

STRIKE THREE—YOU'RE OUT! REVAMPING THE NEW YORK STATE TAYLOR LAW IN RESPONSE TO THREE TRANSPORT WORKERS' STRIKES

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I. INTRODUCTION

For almost three days in late December 2005, millions of New York City commuters braved frigid temperatures as they trekked to work.¹ Armed with their iPods and winter coats appropriate for an arctic expedition, the public walked, rode their bikes, and scooted on Segways to get where they needed to go.² Some New Yorkers even did the unthinkable—they shared cabs and cars with

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¹ See Carl Capanile, Hasani Gittens & Andy Geller, *All Aboard! Strike Ends; Buses and Trains Already Rolling; Union Caves in After Jail Threat, MTA Offers Pension Compromise*, N.Y. POST, Dec. 23, 2005, at 2 (“[t]he walkout began at 3 a.m. Tuesday and lasted for [sixty] hours. It forced New Yorkers to trudge across East River bridges in [twenty]-degree temperatures or trek up to [nineteen] miles from distant points of Queens.”).

² See John P. Avalon, Op-Ed, *Bankruptcy Of The Unions*, N.Y. SUN, Dec. 23, 2005, at 9 (noting the popular use of iPods during the transit strike); Jill Gardiner, *The Daily Commute Turns Into a Frustrating Quest for Transportation*, N.Y. SUN, Dec. 21, 2005, at 3 (discussion on how commuters coped with the strike); Eric Wilson, *A Sense of Fashion Is Lost in Transit*, N.Y. TIMES, Dec. 22, 2005, at G12 (discussing how in light of the transit strike, commuters in fashion mecca New York City, abandoned their usual chic for more sensible, weather appropriate accessories. One designer stated, “[P]eople are dressing like they work in outdoor booths at the flea market.”); Dan Kadison, Carl Campanile & Andy Geller, *NYers Strike Back—Rage At Union While Take Transit Walkout in ‘Stride,’* N.Y. POST, Dec. 21, 2005, at 2; Alan Feuer, *Thrown Together in a Crisis, Strangers Share Cars and Life Stories*, N.Y. TIMES, Dec. 21, 2005, at B1 (one commuter’s story:

Jerry Litwin, a property manager, had mounted a sturdy Trek bicycle for the ride from 101st Street and West End Avenue to 38th Street and Fifth Avenue. At 51st Street, though, his eyes began to leak. “I’ve got weak tear ducts,” Mr. Litwin said, his face slicked with the salty, frozen drops. “But the bike is doing fine.”)

Id. Harris Silver, Op-Ed, *The Strike’s Upside*, N.Y. SUN, Dec. 22, 2005, at 6. Silver, the founder of a pedestrian-rights group, discussed the benefits of New York City’s decision to close Fifth Avenue for only non-emergency vehicular traffic during the transit strike. He stated that commuters could use alternative methods of transportation, including Segways. *Id.*

complete strangers.³ These commuters did not abandon their usual overcrowded, rickety bus or subway to enjoy a very blistery winter wonderland just days before Christmas. They changed their routine because they had no choice: The Transit Workers Union (TWU) Local 100⁴ commenced a labor strike, which crippled New York City's sole public transportation system.⁵ After receiving a contract offer from the Metropolitan Transit Authority (MTA)⁶ which did not meet the qualifications of the TWU's approximately 33,700 members, the union opted to strike.⁷ At 3 a.m. on Decem-

³ See Feuer, *supra* note 2 (discussing how many New Yorkers from different socio-economic backgrounds resorted to hitchhiking in order to get to work and school. Feuer recounts an exchange in the borough of Queens: "'Are you going into the city?' Steven Lai demanded of the man in the van whom he saw stopped at a traffic light in Queens yesterday. 'Can you give me a ride, too?'"

⁴ Founded in 1959, TWU Local 100 has three primary objectives. See CONST. OF THE TRANSPORT WORKERS OF AMERICA art. II, available at <http://www.twulocal100.org/files/Local100constitutionA.PDF>; BYLAWS OF THE TRANSPORT WORKERS UNION OF GREATER NEW YORK, LOCAL 100, AFL-CIO, available at <http://www.twulocal100.org/files/Local100bylaws.PDF>. First, the union must work to unite its members. See CONST. OF THE TRANSPORT WORKERS OF AMERICA art. II (a). Second, the union must use the collective bargaining process to obtain adequate wages and benefits, shorter work hours, and improvements in employment conditions to better the livelihood of its members. See *id.* at art. II (b). The union is also responsible for engaging in legislative action and other policy-oriented activities to "safeguard the economic security and social welfare of working people. . . and to perpetuate the cherished traditions of democracy." *Id.* at art. II (c). TWU Local 100 members must be employed in the transportation industry, and meet the qualification of the union bylaws. See *id.* at art. III, § I; BYLAWS OF THE TRANSPORT WORKERS UNION OF GREATER NEW YORK, LOCAL 100, AFL-CIO, art. XXIV (a) (listing the divisions represented by TWU Local 100).

⁵ See Jennifer Steinhauer, *Transit Strike: Overview; Strike Halts New York Subways and Buses; City Scrambles as Union is Hit with Big Fine*, N.Y. TIMES, Dec. 21, 2005, at A1. In fact, the 2005 transit strike ended due to the efforts of a Public Employee Relations Board (PERB) mediator. See Sewell Chan, *Public Lives: The Mediator Behind the Curtain in the Transit Strike*, N.Y. TIMES, Dec. 30 2005, at B2. See discussion *infra* pp. 171–173 on the purpose and role of this governmental entity.

⁶ See The MTA Network, Public Transportation for the New York Region, <http://www.mta.info/mta/network.htm> (last visited Nov. 19, 2007). The MTA is the umbrella corporation for the bus, light-rail, bridges, and tunnel systems in the greater New York City metropolitan area. See *id.* The MTA has the following governing structure:

A public-benefit corporation chartered by the New York State Legislature in 1965, the MTA is governed by a [seventeen]-member Board. Members are nominated by the Governor, with four recommended by New York City's mayor and one each by the county executives of Nassau, Suffolk, Westchester, Dutchess, Orange, Rockland, and Putnam counties. (Members representing the latter four cast one collective vote.) The board also has six rotating non-voting seats, three held by representatives of the Permanent Citizens Advisory Committee (PCAC), which serves as a voice for users of MTA transit and commuter facilities, and three held by representatives of organized labor. All board members are confirmed by the New York State Senate.

Id.

⁷ See Online News Hour, *Transit Workers End Strike, Agree to Negotiate* Dec. 22, 2005, available at http://www.pbs.org/newshour/bb/transportation/july-dec05/strike_12-22.html. Fol-

ber 21, 2005, the month-and-a-half-long contract negotiations reached an impasse.⁸

The 2005 strike violated the Public Employees' Fair Employment Act (the "Taylor Law"),⁹ a New York state statute forbidding certain public employees from striking.¹⁰ Just prior to the strike, the MTA and the TWU were negotiating for a new collective bargaining agreement.¹¹ The parties could not agree on: a wage increase, retirement age, and employee contributions to their health

lowing the strike, the Union received an offer for a number of "worker-friendly provisions" including raises, paid maternity leave, better retiree health benefits, and assault pay. *See* Steven Greenhouse, *Pull of Union In Transit Pact*, N.Y. TIMES, Dec. 29, 2005, at A1. The MTA had the TWU agree to pay a set percentage of each worker's salary to health premiums, saving the MTA \$32 million annually. *See id.*

⁸ *See* Steinhauer, *supra* note 5. The exact date the contract negotiations commenced is unclear; however, the *New York Times* made reference to the negotiations starting a month before they published an article on the progress of the negotiations. *See* Sewell Chan, *In Transit Talks, Little Mention of Wages*, N.Y. TIMES, Dec. 2, 2005, at B4 ("The session, the fifth since talks formally began last month . . .").

⁹ *See generally* Public Employees' Fair Employment Act, N.Y. CIV. SERV. LAW §§ 200–214 (Consol. 2007).

