acceptance. After weighing the advice of his associates, which was not uniform, the Chancellor decided, despite the risk involved, to do as the TAA representative requested. Accordingly, the Chancellor authorized some concessions during the final few days of bargaining.

Despite this move by the Administration, the reports we received on the bargaining on Sunday, March 8, the day before the strike deadline, were pessimistic. Therefore, after the final negotiation meeting had broken up, we arranged to meet with a few key representatives of the parties, including the Chancellor and Mr. Uelmen. We did not play an active role at the meeting, preferring to leave it to the Chancellor and Mr. Uelmen, both of whom were skilled in handling bargaining crises. In a "last ditch" effort to find a mutually acceptable solution, each of the remaining key issues was discussed. One issue concerned the length and conditions of a TA appointment. During the previous four days of negotiations, the Administration had improved its former offer of a one-year appointment to a three-year appointment, the first year of which was to be a probationary period, that is, the Administration reserving

64. A *Daily Cardinal* story of March 21 noted that the Chancellor recognized Professor Feinsinger as the "official mediator" and agreed to cooperate but stated that he did not regard this as resumption of "face-to-face bargaining or negotiation." Daily Cardinal, March 21, 1970, at 1, col. 3.

the right to terminate the appointment during the first year. Mr. Uelmen proposed an extension of the appointment from three to four years. The Chancellor agreed. Mr. Uelmen tried to get in touch with his partner, Mr. Loeffler, who was attending the TAA membership meeting, to inform him that the Chancellor had offered what Mr. Uelmen regarded as a major improvement in the Administration's proposal on appointments. Mr. Uelmen was unable to reach Mr. Loeffler, and eventually set out for the meeting himself.

We learned the following morning that the TAA vote had rejected the Administration's offer by a wide margin. From that point on we held constant meetings. After meeting with representatives of the TAA separately, we decided that it would be best to have the representatives of the parties explain their positions in face to face meetings, with the hope that some differences might thereby be resolved. The TAA agreed and, after obtaining the permission of the Chancellor, Mr. Christenson and Mr. Neil Bucklew, chief negotiator for the Administration, participated in the meetings.

On Saturday, March 21, the *Wisconsin State Journal* reported that on the previous day "both the TAA and the UW began calling their meetings with Feinsinger 'mediation.'" The *Journal* correctly stated:

> Chancellor Edwin Young Friday refused to reopen direct contract bargaining with the striking Teaching Assistants Assn. (TAA). But he did authorize University of Wisconsin representatives to continue meetings with labor mediator Prof. Nathan P. Feinsinger. Feinsinger has been talking to both sides for the last few days.[65]

At the outset of our mediation efforts, none of the key issues existing when the negotiations were terminated in January had been settled. The strike, of course, hardened the positions of both sides. The bitterness and acrimony displayed at the bargaining table tended to impair the objectivity of the negotiators. This factor would have created a problem for a mediator even if all the issues were typical "bread and butter" issues, which they were not. The "educatonal planning" issue remained the most difficult to resolve because, as previously noted, it represented an attempt by the TAA to wrest from the tenured faculty a share of its control over the entire educational process in form as well as content. Indeed, as the Administration and part of the faculty viewed it, it represented an attempt not only to share but to take control.

> How do TAA and University proposals regarding educational planning differ? TAA proposes "decision-making power over educational planning". The University proposes participation in educational planning. Both parties

65. Wisconsin State Journal, March 21, 1970, § 1, at 1, col. 1.

> state that terms of this proposal should be bargained at the departmental level. The University feels that the faculty must continue to decide what courses will be taught . . . .[66]

As we read the signs, "educational planning" was the rock on which mediation might founder, and conversely, if that issue could be resolved, settlement of the remaining issues, though difficult, would not take long. The labor movement generally was reluctant to support a demand of this type even though organized labor itself at this time had begun to make non-"bread and butter" demands in the private sector (*e.g.*, that the employer take steps to abate environmental pollution). At this point, the latest TAA proposal on this issue stated:[67]