¹⁰ *See* N.Y. CIV. SERV. LAW § 210 (Consol. 2007); *New York v. De Lury*, 23 N.Y2d 175 (N.Y. 1968). *De Lury* involved a nine-day work stoppage by New York City sanitation workers. *See id.* at 179–180. In rendering its decision, the Court of Appeals based its opinion on the findings of the Taylor Report and on the inherent differences between public and private labor relations. The Taylor Report is a government commissioned study, which was lead by a leading labor professor. *See id.* at 182–185. The New York State legislature used the findings from this report to support the 1968 Taylor Law. *See id.* The report found that the right to strike "is not compatible with orderly function of our democratic form of representative government." *Id.* at 185. The court also noted the differences between public and private labor relations, and held that given the nature of private sector labor relations, the right to strike was a necessity in that field, but not a necessity for public sector labor relations. *See id.* at 186–187. The New York Court of Appeals held that the no-strike provision did not deny public employees equal protection under the law, therefore upholding the constitutionality of Section 210. *See id.* at 179, 181–183, 188. The court stated that legislatures:

[D]esigned Section 210 of the Taylor Law] to prevent the paralysis of Government, offends against no constitutional guarantee or requirement. Self-interest of individual or organization may not be permitted to endanger the safety, health or public welfare of the State or any of its subdivisions. There was here indisputable proof not only of deliberate disobedience of the explicit provisions of the Taylor Law but willful defiance of the court's lawful mandates as well. Such defiance, the more egregious when committed by employees in the public sector, is not to be tolerated.

Id. at 188; *see* discussion *infra* pp. 169–170 & 195–196 on the penalties for violating § 210.

¹¹ *See* Sewell Chan & Steven Greenhouse, *M.T.A. and Union Clash on Pensions and Roving Conductors as Deadline Closes In*, N.Y. TIMES, Dec. 7, 2005, at B3. The 2002–2005 collective bargaining agreement between the TWU and the MTA was set to expire on December 15, 2005. *See id.*; *see also* Sewell Chan, *Labor Leaders Criticize Transit Agency*, N.Y. TIMES, Nov. 3, 2005, at B7. Under the Triborough Amendments to the Taylor Law, the current Collective Bargaining Agreement would remain in effect until a new collective bargaining agreement is reached. *See* discussion *infra* pg. 171 on the nature and purpose of the Triborough Amendment.

benefits and pension fund.¹² The MTA claimed that the agency did not have adequate funds in its coffers to support the union's proposals.¹³ Whereas the TWU responded that its members needed better benefits due to the inherent dangers and risks transit workers face each day on the job.¹⁴

At a minimum, the strike caused serious hassles.¹⁵ In reality, the consequences of the 2005 transit strike were much more significant. Although the public transportation system was inoperable for sixty hours,¹⁶ the New York City metropolitan region lost \$1 billion dollars in revenue and productivity.¹⁷ Moreover, the 2005 transit strike called into question the effectiveness of Alternative Dispute Resolution (ADR).¹⁸ The repercussions of the strike demonstrate the negative consequences which can arise from a

¹² See Steven Greenhouse & Sewell Chan, *Transit Negotiations: Overview; Transit Union Calls for Strike in Divided Vote*, N.Y. TIMES, Dec. 20, 2005, at A1.

¹³ See *id.*

¹⁴ See *id.*

¹⁵ See, e.g., Janny Scott & Sewell Chan, *Stakes Climb On Day 2 Of Strike; Jail Threat For Union Leaders*, N.Y. TIMES, Dec. 22, 2005, at A1 (“[f]or many living in Manhattan, the strike remained an inconvenience, not a hardship.” Individuals with Wall Street jobs were able to telecommute or take the company bus. “But for many more, the impact was harsher. Stan Decker said he had walked nearly seven miles from Bensonhurst, Brooklyn to Jamaica, Queens. ‘They’re hurting the ordinary people, they’re not hurting the big shots.’”); see Stephanie Gaskell, James Schram & Lukas I. Alpert, *Biking Bravest ‘Struck’ Down; Pol’s Son Slammed By Bus On His Way To Work*, N.Y. POST, Dec. 23, 2005, at 7 (discussing how a private bus accidentally hit a NYC firefighter as he rode his bike to work in response to the transit strike).

¹⁶ See Capanile et al., *supra* note 1.

¹⁷ See Randi F. Marshall & Lauren Weber, *Strike Cost \$1B*, BALTIMORE SUN, Dec. 23, 2005, at City Section, available at <http://www.baltimoresun.com/news/nyc-biz1223,1,5381514.story?ctrack=1&csset=true>. The New York City Comptroller’s Office indicated that the lost funds were due to employee absence, shortened work day, and tourists spending less. Some industries, such as floral, theater and hospitality, were hit particularly hard considering the strike happened days before Christmas. *Id.*

¹⁸ See discussion *infra* pp. 171–173 on the purpose and function of PERB’s mediation and arbitration processes. In response to the TWU and MTA impasse, under the Taylor Law, PERB appointed a three-member arbitration panel to evaluate the dispute between the parties and to help the parties agree on a contract for the TWU Local 100 workers. See Shlomo Greenwald, *State Board Names Three-Person Arbitration Panel in Transit Dispute*, N.Y. SUN, May 26, 2006, at 3. After six days of meetings, the chief arbitrator decided to take a short recess until the fall which will allow both parties to narrow the disputed issues. See Sewell Chan, *Transit Deal Is No Closer After 6 Days of Arbitration*, N.Y. TIMES, Aug. 14, 2006, at B3. On December 15, 2006, PERB issued a binding arbitration award. See *New York City Transit Authority v. Transport Workers Union of America*, PERB Case No. TIA2005-045 (2006) (Nicolau, Arb.), available at http://www.twulocal100.org/files/Arbitration_Opinion_Reward.pdf. The arbitration award, which is the new contract for TWU workers until early 2009, provides the following: A three percent annual pay increase, 1.5% health contribution, Dr. Martin Luther King, Jr. Day as a holiday, limited retiree benefits, enhancements to the pension plan and other terms from the MTA’s last offer to the TWU. See *id.*

failed negotiation session. They also exemplify how binding arbitration was not an attractive alternative for a union on the verge of striking.¹⁹

A. Brief Overview

Over the past few decades, collective bargaining negotiations have evolved in a number of ways.²⁰ Parties bargaining for a collective bargaining agreement (CBA) now address potential negotiation impasse differently.²¹ Employers, worried by the possibility of costly labor strikes, have insisted that unions agree to a no-strike provision in exchange for offering the union binding arbitration.²² Unions, who tend to receive favorable benefits using binding arbitration, accept and honor the no-strike provision.²³ As a result, the use of arbitration has reduced the number of labor strikes.²⁴

Despite the advantages of binding arbitration and being bound by Taylor Law Section 210, the TWU has on multiple occasions used the threat of strike during contract negotiations.²⁵ In

¹⁹ See discussions *infra* pp. 167–169 of how binding arbitration is used as an incentive to stop a union from striking.

²⁰ See William B. Gould IV, *Kissing Cousins?: The Federal Arbitration Act and Modern Labor Arbitration*, 55 EMORY L.J. 609 (2006); see also Jeffery W. Fields, *Continuing the Downward Spiral for Unions*, 1997 J. DISP. RESOL. 263 (1997).

²¹ See Gould, *supra* note 20.

²² See William B. Gould, *On Labor Injunctions Pending Arbitration: Recasting Buffalo Forge*, 30 STANFORD L. REV. 533, 536 (1978) (“[p]lainly the agreement to arbitration grievance disputes is the quid pro quo for an agreement not to strike.”); see also Montefiore Hosp. & Med. Ctr. v. Comm. of Interns & Residents, 414 N.Y.S.2d 600, 602 (Sup. Ct. New York County, 1979) (“[i]n this case, the *quid pro quo* is the union’s surrender of its right to strike in exchange for the right to compel the employer to arbitrate at the union’s election.”). In fact, Section 210 of the Taylor Law seeks to accomplish this same goal. See *Betts v. Hoosic Valley Teachers’ Ass’n*, 382 N.Y.S.2d 647, 647–48 (N.Y. Sup. Ct. Rensselaer County, 1976) (discussing an arbitration award, the court acknowledged a precedent, that “extension of [an arbitration award] to be the *quid pro quo* for the prohibition against strikes by public employees imposed by the Taylor Law Civil Service Law, § 210. ‘If public employees are prohibited from striking then they must be protected’” before an arbitration award is in effect.) (citation omitted); see also discussion *infra* pp. 169–173 & 195–196 on the purpose of the Section 210 of the Taylor Law.

²³ See Martin H. Malin, *Public Employees’ Right to Strike: Law and Experience*, 26 U. MICH. J.L. REFORM 313 (1993). Offering interest arbitration is a mechanism used to deter a union from striking. See *id.* The union is likely to obtain higher wages via interest arbitration. See *id.*

²⁴ See Gould, *supra* note 22; see also Gould, *supra* note 20.

²⁵ Interestingly, although the demographics of the TWU leadership and membership have changed over time, the use of strong tactics like threatening to strike and in some cases actually striking, are characteristics that have remained consistent in the TWU ranks over time. See Diane Cardwell, *Race Bubbles To the Surface In Standoff*, N.Y. TIMES, Dec. 22, 2005, at B1 (the union advocated for Dr. Martin Luther King, Jr. Day as a paid holiday, which would cost the MTA

fact, the Taylor Law was created in 1967 in response to the 1966 TWU strike.²⁶ The TWU also struck in 1980.²⁷ The TWU has threatened to strike during other negotiation periods, notably during the 1980s, 1990s, and even in 2002.²⁸ In addition to these threats, the TWU has made derogatory statements on the process of arbitration.²⁹ The repeated negative behavior exhibited by the

approximately \$9 million per year. “Indeed, the politics of the strike are in some ways embedded in the broader demographic changes in the city. Mr. Toussaint, who is originally from Trinidad, leads a union, now dominated by blacks, Latinos and Asian-Americans, whose members were once mostly of European descent.”).

²⁶ See Vincent Martin Bonventre, *The Duty of Fair Representation Under the Taylor Law: Supreme Court Development, New York State Adoption and a Call for Independence*, 20 *FORDHAM URB. L.J.* 1, 5 n.35 (1993). In 1966, “the Transport Workers commenced the strike on January 1st, paralyzing public transportation in the city for [twelve] days, at a loss of approximately \$100 million a day.” *Id.* This twelve-day strike caused \$800 million dollars in business loss in New York City, \$25 million dollars per day were lost as a result of employees being unable to get to work, and 500 million man hours were lost per week (hurting the commerce and banking industries). *Id.* See also *Weinstein v. New York City Transit Auth.*, 267 N.Y.S.2d 111, 115 (Sup. Ct. New York County, 1966). The ripple-effect of the strike was described as “‘the worst economic catastrophe since the great depression’ of the 1930s.” See *id.* (quoting The New York City Commerce and Industry Association). The 1966 strike also impacted other municipalities. See *id.* at 115–116 (noting that the decreased production in New York City’s garment industry caused stores across the country to have a short supply, trucking businesses which travel through New York City experienced a chaotic delivery system, and there were delays in financial transactions (“The Federal Reserve System reported that checks in the process of collection declined by [\$347 million] on an average day during the strike.”)).

²⁷ See Sam Roberts, *Transit Strike: History; Even With a Script, Ending a Strike Can Be Difficult*, N.Y. *TIMES*, Dec. 22, 2005, at B9.

In 1980, the [eleven]-day strike was waged over demands that workers receive pay increases that had been denied them during the city’s fiscal crises. The union wanted [thirty percent] wage increases over two years and a holiday to commemorate their founder and fallen labor leader, Michael Quill. They eventually received [nine percent] and [eight percent] raises.

Id. See Jeremy Smerd, *Ratify Contract, Union Tells Members*, N.Y. *SUN*, Dec. 28, 2005, at 1. In response to the 1980 strike, the TWU received a \$1 million fine and a two-day pay penalty per striker for each day of the strike, but the New York Metropolitan area lost \$1 billion in lost revenue. See Joel St. Ashenko, “*No-Strike*” *Taylor Law Was Born After Crippling Transit Walk in 1966*, N.Y. *SUN*, Dec. 12, 2005, at 4.

²⁸ See *A Strike is Authorized*, N.Y. *TIMES*, Oct. 31, 1983, at B6; Alan Finder, *Transit Union Reaches Deal on a Contract*, N.Y. *TIMES*, Apr. 30, 1992, at B1 (noting threat of strike); Elisabeth Bumiller, *Both Sides Cite Progress Made in Transit Talks*, N.Y. *TIMES*, Dec. 14, 1999, at A1 (TWU threatens strike); Steven Greenhouse, *The Transit Settlement: The Deal; Transit Strike Averted After Tentative Deal is Reached*, N.Y. *TIMES*, Dec. 17, 2002, at A1; but see Michael Oreskes, *A Transit Strike? Union Chief Says “No Way,”* N.Y. *TIMES*, Mar. 18, 1985, at A1 (In 1985, the TWU opted not to strike).

²⁹ See, e.g., Steven Greenhouse, *Transit Strike: The Issues; Tough Stance; Tougher Fines*, N.Y. *TIMES*, Dec. 22, 2005, at A1.

Mr. Toussaint, the truculent bargainer, has drawn so many lines in the sand – refusing binding arbitration, or any contract that treats new workers worse, or any wage offer that does not exceed inflation – that it is hard to imagine that he might not eventually have to accept a deal that will make him eat some humble pie. But the history of

TWU could suggest that the Taylor Law is ineffective at keeping bargainers at the table, especially parties who may not want to be at the table in the first place.

Using the failed 2005 TWU/MTA collective bargaining negotiations as an example, this Note examines two aspects of New York public employee contract negotiations. First, this Note explores how the attitude of bargaining parties influences the nature of contract negotiations. Second, this Note investigates ways the New York State Legislature could amend the Taylor Law to better guide negotiating parties to use ADR methodology to resolve their contractual disputes.

The first section of this Note addresses the nature of collective bargaining negotiations. In this section, I will discuss how labor negotiations differ from other types of negotiations. The commentary will pay special attention on how the Taylor Law affects the manner by which public labor unions and governmental entities negotiate. The second section of this Note explores how attitude affects a party's ability to be an effective advocate. My analysis in the second section focuses on how having a party with a negative attitude at the table makes it harder to resolve a dispute using ADR. The final section of this Note offers recommendations on how the Taylor Law can be amended to both deter future strikes by New York public employees and to encourage parties, who may have a negative attitude, to use ADR methods.³⁰

II. BACKGROUND

A. Applicable Law on Public Employee Unionization in New York State

The Taylor Law guides the collective bargaining process between public employees and governmental entities in New York State.³¹ The provision not only grants public employees the right

labor relations is peopled with negotiators who steadfastly assert that they will never accept this or that and then a week or two later accept it, saying that they were cleverly posturing.

Id.

³⁰ See Eric A. Hernandez, Note, *Mandatory Arbitration and Employment Discrimination: The Unfair Law*, 2 CARDOZO ONLINE J. CONFL. RESOL. 96 (2001). In fact, ADR methods have been shown to bring about more cost effective results due to the aid of the arbitrator, parties are better able to stay focused and avoid tangential issues. See *id.*

³¹ See N.Y. CIV. SERV. LAW § 200 (Consol. 2007). The policy Statement of the Taylor Law is:

to organize, but also gives elected unions the right to negotiate on behalf of each employee for wages, work hours, and other employment conditions.³² In exchange for having the right to organize, public employees have a number of responsibilities to meet. The most notable obligation is that these unionized employees must refrain from engaging in a strike, boycott, work stoppage, or any other mechanism which would prevent a governmental entity from fully functioning.³³

The Taylor Law has preset penalties for a union that opts to violate the no-strike provisions.³⁴ However, legislators discovered that Section 210 lack sufficient provisions to entice a union not to

The legislature of the state of New York declares that it is the public policy of the state and the purpose of this act to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government. These policies are best effectuated by (a) granting to public employees the right of organization and representation, (b) requiring the state, local governments and other political subdivisions to negotiate with, and enter into written agreements with employee organizations representing public employees which have been certified or recognized, (c) encouraging such public employers and such employee organizations to agree upon procedures for resolving disputes, (d) creating a public employment relations board to assist in resolving disputes between public employees and public employers, and (e) continuing the prohibition against strikes by public employees and providing remedies for violations of such prohibition.

Id.

³² See N.Y. CIV. SERV. LAW §§ 202–204 (Consol. 2006).