> The parties agree that each departmental faculty shall have an obligation to bargain collectively with the respective departmental TAA affiliate meaningful decisionmaking mechanisms for educational planning. The mechanisms bargained shall include both students and teaching assistants. Nothing in this agreement shall dictate the allocation of decision-making power among faculty, teaching assistants, and students. The form of the mechanism and the operation of the mechanisms shall be determined entirely by departmental collective bargaining and the specifications of this agreement.
>
> To bargain collectively is the performance of the mutual obligation of the departmental faculty and the departmental TAA to meet at reasonable times and confer in good faith with respect to the mechanisms of educational planning and the execution of a written agreement if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.
>
> The following standards and guidelines shall govern bargaining over educational planning:
>
> Participation in educational planning shall include:
>
> 1. Departmental collective bargaining over broad course mandates where the teaching assistants are the sole teacher.
>
> 2. Departmental collective bargaining over course creation.
>
> 3. Participation in other mechanisms developed through departmental collective bargaining which exercise decision-making power over
>
> a. course content (e.g., emphasis, coordination topics, goals);
>
> b. texts and materials used;

66. Campus Report, March 10, 1970, at 3.
67. TAA Proposal on Educational Planning, March 14, 1970.

c. pedagogical techniques (*i.e.*, evaluative methods, pacing, lecture-or-discussion format);

d. coordination of courses.

Meaningful mechanisms shall include but not necessarily be limited to:

1. Voting power on decision-making committees for courses or departments;

2. Voting power in decision-making plenary sessions in courses or departments;

3. Direct collective bargaining in the departments;

4. Sectional autonomy where there are guarantees of no penalties for students in sections where autonomy prevails;

5. Participation in a consensus procedure with the understanding that a more formal procedure shall be implemented where a consensus cannot be reached.

The following additional guidelines shall prevail:

1. [S]tudents shall control educational planning within the limitations specified herein;

2. A good faith effort shall be undertaken by the parties to conclude departmental bargaining on educational planning mechanisms by Nov. 1, 1970.

3. Impasses may be resolved by third-party arbitration, fact-finding, or mediation by a person or persons selected by the parties;

4. Students may waive the right to participate in any mechanism negotiated departmentally;

5. Agreement reached departmentally shall be ratified solely by members of the departmental affiliate;

6. No more than one representative from outside the department shall be a member of the respective departmental bargaining team.

The latest Administration proposal stated:

The parties agree that in departments where the TAA has gained exclusive bargaining rights each departmental faculty and its TAA affiliate shall have a mutual obligation to bargain collectively, in good faith and at reasonable times, to establish meaningful shared mechanisms by which a teaching assistant may participate in educational planning of a course in which he teaches. The mechanisms bargained shall also provide for participation of students.

Educational planning shall refer to those aspects of planning normally at the discretion of the faculty member in teaching a course of which he is given charge.

A committee of equal numbers of faculty, students who

> are majors in the department, and experienced teaching assistants (two, two, two, for example) shall be created to provide broad course mandates for courses which are taught solely by teaching assistants. Recommendations of this committee to change existing mandates must be approved by the department before they become effective.[68]

At the outset of the mediation, it appeared on the surface that the TAA had the upper hand in the dispute. However, it seemed to us, as mediators, that the balance of power was on the side of the Administration and faculty—that the struggle was between two dramatically unequal opponents. And, it became increasingly clear that some influential members of the faculty felt that the Chancellor had already gone too far in his rejected proposal of March 15.

After a series of joint and separate meetings with the parties, we met separately with the Chancellor to learn whether there was any realistic hope of further concessions from the Administration on the remaining issues, including educational planning, use of the grievance procedure in relation to the probationary year of the TA appointment, and the TAA demand that an amnesty provision include students and faculty as well as TAs. Following our report, the TAA representatives asked to have the Chancellor attend the next mediation session. The Chancellor consented to do so. At this meeting, the TAA questioned the Chancellor at length and received a full and frank response on each issue. The discussion ranged over the whole spectrum of issues, including workloads, appointments, secret files, health plans, class size, and amnesty. The "educational planning" issue was still unresolved. Nevertheless, the session was very helpful; it cleared the atmosphere of uncertainty and mistrust.

On Thursday afternoon, March 26, we met with James Marketti, David Loeffler, Don Eaton, Neil Bucklew, Arlen Christenson, and the Chancellor at the usual meeting place at Van Hise Hall. The Chancellor presented a new and satisfactory solution to the health plan issue. The "evaluation" issue (including questions concerning secret files and letters of reference) and the appointments and class load issues appeared to be close to solution. It was clear to us, however, that the Administration, as a result of growing faculty opposition, would not go beyond the March 15th proposal on "educational planning" and it was equally clear that the TAA could not settle for a proposition which its membership had already rejected.

On the way to the mediation session that day, a TAA representative remarked that the TAA would be better off with nothing on educational planning than with the March 15th Administration proposal then on the table. Professor Feinsinger interpreted the remark as a suggestion that the educational planning issue could be "brushed under the rug." Professor Roe interpreted it as simply

68. U.W. Proposal on Educational Planning, March 15, 1970.

expressing the TAA's view that the current Administration proposal was worse than none. At the ensuing meeting, Professor Feinsinger suggested, as a solution to the existing impasse, that the contract omit any language referring to educational planning. There was no comment by either side. Again, our interpretations differed. Professor Feinsinger inferred that silence meant acquiescence; Professor Roe thought that the suggestion had not been taken seriously by the TAA representatives and was, therefore, ignored. At the end of that session, the TAA asked that the Administration prepare a complete proposal along the lines discussed for consideration at the next day's meeting.

Evidently, Professor Feinsinger's remark concerning omission of any educational planning proposal was not ignored by Professor Christenson and Mr. Bucklew; the contract which they prepared overnight omitted reference to educational planning. When questioned by the TAA representatives, Christenson and Bucklew stated that the omission was intentional, that previous Administration proposals on that issue had been withdrawn. The TAA representatives said that they were confident the Administration's proposed contract would be rejected at the forthcoming stewards' meeting because of this omission. The next day's *Wisconsin State Journal* reported that the president of the TAA, Robert Muehlenkamp, stated that the latest University of Wisconsin offer was "clearly unacceptable" because it did not provide for student decision-making in educational planning and that he had "denied reports the TAA had agreed not to press the University on the issue."[69]

On Monday, March 30, the Stewards' Council, the TAA policy-making group, rejected the Administration's offer and voted to recommend that the membership "refuse the University's latest offer in view of the fact that it has no provision for satisfying the TAA's 'educational planning' demand."[70] At the TAA membership meeting the night of April 5, the final day of the Easter recess, the Administration's proposal was turned down.

On Monday, March 16, the state Attorney General, on behalf of the Regents of the University, had petitioned the Dane County Circuit Court for an injunction against the strike. No action was taken by the court while negotiations continued, apparently to avoid jeopardizing the chance of a settlement. On Wednesday, April 1, two days after the Council's rejection of the Administration's offer, Circuit Judge William C. Sachtjen issued an opinion upholding the University Regents' right to an injunction on the ground that the strike was illegal under common law, particularly in the light of the policy set forth in subchapter V, chapter 111, of the *Wisconsin Statutes*. Peaceful picketing, however, not in furtherance of the strike, was held not enjoinable. The injunction was

69. Wisconsin State Journal, March 8, 1970, § 2, at 1.
70. The Capital Times, April 1, 1970, § 4, at 47, col. 5.

signed on April 3, 1970. The strike, nevertheless, continued, resulting in service of contempt citations on 21 TAs, commencing on April 8th.

The agenda for the regular University faculty meeting on April 6 listed the TAA strike as an item for discussion. In order to assist in putting the issues in proper focus for that meeting, we prepared a document (dated April 3, 1970) which was distributed to the faculty. This document had been carefully checked and cleared with representatives of the Administration and the TAA and with faculty members of various shades of opinion on the TAA dispute, including some who thought that collective bargaining was irrelevant to university problems and that chapter 10D was the proper approach to sound TA-faculty relations.

At this faculty meeting, which carried over to the following day, the Chancellor called on the chairman of the University Committee to preside over a committee of the whole discussion regarding the teaching assistant situation. Three sharply conflicting resolutions were introduced. At one extreme was a resolution which called for termination of the April 26, 1969 structure agreement on the ground of alleged violation by the TAA; it was defeated by a 533 to 216 vote. At the other extreme was a resolution advanced by a group of professors known as the Committee of Thirty, which proposed that educational planning procedures "be arrived at *by agreement* among the faculty members and teaching assistants in each department, meeting at reasonable times and conferring in good faith" (emphasis added); it lost by a vote of 496 to 232. A third resolution was adopted by a vote of 531 to 140. It read as follows:

> It is in the interest of the University community to insure that there are mechanisms in each department that give students and teaching assistants an opportunity to participate in a meaningful way in educational planning. Such departmental mechanisms shall be developed by the faculty of each department on the Madison campus in collaboration with the students and teaching assistants involved in the courses offered by that department. Such mechanisms, however, shall not infringe upon the ultimate responsibility of the faculty for curriculum and course conduct.