³³ See N.Y. CIV. SERV. LAW § 210 (Consol. 2007); Kurt L. Hanslowe and John L. Acierno, *The Law and Theory of Strikes by Government Employees*, 67 *CORNELL L. REV.* 1055, 1061, 1063–1065 (1982); see also *New York v. De Lury*, *supra* note 10 (noting that the purpose of § 210 is to protect the public from the devastating effects of a labor strike). The TWU strikes or the potential of a strike always gain much press attention as the impact of such a strike on New York City is momentous. But New York courts do not limit the application of the Taylor Law to strikes or threats of strikes. In fact, work slow-downs and a concerted effort not to complete one aspect of the job has been found to violate the Taylor Law. See *Bellmore-Merrick Central High School District v. Bellmore-Merrick United Secondary Teachers, Inc.*, 378 N.Y.S.2d 881 (Sup. Ct. Nassau County, 1975) (finding teachers to have violated Section 210 for not attending an evening parent-teacher conference night, even though such a activity was not included in the teachers Collective Bargaining Agreement); *Andreucci v. Kinzler*, 381 N.Y.S.2d 116 (2d Dep't 1976) (courts may imply that an unusually high absentee rate among unionized employees is a form of work stoppage/strike and thus a violation of the Taylor Law and the appropriate punishments are justified); *Dowling v. Bowen*, 385 N.Y.S.2d 355 (2d Dep't 1976) (holding that acting overly diligent at work can be a violation of the Taylor Law. In *Dowling*, Police Officers opted to give frivolous citations to city vehicles in response to police department salary change.). *But see Buffalo v. Mangan*, 370 N.Y.S.2d 771 (4th Dep't 1975) (holding that a firefighter union did not violate the Taylor Law when it opted to cancel the fire department's voluntary call-ins. So long as the fire department responded to emergency calls, fulfilled regular shift requirements, then suspension of the voluntary call in system did not present a public harm and not a violation of the Taylor Law.).

³⁴ See discussion *supra* pp. 169–170 & *infra* pp. 195–196 on Section 210 penalties.

strike insufficient at enticing unions not to strike.³⁵ In response, state legislators implemented one remedy – the Triborough Amendment.³⁶ This addition to the Taylor Law extends the terms of the soon-to-be expired collective bargaining agreement, by keeping such agreement in effect until a new agreement is reached.³⁷

To help bargaining parties come to the negotiation table rather than the picket line, legislators created a specialized governmental agency to manage disputes between public labor unions and its governmental employer.³⁸ The Taylor Law provides for the Public Employees Relations Board (PERB).³⁹ It is a governmental entity empowered to make decisions on labor disputes, including recom-

³⁵ See Robert E. Casagrande, Steven M. Klein & Stephanie Baxter, *Public Sector Bargaining New York: Examining PERB's Sunset Doctrine in a New Light*, 59 ALB. L. REV. 481, 487–488 (1995). Casagrande et al. discuss the history of the Triborough Amendment, noting the legislative intent as:

The chief sponsor of the Triborough Amendment, Assemblyman Lentol, wrote to the Governor's Counsel that the purpose of the legislation was "to enhance the negotiating process by preserving the status quo until a new agreement is reached by the concerned parties." Assemblyman Lentol justified the legislation on two grounds: First, it has been past experience that some employers will not bargain in good faith, as they rely on the Taylor Law to serve as a tool for forcing employees to accept a new contract that is less than agreeable to them. Moreover, some employers have abused the Taylor Law to better their own financial state, at the expense of their employees. Second, perhaps more importantly, this bill enacts into law what has become a standard, though not mandatory practice. In recent years, practically all expired contracts have been continued until a new agreement is decided upon. Thus, this bill will not impose any new burdens on responsible governments or employees.

Id.

³⁶ See N.Y. CIV. SERV. LAW § 209-a(1)(e) (Consol. 2007).

³⁷ See N.Y. CIV. SERV. LAW § 209-a(1)(e) (Consol. 2007); see also *County of Niagara v. Newman*, 481 N.Y.S.2d 563 (4th Dep't 1984) (holding that it is an unfair labor practice for an employer to refuse to extend the terms of a collective bargaining agreement if a new agreement is not reached and the state legislature may not impose a legislative solution to a labor dispute); *City of Utica v. Zumpano*, 91 N.Y.2d 964 (1998) (holding that the Triborough Amendments did not interfere with a municipality's right to alter its staffing needs).

³⁸ See N.Y. CIV. SERV. LAW § 205 (Consol. 2007); see also *Jefferson County Brd. of Supervisors v. PERB*, 330 N.E.2d 621, 624 (N.Y. 1975). "PERB has the express power to formulate and establish procedures . . . [to halt] improper employer and employee organization practices . . . [T]he Legislature . . . mandated that PERB 'shall exercise exclusive nondelegable jurisdiction' of the powers conferred upon it . . . PERB is authorized to [implement] procedures [that] will effectuate the [Taylor Law's] purposes and provisions." *Id.* at 624 (citation omitted). A PERB decision will only be set aside if it is arbitrary and capricious. *Id.* "However, PERB may not disregard an explicit legislative directive to the effect that, as in the instant situation, it is precluded from doing anything more than entering an order requiring the County to negotiate in good faith." *Id.*

³⁹ See N.Y. CIV. SERV. LAW § 205 (Consol. 2007).

mending that the bargaining parties send their dispute to PERB's ADR system.⁴⁰

If the collective bargaining negotiations come to an impasse,⁴¹ PERB charts the appropriate course of action. The Taylor Law offers four courses of action to resolve such a dispute.⁴² The first step is mediation.⁴³ Management or the union may request a mediator by filing a Declaration of Impasse with PERB.⁴⁴ The mediator's chief objective is to cultivate a settlement agreement between the parties.⁴⁵

The second step is the fact-finding process.⁴⁶ Parties move to the fact-finding stage only if the voluntary mediation does not resolve the impasse.⁴⁷ The fact-finder may hold hearings, take testimony and accept materials from the disputing parties.⁴⁸ The goal is for the mediator to elicit enough information to make a non-binding recommendation to the parties.⁴⁹

If, however, fact-finding mediation does not entice the parties to agree, then for select public unions (including transit works), their dispute is subject to binding arbitration.⁵⁰ This is the third step in the PERB ADR impasse resolution process. There are

⁴⁰ *See id.* (PERB's powers include, but are not limited to: resolving bargaining disputes, addressing mid-CBA turmoil, initiating and conducting surveys on labor conditions for public employees, to holding hearings and fact-finding sessions related to public employee matters); *see also* Kurt L. Hanslowe & Walter E. Oberer, *Determining the Scope of Negotiations under Public Employment Relations Statutes*, 24 *INDUS. & LAB. REL. REV.* 432 (1971).

⁴¹ *See* N.Y. CIV. SERV. LAW § 209 (2)–(3). Parties may reach an impasse in a variety of ways. Sometimes when bargaining parties are unable to reach an agreement on a particular bargaining issue, the parties will, in effect, agree to disagree, and voluntarily declare an impasse. *See id.* The parties will contact PERB in order to use the agency's ADR procedures to resolve the disagreement. *See id.*; *see, e.g.*, *Newburgh v. PERB*, 470 N.Y.S.2d 799 (3rd Dep't 1983) (firefighters frustrated with the nature of the CBA negotiations filed a declaration of impasse with PERB). An impasse can also occur under involuntary conditions. *See* N.Y. CIV. SERV. LAW § 209 (2)–(3). Involuntary impasse often starts when one of the parties opts to walk away from the bargaining table. An employer lockout or a union strike is an example of a party walking away from the bargaining table. *See, e.g.*, *Newburgh v. Newman*, 505 N.E.2d 590 (N.Y. 1987) (noting that PERB may require compulsory arbitration if police and fire unions are unable to reach a contractual agreement with management). PERB has a preset impasse protocol for the bargaining parties. *See* discussion *infra* 171–173 on PERB impasse proceedings.

⁴² *See* N.Y. CIV. SERV. LAW § 209(3) (Consol. 2007).

⁴³ *See* N.Y. CIV. SERV. LAW § 209(3)(a) (Consol. 2007).

⁴⁴ *See id.*

⁴⁵ *See* N.Y. CIV. SERV. LAW § 209(3)(b) (Consol. 2007).

⁴⁶ *See id.*

⁴⁷ *See id.*

⁴⁸ *See* N.Y. CIV. SERV. LAW § 209(5) (Consol. 2007).