The first two sentences were presented by the so-called "Council of Ten," advisers to the Administration during the TAA negotiations. The final sentence was added by an amendment offered from the floor, which was approved by a vote of 530 to 256. It is significant that the resolution adopted makes no reference to collective bargaining and does not require TAA agreement on any mechanism established by departmental faculty. The addition of the last sentence to the resolution sounded taps on student and teaching assistant participation in educational planning *decisionmaking*, for the time being.

We met with Professor Arlen Christenson, Mr. Neil Bucklew, and the TAA representatives on Wednesday afternoon, April 8, before the TAA meeting which was scheduled for that night. At our meeting the Administration representatives presented the TAA with a proposed contract which contained, on the subject of educational planning, the resolution adopted by the faculty the previous day. The proposed contract was discussed at length and relayed by the TAA representatives to the membership meeting which was about to begin. The only development of any consequence at our meeting was an inquiry from the TAA as to whether Professor Feinsinger would be willing to make recommendations for settlement, if requested. The representatives of the Administration felt that agreement to such a procedure would have to come from the Chancellor. When presented with the proposition by telephone, the Chancellor declined to agree.

During the ensuing four- or five-hour TAA membership meeting a resolution to reject the Administration's contract offer and to escalate the strike tactics received enthusiastic support from many members, but was eventually voted down. A motion to continue the strike until the Administration agreed to accept the procedure of recommendations was also defeated. After midnight, the TAA agreed by voice or hand vote, to accept the latest Administration proposal and to end the strike at 11 o'clock Monday morning and at that time to begin a three-hour paper ballot on the question of acceptance, as required by its by-laws. The final vote was 534 to 348 in favor of the contract.

The TAA's reaction to its experience was bitter. President Muehlenkamp stated in part:

> There's a terrible discrepancy between what the contract says and what we've done. We've created a union . . . . What we're left with is what we said all along we'd have to do it with—and that is ourselves. . . . We know what we did. We didn't do enough. But this is only the first annual TA strike.[71]

Suffice it to say, the wounds are not yet healed.

IV. OVERVIEW

It is our intention to look as objectively as possible at some of the short and long run aspects of the University of Wisconsin-TAA experience, to evaluate the results and the means by which they were accomplished, and to consider its implications for the future.

A. Evaluation of the April 26, 1969 Agreement

The dispute must be looked at in the context of the times and the

71. The Daily Cardinal, April 10, 1970, at 1.

historical background of the University-TA relationship. It has long been recognized that the TA has been "the forgotten man" on the Madison campus. The Mulvihill Report of February 5, 1968, was a forthright and courageous documentation of that fact. For years the TAs had sought to improve their working conditions and their economic position and to gain an effective voice in the reform of our system of higher education, a reform generally recognized as long overdue. The TAs felt that they had a significant contribution to make toward greater relevancy in our educational program because of their closeness to the student in age and experience, their potential status as college professors, and their classroom experience and training in the traditional type of education currently being offered on our campus. The best avenue that had been offered to obtain consideration of their views on both course content and pedagogical methods was the procedure of "consultation" through joint committees proposed by chapter 10D of the University Rules and Regulations, adopted by the faculty on December 2, 1968. In the opinion of the TAs, this proposal was inadequate because it did not provide them with a role in the decisionmaking process on academic issues, *e.g.*, educational planning. Consequently, the TAA, led by graduate students in the Industrial Relations Research Institute (IRRI) of the University, decided to pursue its objectives through the process of collective bargaining which is, in essence, joint decisionmaking.

In the absence of statutory mandate or procedure for bargaining, the first move was to persuade the Chancellor to agree to bargain. The Chancellor was aware of the need for reform of our educational system. He was also aware of the difficulty of persuading the faculty and the Regents to accept the procedure of collective bargaining as a means of solution. He may have felt that the failure of the state employment relations statute to include the TAs was inequitable, that this inequity would sooner or later have to be corrected, and that in the meantime something should be done to bridge the gap. Finally, he knew that on the issue of "recognition" for bargaining purposes, the TAA would have the strong support of the labor movement. The solution which the Chancellor proposed was a master stroke; by transplanting the terms of subchapter V[72] to the UW-TAA relationship, so far as they could be made to fit, and obtaining the consent of the TAA for what it presumably regarded as a quid pro quo for "recognition," he was able to satisfy to a reasonable extent the various interests involved.

The net result of the April 26th structure agreement was the establishment of a solid foundation for collective bargaining between the Administration and the TAA on the substantive issues. The agreement also created a precedent for resort to collective bargain-

72. WIS. STAT. § 111.80 *et seq.* (1967).

ing, when circumstances warrant, in academic situations not covered by any statute.

B. Academic Issues and Collective Bargaining

Doubts have been expressed as to whether the collective bargaining process has any place in the resolution of academic issues. Does the experience on the Wisconsin Madison campus throw any light on the matter? The answer is yes. This is most clearly demonstrated in the settlement of the chief academic issue involved in the dispute; namely, educational planning—a term used in this case to include determination of course content and pedagogical procedure. Though the TA's complaints over lack of participation in educational planning had been urgently pressed over a period of years, decisions continued to be made unilaterally by the departments, with the role of the TAs limited to consultation. Consultation is a far cry from decisionsharing, especially when, as the TAA contends, its suggestions may be ignored entirely or rejected out of hand.

In retrospect, it would seem that the TAA would have been well advised to follow the maxim, "He who fights and runs away may live to fight another day." In other words, perhaps it should have accepted the Administration's proposal of March 15, 1970,[73] which provided for collective bargaining "*to establish meaningful shared mechanisms* by which a teaching assistant [or student] shall participate meaningfully in educational planning of a course in which he teaches." (emphasis added) The provision finally adopted omits any reference to "collective bargaining" as the mechanism through which the TAA could take a part.[74]

The final agreement preserves the principle of unilateral determination in the faculty. Presumably, however, it does not foreclose any particular department from voluntarily granting to TAs and students a share of the decisionmaking process on the issue of educational planning. However disappointed the TAA may be as to the final disposition of that issue, that fact remains that what appears in the contract is the product of joint determination.

The TAA has succeeded in establishing collective bargaining as a *modus vivendi* on academic as well as bread and butter issues and there is little doubt that it will be back on both types of issues. Even if neither side is completely satisfied with the provision on educational planning (which is "par for the course" in collective bargaining generally), the fact that the issue has been resolved for the duration of the contract is a significant achievement in itself and an indication that the collective bargaining process has worked.

The question naturally arises as to whether the strike was neces-

73. *See* text accompanying note 68, *supra*.
74. *See* text accompanying notes 70-71, *supra*.

sary and, if so, whether it was "worthwhile." Some observers would say, as did the TAA, that the strike was necessary to prove that the union could survive against great odds and that its survival proves the strike was successful. It seems clear that by dramatizing the situation, the strike brought home to not only the public generally, but to a large part of the faculty, the significance of the issues involved and the merits of the TA's grievances. Though feelings ran high, and though irked by the strike, the faculty, in rejecting the resolution to rescind the structure agreement, showed a commendable lack of vindictiveness. The motion finally adopted, while not granting the TAA's request for a share in decisionmaking at this time, demonstrated the faculty's willingness to leave the door open for the future.

C. Mediation Aspects of this Case

In considering the role of mediation in this case, the first question that arises is, "What would have happened had there been no mediation?"

The approximately two-month stalemate which began on January 8, 1970, left the Administration with the upper hand for the time being. There was no effective pressure on it to take affirmative action. Its alternatives were these: it could act unilaterally to put its last previous offer into effect, leaving the way open for further negotiations at the request of the TAA; in the event of a strike, it could await expiration of TA individual contracts, at which time it would be free, theoretically at least, to "pick and choose" its future TAs or to replace the TA system with a system of instructors; if a work stoppage occurred, the Administration could employ strike-breaking tactics, seek an injunction, or sue for damages.

As for the TAA, it must have realized that time would not run in its favor. Moreover, the burden of going ahead is on the party which seeks to change the status quo. Like the Administration, the TAA had various alternatives: it could press for a resumption of negotiations if its membership was prepared for some compromise; it could seek to marshal student, faculty, and public support by informational picketing or otherwise in order to put pressure on the Administration; it could seek the Administration's agreement to invoke mediation, fact-finding, or arbitration; it could take the strike route.