⁴⁹ *See id.*

⁵⁰ *See* N.Y. CIV. SERV. LAW § 209(5)(a) (Consol. 2007).

three members of the binding arbitration panel who are each selected according to the requirements of the Taylor Law.⁵¹ The arbitration panel has limits as to the issues it may resolve.⁵²

In the fourth and final step of the PERB impasse resolution process, the New York State legislature may hold committee hearings on the substance of the fact-finder's report.⁵³ The committee has wide discretion in its recommended action.⁵⁴ Legislative remedies range from requiring the parties to return to the negotiation table to even legislating specific terms of the collective bargaining agreement.⁵⁵ This fourth step, however, is not available to certain employee unions, including the transit workers.⁵⁶

⁵¹ See *id.* Specifically, the "Board shall refer the dispute to a public arbitration panel, consisting of one member appointed by the public employer, one member appointed by the employee organization and one public member appointed jointly by the public employer and employee organization." *Id.* (provision also notes the timing, and the right of one party to knock a selection offered by the other party).

⁵² See N.Y. CIV. SERV. LAW § 209(5)(d) (Consol. 2007). Specific to transit workers, the arbitration panel may make determinations on the following:

- (i) comparison of the wages, hours, fringe benefits, conditions and characteristics of employment of the public employees involved in the impasse proceeding with the wages, hours, fringe benefits, conditions and characteristics of employment of other employees performing similar work and other employees generally in public or private employment in New York city or comparable communities;
- (ii) the overall compensation paid to the employees involved in the impasse proceeding, including direct wage compensation, overtime and premium pay, vacations, holidays and other excused time, insurance, pensions, medical and hospitalization benefits, food and apparel furnished, and all other benefits received;
- (iii) the impact of the panel's award on the financial ability of the public employer to pay, on the present fares and on the continued provision of services to the public;
- (iv) changes in the average consumer prices for goods and services, commonly known as the cost of living;
- (v) the interest and welfare of the public; and
- (vi) such other factors as are normally and customarily considered in the determination of wages, hours, fringe benefits and other working conditions in collective negotiations or impasse panel proceedings.

N.Y. CIV. SERV. LAW § 209(5)(d)(i)-(vi).

⁵³ See N.Y. CIV. SERV. LAW §209(3)(e) & (f) (Consol. 2007).

⁵⁴ See N.Y. CIV. SERV. LAW §209(3)(e)(iv) (Consol. 2007) ("thereafter, the legislative body shall take such action as it deems to be in the public interest, including the interest of the public employees involved.").

⁵⁵ See N.Y. CIV. SERV. LAW § 209 (Consol. 2007).

⁵⁶ See *Mauro v. Kiley*, 503 N.Y.S.2d 680 ("[t]hat branch of the petitioner's application seeking an order directing that the differences between the parties be submitted to the New York State Legislature is denied, in view of the determination that that body is not the legislative one intended and meant under the Fair Employment Act.").

i. Academic Commentary on the Taylor Law

Ever since the passage of the Taylor Law in 1967, academic commentators have analyzed aspects of the Taylor Law. Some commentators analyzed the mechanical aspects of the Taylor Law, such as the use of interest arbitration.⁵⁷ For instance, Arvid Anderson and Loren Krause explore the benefits of interest arbitration (the method of arbitration utilized in the Taylor Law).⁵⁸ They suggest that the lure of interest arbitration⁵⁹ combined with the fact that the TWU had previously requested interest arbitration, could be the ingredients that finally cure the TWU from its desire to strike.⁶⁰ To support their argument, the authors examined the interest arbitration provisions in other states⁶¹ – provisions which have proven quite successful.⁶²

⁵⁷ See Malin, *supra* note 23. Malin discusses interest arbitration as a mechanism to deter a union from striking, noting that the potentially higher wages via interest arbitration will usually halt a union from striking. *See id.*

⁵⁸ See Arvid Anderson & Loren A. Krause, *Interest Arbitration: The Alternative to the Strike*, 56 *FORDHAM L. REV.* 153 (1987) (“[i]nterest arbitration is a process in which the terms and conditions of the employment contract are established by a final and binding decision of the arbitration panel.”). The primary difference between arbitration and other ADR methods, is arbitration is a “private, judicial determination of a dispute.” Leslie Grant, *What is Arbitration*, HR.com, Apr. 20, 2000, available at <http://www.mediate.com/articles/grant.cfm>. A neutral third party panel (usually consisting of an odd number like one or three) evaluate the evidence and the arguments presented by the parties. *See id.* Unlike the other ADR methods, arbitration awards, in most jurisdictions, are given the same force and effect of a decision rendered by a judge. *See id.* In essence, arbitration is “an alternative to court action.” *Id.* Parties will often agree ahead of time to use arbitration to resolve a dispute. *See id.* There are two arms to labor arbitration: rights arbitration and interest arbitration. *See id.* Rights arbitration involves adjudicating an alleged violation of a term in the party’s current collective bargaining agreement. *See id.* This is similar to breach of contract claims brought in court. *See id.* Interest arbitration, on the other hand, “involves adjudication on the terms and conditions of employment to be contained in a resulting collective agreement.” *Id.* Parties turn to interest arbitration when their current collective bargaining negotiations have reached an impasse. *See id.* The use of interest arbitration is pre-agreed to by the parties, and often mandated by statute. *See id.* Some unions and employers will agree to use a combined form of mediation/arbitration. *See id.* Under this hybrid method, parties first use mediation to resolve their dispute. *See id.* If the mediator is unable to encourage the parties to reach agreement, then the dispute is submitted to another third party for binding arbitration. *See id.* The Taylor Law is an example of a labor-relations management system that uses this hybrid approach. *See discussion supra* pp. 171–173 on the PERB dispute resolution process.

⁵⁹ See Anderson & Krause, *supra* note 58 (unions tend to receive more favorable benefits via arbitration); *see also* discussion *supra* note 49 on the differences between interest arbitration and other forms of arbitration.

⁶⁰ See Anderson & Krause, *supra* note 58.

⁶¹ *See id.* at 157–164 (analyzing and categorizing the public labor law in approximately twenty states – including “big labor” states like Michigan, California, and Illinois).

⁶² *See id.* Anderson and Krause thoroughly explore the interest arbitration aspects to each state’s law. *See id.* While weighing the advantages and disadvantages of each option, Anderson

The following logical premises support the Anderson and Krause theory on interest arbitration and TWU/MTA negotiations: the collective bargaining process needs either a strike or interest arbitration; the TWU sought the option of interest arbitration, therefore the TWU will continue to prefer this option.⁶³ The analysis, while generally true, is not a logical tautology. It ignores that other factors could impact a union's strike decision. In fact, even with the PERB interest arbitration provisions in effect, a number of unions have opted to strike.⁶⁴ No better example come but from the TWU's constant threats of strike from the late 1980's onward and the 2005 strike.⁶⁵ Though Anderson's and Krause's theory has some weaknesses, perhaps the success of interest arbitration in other states is a strong reason why interest arbitration should remain in any amendment to the Taylor Law.⁶⁶

The Triborough Amendment is another mechanical aspect of the Taylor Law, which like interest arbitration, was implemented to reduce the number of CBA negotiations that reach impasse. Commentators, like Casagrande, Klein and Baxter, suggest that the New York State Legislature added the Triborough Amendment to the Taylor Law as an incentive for unions to avoid work stoppages.⁶⁷ In fact, some critique the Triborough Amendment as a legislative remedy that in reality does not give bargaining parties the incentive to come to the negotiation table.⁶⁸

and Krause express preference for conventional arbitration, which gives the arbitrator the ability to weigh arguments and materials before rendering a decision "because it gives the arbitrator the greatest latitude in deciding the issues in dispute." *Id.*

⁶³ See *id.* at 155.

⁶⁴ See, e.g., *Barner v. Jeffersonville-Youngville Cent. Sch. Dist.*, 502 N.Y.S.2d 285 (App. Div. 3d Dep't 1986) (example of a teacher's strike).

⁶⁵ See discussion *supra* pp. 5 & 6 on prior transit strikes and threats of strikes.

⁶⁶ See Anderson & Krause, *supra* note 58, at 157-164.

⁶⁷ See Casagrande et al., *supra* note 35.

⁶⁸ See Denis M. Hughes, *Taylor Law Reform for the Twenty-First Century Final Report and Recommendations of the New York State AFL-CIO* at 9 (June 2002), available at <http://www.nysaflcio.org/documents/Taylor%20law%20reform%20final.pdf>. Hughes argues:

Although the terms of an expired collective bargaining agreement continue after expiration by operation of the "Triborough Amendment" in §209-a.1(e) of the Taylor Law, many employers prefer to sit with the status quo rather than enter into an agreement for new or improved terms and conditions of employment. Thus, it is still not uncommon in New York's public sector to find labor agreements that have been expired for several years before a successor collective bargaining agreement is reached.

Id.; *c.f.* *Prof'l Staff Congress-City Univ. of N.Y. v PERB*, 799 N.Y.S.2d 7, 15 (App. Div. 1st Dep't 2005), *rev'd on other grounds* 857 N.E.2d 1108 (N.Y. 2007) ("the Triborough doctrine is primarily a protection for employee representatives and not, as PERB views it, an imposition of reciprocal obligations to maintain the status quo.").

Other commentators, such as James T. O'Reilly and Neil Gath, critique how laws which prohibit striking, like the Taylor Law, in reality limit a union's bargaining power at the negotiating table.⁶⁹ Traditionally, economic pressure is a primary resource that unions use to leverage their positions with an employer.⁷⁰ Unions have succeeded in persuading the employer to meet its demands by threatening economic recourse.⁷¹ Using the bargaining ability of the Ohio public sector unions as an example, O'Reilly and Gath argue that "since the single most potent weapon of employees in the collective bargaining situation is the strike, it was very difficult for Ohio's public sector unions to accomplish effective bargaining with public employers in the absence of a legal right to strike."⁷² In essence, unions – situated in jurisdictions with laws that prohibit public employees from striking – find that they have one less tool to wager against their employer, as they cannot use economic strength in order to effectively advocate for their benefits at the bargaining table.⁷³

The differences between the private and public sector is one justification for denying public employees the right to strike.⁷⁴ Hanslowe and Acierno, for instance, contend that economic power is a factor in private sector negotiations,⁷⁵ whereas in the public

⁶⁹ James T. O'Reilly & Neil Gath, *Structures and Conflicts: Ohio's Collective Bargaining Law for Public Employees*, 44 OHIO ST. L. J. 891 (1983).

⁷⁰ See Hanslowe & Acierno, *supra* note 33; *New York v. De Lury*, *supra* note 10; *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611 (1984) (part 1 of 2); *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1676 (1984) (part 2 of 2).

⁷¹ See Hanslowe & Acierno, *supra* note 33; *New York v. De Lury*, *supra* note 10; *Developments in the Law—Public Employment* (part 1 of 2), *supra* note 70; *Developments in the Law—Public Employment* (part 2 of 2), *supra* note 70.

⁷² O'Reilly & Gath, *supra* note 69, at 893.

⁷³ See, e.g., O'Reilly & Gath, *supra* note 69.

⁷⁴ See Hanslowe & Acierno, *supra* note 33; see also *Developments in the Law—Public Employment* (part 2 of 2), *supra* note 70.

⁷⁵ See Hanslowe & Acierno, *supra* note 33 (noting that state statutory provisions and common law have prohibited public employee strikes under the doctrine that "the 'government is sovereign'" and to avoid "distort[ing] democratic political processes." In 1996, the state Committee responsible for creating the Taylor Law "argued that in the public sector, where democratic processes rather than economic power determine the character of employment agreements, the right to strike conflicts with orderly democratic function." In distinguishing the role of strikes in the private sector versus in the public sector, this same committee noted "that while the right to strike normally performs a useful function in the private enterprise sector (where relative economic power is the final determinant in the making of private agreements), it is not compatible with the orderly functioning of our democratic form of representative government (in which relative political power is the final determinant)." Furthermore,

[p]roponents of the democratic process argument contend that public sector strikes would engender few benefits. The analysis asserts that public employers are less likely than private enterprises to exploit their employees because the public em-

sector there is more political pressure at play.⁷⁶ Thus, because public sector negotiations should not be motivated by economic reasons, it is not necessary to give the union the right to strike.⁷⁷ Moreover, since many public employees protect the health and safety of our society, in the interest of the public good, it is appropriate to prohibit their right to strike.⁷⁸

B. The Nature of Labor Collective Bargaining Negotiations

Briefly before a collective bargaining agreement is set to expire, the union and management will meet to discuss the terms of the new collective bargaining agreement.⁷⁹ Common terms discussed include: wages, benefits, working conditions, training and hiring practices.⁸⁰ Often the union and management are represented by a specialist or advocate.⁸¹

i. Negotiation Strategies for Collective Bargaining.

Generally, there are three types of negotiation strategies: competitive, compromising, and collaborating (joint-problem solving).⁸² Parties pick not only a negotiating style that feels

ployer must pay wages that are competitive with private sector wages. . . . The 'democratic process' argument not only sees few benefits in public sector strikes, but also views the costs of granting a right to strike to public employees as considerable. Arguably a right to strike would give public sector employees a weapon more powerful than the strike weapon that their private counterparts wield.

As a result, the government

faced with a public strike, therefore, must either increase taxes or shift money from one government service to another. . . .the public strike allegedly forces the governmental employer to redistribute income rather than allocate resources. The argument then assumes that questions of income redistribution 'are essentially political questions,' which leads to the conclusion that a public sector strike will distort the political decision making process.)

Id.

⁷⁶ See Hanslowe & Acierno, *supra* note 33; see also *Developments in the Law—Public Employment* (part 2 of 2), *supra* note 70.

⁷⁷ See Hanslowe & Acierno, *supra* note 33; see also *New York v. De Lury*, *supra* note 10; *Developments in the Law—Public Employment*, (part 2 of 2), *supra* note 70.

⁷⁸ See *supra* note 77.

⁷⁹ See, e.g., BYLAWS OF THE TRANSPORT WORKERS UNION OF GREATER NEW YORK, LOCAL 100, AFL-CIO, *supra* note 4 (noting the timeline for the TWU leadership to commence bargaining with the MTA).

⁸⁰ See, e.g., N.Y. CIV. SERV. LAW § 204(3) (Consol. 2007).

⁸¹ See Fields, *supra* note 20.

⁸² See Gary Goodpaster, *A Primer on Competitive Bargaining*, 1996 J. DISP. RESOL. 325, 326 (1996). See also Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on*

comfortable for their negotiator, but also a method that under the circumstances would receive the best possible results.⁸³

Competitive negotiations are characterized as “hard distributive, positional, zero-sum or win-lose bargaining, with the purpose of maximizing the competitive bargainer’s gain over the gain of those with whom he negotiates.”⁸⁴ Parties engaged in competitive negotiations tend to have a narrow definition of success.⁸⁵ In essence, each party seeks to get as much as it can.⁸⁶

Compromising negotiations are viewed as “soft bargaining, or win-some-lose-some, or give-and-take bargaining.”⁸⁷ Under this model, parties will trade off something valuable to get what they want.⁸⁸ Goodpaster argues that to some extent, one party cares about the needs of the other party, in order to get what it wants from the negotiation.⁸⁹ Unlike the competitive negotiation style, under the compromising model, the final deal will appear equally fair to the negotiating parties.⁹⁰

The last primary method of negotiating is the collaborating or the joint-problem solving style.⁹¹ Goodpaster describes this method as “positive-sum, or win-win bargaining . . . parties aim to satisfy their interests, as well as those of the other negotiating parties.”⁹² However, given the often polar opposite views between management and the union, it may be more challenging to use this method for collective bargaining negotiations.⁹³

the Effectiveness of Negotiation Style, 7 HARV. NEGOT. L. REV. 143 (2002) (a critical look at different negotiation strategies).

⁸³ See Schneider, *supra* note 82.

⁸⁴ Goodpaster, *supra* note 82, at 326.

⁸⁵ See *id.*; see also Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 760, 818–821 (1984).

⁸⁶ See Goodpaster, *supra* note 82, at 326; see also Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 172 (2005) (“[i]n contests of power, parties typically expend substantial energies attempting to deceive each other regarding not only their intentions, goals and bargaining positions, but also to prevent the other party from obtaining information about their actual degree of power.”).

⁸⁷ Goodpaster, *supra* note 82, at 327.

⁸⁸ See *id.* at 326; see also Joseph L. Daly, *International Commercial Negotiation and Arbitration*, 22 HAMLINE J. PUB. L. & POL’Y 217 (2001) (comparing hard and soft bargaining techniques).