At this time, both sides had expressed strong reservations concerning mediation as the means to resolve this dispute. The TAA had rejected an offer by the WERC to mediate. This left the parties with the alternatives listed above. An agreement to arbitrate would, of course, have settled the dispute. One can only speculate as to the success or failure of the other alternatives had they been

used. The TAA chose the strike route. In doing so, it made fullest use of the strike tactic by spacing the steps in such a way as to put maximum pressure on the Administration and at the same time to allow the widest opportunity for reaching a settlement through negotiation.[75] In our judgment, had the strike continued without third-party intervention, there would have been an outgrowth of violence. In that event, any agreement reached would have been wholly on the University's terms and the union would have been seriously weakened or discredited. If no agreement had been reached, the union would have been destroyed and the whole process of collective bargaining as a means of determining academic issues would have suffered a serious setback.

What then was the effect of our intervention, whether called mediation or something else? One cause of the stalemate was the hostile reaction of the Administration bargaining team to the acrimonious attitude of the TAA bargaining team at the bargaining table. Our first efforts after entering the picture were to bring about a rapproachment and to replace the atmosphere of distrust with one of mutual respect, without which further negotiations would have been fruitless. We had full cooperation from both sides, even during the approximately 10-day period prior to the official request for mediation. The unscheduled, unofficial, and unpublicized mediatory procedure developed smoothly; it succeeded in gaining authorization for two key Administration representatives to join in the discussions. By the time it became necessary to have the parties meet face to face, the mediators had gained the necessary acceptance of that procedure.

D. Some Observations

The notion that mediation is nothing more or less than "compromise" must be taken with some reservations. For one thing, many noted mediators follow the maxim, "To the lion goes the lion's share." As they see it, the mediator does not attempt to correct imbalances in bargaining strength; he tries, instead, to guide the parties toward the result which, in all likelihood, would have been achieved had collective bargaining been allowed to run its course without third-party intervention.

It is not unusual in negotiations for a party to take a "we will never agree to that" stance, without full exploration of the facts or appreciation of the consequences. Wise and experienced negotiators never—or hardly ever—use the word "never." When a negotiator does, the mediation process often serves the valuable function of "face saving." This case was no exception. For example,

75. The TAA announced that on March 3, 1970, a three-day strike ballot was to begin, that on March 9th the results would be made public and that if affirmative, a strike would begin on March 16.

mediation enabled the Administration to adhere to its "hard line" position of refusing to negotiate face to face with the TAA during the strike and at the same time to participate in joint sessions under the rationalization of cooperation with the mediators. In brief, on several occasions, mediation offered to each side an opportunity for a graceful withdrawal from an untenable position.

Mediators don't always function in the same way and the degree of their success under identical circumstances may vary for many reasons. For this particular kind of dispute, a number of factors contributed to the chance of successful mediation. These factors included academic background, friendly relations on the campus with faculty members representing all shades of opinion on the merits of the dispute, equally friendly teacher-student relations with a leading spokesman for the TAA, a record of successful settlement of disputes of various kinds, and acceptance of the mediator's credibility by the community at large. This is not to say that other mediators with similar or different qualifications might not have done as well or better.

We pass no judgment on the merits of extending collective bargaining to college campuses. Furthermore, a discussion of that subject would add little at the present time as collective bargaining in higher education is a *fait accompli*. It has been endorsed by all the major academic organizations, albeit with some differences in form and scope. The most important and controversial remaining issue is the scope of such bargaining. Will it be extended to cover academic issues such as educational planning and issues involving academic freedom as, for instance, the issue of academic freedom implicit in the TA's objection to the probationary year? Sooner or later, this question will arise in bargaining at all levels in higher education, including tenured and tenure-track faculty and nontenure track faculty, as well as TAs and, last but not least, students. Consider, for example, the implications of the following report:

> The Student Association at the State University of New York at Buffalo with support coming from local labor leaders and politicians, has announced a plan to form a student union on campus—much like any labor union—to bargain collectively with the university's administration. The union would negotiate on "bread and butter issues", according to Mark Huddleston, Student Association President. Such issues might include class size, marking systems, professors who fail to meet their classes, independent study, and other student "working conditions." According to a university news release, which reported the student plan, if the union idea is implemented at UB, it would probably be the first such organization of students in this country, although the concept has been used for years in Europe. Huddleston, advocating "good faith collective bargaining with the University administration with neutral

> third-party review", said giving students collective bargaining rights would facilitate "peaceful resolution of student grievances."[76]

E. Open Questions

There are undoubtedly many questions, legal and otherwise, left open by this paper. Moreover, the judgment of others might differ as to whether there were not other questions which also deserved comment. For example, should mediation have been left to "outsiders" rather than to "insiders"; that is, members of the faculty like ourselves?