⁸⁹ See Goodpaster, *supra* note 82, at 326.

⁹⁰ See *id.*; see also Daly, *supra* note 88.

⁹¹ See Goodpaster, *supra* note 82, at 326; see also John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315 (2003) (discussing joint-problem solving negotiations).

⁹² Goodpaster, *supra* note 82, at 327–328.

⁹³ See Lande, *supra* note 91, at 1366 (discussing limitations of joint-problem solving negotiations when the party’s interests clash).

In addition to the three main styles, other factors may influence the nature of a negotiation. For instance, the culture of the negotiating parties may impact not only what a party hopes to gain from the negotiation, but also the method used.⁹⁴ Perhaps since the TWU Local 100 members tend to come from a few predominate socio-economic groups,⁹⁵ there may be cultural differences between union and management which may influence their view of the bargaining as they enter a negotiation session. Similarly, negotiating in the public sector also impacts the negotiation strategy used. For instance, though unrelated to labor negotiations, public zoning negotiations differ from traditional business negotiations because the interest of the public must be taken into consideration at the bargaining table.⁹⁶

III. BARRIERS TO EFFECTIVE NEGOTIATIONS

A number of factors may impact the success of a negotiation session.⁹⁷ One such factor is the psychological barriers to negotiations. Psychological barriers are found in the mental mind-set that a party has when it walks into the negotiation room.⁹⁸ Psychological barriers span from attitude or mood to deeply embedded beliefs such as distrust of the other negotiating party.⁹⁹

There are eight general types of psychological barriers that apply to negotiations:¹⁰⁰ (1) reactive devaluation; (2) optimistic over-

⁹⁴ See Kevin Avruch, *Culture as Context, Culture as Communication: Considerations for Humanitarian Negotiators*, 9 HARV. NEGOT. L. REV. 391 (2004).

⁹⁵ See Cardwell, *supra* note 26 (“[s]eventy percent of the employees of New York City Transit are black, Latino or Asian-American.”).

⁹⁶ See Erin Ryan, *Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Planning Conflicts*, 7 HARV. NEGOT. L. REV. 337 (Spring 2002).

⁹⁷ For example, financial constraints can effect the nature of negotiations. See, e.g., Greenhouse & Chan, *supra* note 12 (reporting on the MTA’s claim of insufficient funds).

⁹⁸ See Jean R. Sternlight, *Lawyers’ Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269 (1999) (noting how the behavior of an advocate can influence an ADR session); Goodpaster, *supra* note 82.

⁹⁹ See Sternlight, *supra* note 98; Goodpaster, *supra* note 82 (discussing how psychological barriers exhibited by one party have effects on another party, regardless of the negotiation strategy).

¹⁰⁰ See Maurits Barendrecht & Berend R. de Vries, *Fitting the Forum to the Fuss With Sticky Defaults: Failure in the Market for Dispute Resolution Services?*, 7 CARDOZO J. CONFLICT RESOL. 83 (2005); Sternlight, *supra* note 99; Goodpaster, *supra* note 82; Robert S. Adler, *Flawed Thinking: Addressing Decision Biases In Negotiation*, 20 OHIO ST. J. ON DISP. RESOL. 683 (2005) (discussing bias as a psychological barrier).

confidence; (3) loss aversion; (4) anticipated regret; (5) ambiguity; (6) equity or justice seeking; (7) biases in assimilation; and (8) dissonance reduction and avoidance.¹⁰¹

Under reactive devaluation “proposals made by adversaries will be valued lower than identical proposals made by a neutral party or a member of one’s own group.”¹⁰² In practice, negotiating parties will distrust, question the motives of the other party, and even devalue the motives of the other party.¹⁰³ A party experiencing optimistic overconfidence “is likely to overestimate its position and thus its chances in a conflict resolution procedure.”¹⁰⁴ At the bargaining table, an overly confident party tends to obtain less information supporting the other side’s position, relies heavily on its own beliefs, and focuses on finding facts to support its own position rather than countering the position of the other side.¹⁰⁵

A negotiation party with a loss aversion barrier desires to avoid a result that has certain loss, as the party observes “that losses generally loom larger than corresponding gains.”¹⁰⁶ This type of negotiating party is fearful of considering an option that may have a loss, but when looking at a situation rationally, is the best option on the table. Parties will turn down a fairly rational offer as they are attempting to avoid risk.¹⁰⁷

¹⁰¹ Barendrecht & de Vries, *supra* note 100.

¹⁰² *Id.* at 96; see Jonathan M. Hyman, *Slip-Sliding into Mediation: Can Lawyers Mediate Their Clients’ Problems?*, 5 *CLINICAL L. REV.* 47, 56 (1998) (discussing reactive devaluation).

¹⁰³ See Barendrecht & de Vries, *supra* note 100, at 97; Eloise Pasachoff *Block Grants, Early Childhood Education, and the Reauthorization of Head Start: From Positional Conflict to Interest-Based Agreement*, 111 *PENN ST. L. REV.* 349, 397 (2006) (“[p]arties judge proposals not only on their abstract merits but also by the context of the offer and their relationship with the offeror. Parties are likely to judge a policy proposal as being less favorable when they do not trust its source.”); see also Hyman, *supra* note 102, at 56.

¹⁰⁴ Barendrecht & de Vries, *supra* note 100, at 98; see Julia Ann Gold, *ADR Through A Cultural Lens: How Cultural Values Shape Our Disputing Processes*, 2005 *J. DISP. RESOL.* 289, 305 n. 106 (2005):

Research by psychologists. . . indicates that [parties] assess the likely success of their claim in a self-interested manner due to perspective biases. Those biases also lead to exaggerated perceptions of personal control, sometimes called “optimistic overconfidence”. . . leads to search[es] for information that buttresses assessment[s] and . . . ignore[s] information that weakens it.

Id.

¹⁰⁵ Barendrecht & de Vries, *supra* note 100, at 98; Gold, *supra* note 104.

¹⁰⁶ Barendrecht & de Vries, *supra* note 100, at 99; see Amitai Aviram & Avishalom Tor, *Overcoming Impediments to Information Sharing*, 55 *ALA. L. REV.* 231, 257–258 (2004) (“[a] substantial amount of psychological evidence shows, however, that reference points play a large role in determining preferences among options. Specifically, numerous studies show that decisionmakers commonly evaluate their options as gains and losses relative to the status quo.”).

¹⁰⁷ See Barendrecht & de Vries, *supra* note 100, at 99–100; Aviram & Tor, *supra* note 106, at 258 (2004) (“[o]ne important implication of loss aversion is that market participants have a

Similar to loss aversion, anticipated regret is based on the fact that “the decision whether or not to use an alternative resolution method involves uncertainty about the outcome of that procedure.”¹⁰⁸ A party with this psychological barrier engages in risk-avoiding behavior by constantly weighing possible outcomes using different methodology.¹⁰⁹ Parties often consider using ADR, over which they have control and could potentially feel horrible if something adverse were to happen, against other binding forms of conflict resolution in which the party has no direct control.¹¹⁰

Another psychological barrier is ambiguity. If the results of a transaction are uncertain and there is the possibility of third party intervention, the parties will avoid an option with unknown results.¹¹¹ In practice, negotiating parties will gravitate toward certain results and options which are more familiar.¹¹²

A party's quest for equity or justice also psychologically impacts negotiations. A party will reject an offer if it violates the individual party's “sense of fairness or equity. . . especially if parties are longstanding adversaries.”¹¹³ Interestingly, this psychological barrier leads a party to fear concessions. Consequently, bargaining parties experiencing this psychological barrier will avoid ADR remedies as they associate ADR with concessions.¹¹⁴

Another psychological barrier is biases in assimilation, which occur when the negotiating party gives different interpretations to a particular dispute.¹¹⁵ Like with reactive devaluation, this barrier leads to distrust and questioning of the other party's action.¹¹⁶

Lastly, dissonance reduction and avoidance is a type of psychological barrier. Parties affected by this type of psychological barrier experience discomfort “at a discrepancy between what they believe and new information or a new interpretation of circum-

strong tendency to remain in the status quo, because the disadvantages of leaving the status quo loom larger than the advantages of doing so.”).