As to legal questions, the paper would not be complete without some reference to the April 1, 1970, opinion issued by Dane County Circuit Court Judge William C. Sachtjen on the legality of the strike and the opinion of Attorney General Robert W. Warren in response to a request from the Chairman of the Senate Joint Committee on Finance for a ruling on certain questions arising out of the TAA-University dispute. In *Regents of University of Wisconsin v. The Teaching Assistants Association*,[77] Judge Sachtjen held that the teaching assistant strike was illegal at common law. The judge stated:

> Although neither the Municipal Employment Relations Act (Sec. 111.70, Wis. Stats.) nor the State Employment Relations Act (sec. 111.80) cover these particular employees, these statutes are helpful in discovering the underlying *public policy of this state* on which to base the common law. . . . (emphasis added)

Might it not be said with equal force that since the legislature, in the state employee statute enacted in 1966, had clearly confined its coverage to "classified employees," it meant to *exclude* "unclassified employees" (defined in *Wisconsin Statute* section 16.08) from any of its provisions, including the provisions prohibiting strikes? If the strike was properly held to be illegal, however, the judge was on safe ground in distinguishing between peaceful picketing in furtherance of the strike as an illegal objective, and peaceful picketing *not* in furtherance of the strike.[78] In granting the petition for an injunction, the judge stated:

> In addition, the plaintiff is entitled to an injunction . . . . That injunction, however, should include a paragraph expressly indicating that it shall not be construed to cover peaceful protests or picketing unrelated to the illegal strike . . . .

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76. National Association of State Universities and Land Grant Colleges, Circular Letter No. 23, Oct. 27, 1970, at 4.

77. Civ. No. 130-095 (Cir. Ct., Dane County, Madison, Wis. April 1, 1970).

78. *See* International Brotherhood of Teamsters v. Vogt, 354 U.S. 284 (1957).

In his opinion mentioned above, the Attorney General stated:

> We have already noted that there is no labor relations legislation applicable to the parties. Legislation is necessary to provide: (1) that a representative is the exclusive representative for *all* members of the collective bargaining unit, and (2) that the collective bargaining contract establishing the wages, hours and conditions of employment binds *all* members of the unit;—whether or not all members of the collective bargaining unit have designated the representative to bargain and contract for them.
>
> Without legislation, the *common law of agency* applies and an agent cannot bind a person with whom he has no principal-agent relationship. Thus, in this case non-Association members of the collective bargaining unit are not bound by the agreement made by the association with the University. (emphasis added)
>
> It is true that the University can unilaterally establish wages, hours and conditions of employment, and under the contract, it can still do so. And we may assume it will do so under the terms of the collective bargaining agreement. Of course, this will have the practical effect of setting the same terms for the non-union members. However, the collective bargaining agreement cannot cut off any rights that the non-union members have, if they have any, as would be the case in the private employment sector where labor legislation is applicable.
>
> It is impossible to visualize at this time any practical problems that might arise as a result of this peculiar aspect of the contractual relationships of the parties involved. It is my opinion, that, as between the teaching assistants who are not members of the Teaching Assistants Association and the University of Wisconsin, there is no collective bargaining agreement. However, this does not affect the legality of the contract as between the University and the Teaching Assistants Association and its members.[79]

Might it not be said with equal force that the relationship between a union and an employee, union or nonunion, is sui generis and that the agency analogy is, therefore, inappropriate.[80] Next, it is clear that the employer, in the absence of an agreement to the contrary, may unilaterally establish and change the terms and conditions of employment regardless of his motivation and that he can share his decisionmaking in any way he wishes, by collective bargaining or otherwise.

We must reluctantly resist the temptation to go beyond merely raising the above questions, and leave it to others to pursue them.

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79. *See* Opinion of Att'y Gen. Robert W. Warren, 59 OP. WIS. ATT'Y GEN. —, — (Nov. 17, 1970).

80. *See* J.I. Case Co. v. NLRB, 321 U.S. 332 (1944).