¹⁰⁸ Barendrecht & de Vries, *supra* note 100, at 100; see Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 GEO. L.J. 67 (2001).

¹⁰⁹ Barendrecht & de Vries, *supra* note 100, at 101; Chris Guthrie, *Better Settle Than Sorry: The Regret Aversion Theory of Litigation Behavior*, 1999 U. ILL. L. REV. 43 (1999).

¹¹⁰ See Barendrecht & de Vries, *supra* note 100, at 101–102; Guthrie, *supra* note 109.

¹¹¹ Barendrecht & de Vries, *supra* note 100, at 102.

¹¹² See *id.*

¹¹³ See *id.*

¹¹⁴ See *id.* at 103.

¹¹⁵ *Id.*; Adler, *supra* note 100.

¹¹⁶ Barendrecht & de Vries, *supra* note 100, at 103–104; see Adler, *supra* note 100.

stances pointing in other directions.”¹¹⁷ A consequence of experiencing this type of barrier is two-fold. First, parties stick to their initial beliefs and/or bargaining position. Second, parties experiencing this barrier tend to feel their beliefs are more justified than they actually are.¹¹⁸

Similar to psychological barriers that a party may face when it attempts to negotiate, mood also affects a party’s ability to negotiate effectively.¹¹⁹ Parties in a good mood set realistic goals, have better relationships, and have fewer threats of breaking off of deals.¹²⁰ Mood can also affect a party’s view of the negotiations generally, and it factors into its ability to make “conscious and deliberate choices.”¹²¹ A party in a negative mood may be unable to understand the interests of its counterparty.¹²² It also results in more competition.¹²³

Some criticize that a positive mood can lead to more concessions, which some view as a problem if you are trying to meet certain demands.¹²⁴ Freshman, Hayes and Feldman suggest that mood plays a different role in the legal sphere.¹²⁵ The commentators note that changing moods may not have an effect on legal negotiations, as lawyers tend to have time to plan a good negotiation strategy, meaning that mood may not have such an influence.¹²⁶ Mood is less critical for longer negotiations, where strategy is much more important.¹²⁷ Mood does have an effect if a long term negotiation all of a sudden becomes urgent in a short time period.¹²⁸ For exam-

¹¹⁷ Barendrecht & de Vries, *supra* note 100, at 102; see Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 *GEO. L.J.* 1, 104–105 (2004).

¹¹⁸ See Barendrecht & de Vries, *supra* note 100, at 104; Hanson & Yosifon, *supra* note 117, at 104–05; Guthrie, *supra* note 109.

¹¹⁹ See Clark Freshman, Adele Hayes & Greg Feldman, *The Lawyer-Negotiator as Mood Scientist: What We Know and Don’t Know About How Mood Relates to Successful Negotiation*, 2002 *J. DISP. RESOL.* 1 (2002); see also Valerie A. Sanchez, *Back to the Future of ADR: Negotiating Justice and Human Needs*, 18 *OHIO ST. J. ON DISP. RESOL.* 669 (2003).

¹²⁰ See Freshman et al., *supra* note 119.

¹²¹ See *id.* at 20.

¹²² See Freshman et al., *supra* note 119; Mitchell, *supra* note 108; Adler, *supra* note 100.

¹²³ See Freshman et al., *supra* note 119; Mitchell, *supra* note 108.

¹²⁴ See Freshman et al., *supra* note 119.

¹²⁵ See *id.*

¹²⁶ See *id.* (though the authors note there is no empirical evidence to support their claim on this matter).

¹²⁷ See *id.*; Sanchez, *supra* note 119.

¹²⁸ See Freshman et al., *supra* note 119.

ple, a union may wait to the end of its collective bargaining agreement to commence negotiations.¹²⁹

Similar to mood, attitude can also affect negotiations. For instance, a party voicing extreme demands may at times get what it wants.¹³⁰ But this attitude gives “the perception of lack of willingness to negotiate seriously and [in the end this attitude] increases the risk of deadlock.”¹³¹ Likewise, threatening another party can lead to less than desirous results. A threatening attitude is used when all forms of “constructive action [have] failed.”¹³²

The audience can also affect attitude.¹³³ A negotiating party must balance between having an attitude that will yield a positive evaluation from the large audience while attempting “to avoid being manipulated by that [exact same] audience.”¹³⁴

A. Analysis of the Impact of Psychological Barriers on the 2005 Negotiations

i. Standard

ADR aspects were specifically added to the Taylor Law to entice unions not to strike.¹³⁵ Although the Taylor Law offers the option for parties to use ADR to resolve their contract negotiation, the Taylor Law deterrent effect is not foolproof. Unions still strongly consider striking, at times use it at a threat and even engage in the unlawful practice all together. As a result, by not fully deterring unions, the Taylor Law has not met one of its chief objectives.¹³⁶

¹²⁹ See *id.*; see also discussion *supra* note 8 on the short duration of the 2005 transit negotiations.

¹³⁰ See National Institute for Trial Advocacy, *The Social Psychology of Negotiation: Social Psychology of Selected Tactics*, in A PRACTICAL GUIDE TO NEGOTIATION Ch. 3, § C (1997) [hereinafter National Institute for Trial Advocacy]; Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 GEO. L.J. 67 (2001).

¹³¹ See National Institute for Trial Advocacy, *supra* note 130; Mitchell, *supra* note 130.

¹³² See National Institute for Trial Advocacy, *supra* note 130.

¹³³ See *id.*, at Ch. 3, §A.

¹³⁴ See *id.*

¹³⁵ See, e.g., Syracuse Hancock Prof'l Firefighters Ass'n., Local 1888 v. Newman, 494 N.Y.S.2d 191, 193 (App. Div. 3d Dep't 1985), *appeal denied* 492 N.E.2d 794 (N.Y. 1986) (“Section 209 (4) was enacted to respond to the special need to lessen the likelihood of work stoppages in the sensitive areas of public safety in which municipal police and fire departments function.”).

¹³⁶ See discussion *supra* pp. 167–168 of history of prior transit strikes.

In order to determine why the Section 210 penalties did not deter the TWU from striking, it is necessary to explore what actually happened in the TWU/MTA negotiations. The analysis¹³⁷ for this Note focused on local print news articles¹³⁸ covering the time period shortly before the strike and the aftermath of the strike. One reason collective bargaining negotiations reach an impasse and result in a strike, is the negotiating parties exhibited some type of psychological or mood barrier that inhibited otherwise successful negotiations.

ii. Results of Content Analysis

a. Actions by the TWU

Tactics Used in 2005 Negotiations: The TWU used a competitive tactic during its last contract negotiation.¹³⁹ This is evidenced by the union's inability to significantly alter its position during negotiations.¹⁴⁰

¹³⁷ Methodology used in this Note:

The analysis of the news articles does not follow any recommended social science content analysis methodology. Rather, the articles were selected because these sources are based in New York City and are likely to cover issues facing New York City with the level of depth and breadth required to elucidate information to evaluate. Moreover, newspapers, unlike transcripts from broadcast journalism, tends to cover issues in more detail. Also both since the MTA/TWU just received the final arbitrator award and due to the complexity of reaching a MTA/TWU official to conduct an interview on this matter, the level of detail in the New York City newspapers will provide the necessary detail for the content analysis.

I reviewed these articles to obtain an understanding of the psychological barriers to the 2005 collective bargaining negotiations. The note does not attempt to "prove" that the MTA or TWU bargained in bad faith nor show that a negative attitude was the definitive reason why the 2005 collective bargaining negotiations failed. Rather this note uses these local news sources to show how attitude could have had an effect on the negotiation, and how changing the law to preempt a negative attitude could yield fewer strikes or other work stoppages.

To show that attitude was the chief reason the 2005 collective bargaining negotiations ended the way it did, I recommend that formal interviews be conducted and an examination be undertaken of any documents or other similar sources that could in fact reveal the true intent of the parties. Such a study would be similar to a social science research project. An objective review of something so subjective as attitude and mood produces results that scratch the surface of possible deeper issues.

Moreover, the reader of this note should not construe any observation or recommendation as a personal attack on the TWU, MTA, or labor relations in general. The information is designed to be presented in an objective manner, and may not fully represent the personal viewpoints of the author.

¹³⁸ *The New York Times*, *The New York Post*, *The New Yorker*, *New York Magazine*, *The New York Sun*, *The New York Observer*, the *New York Law Journal*, and the *Wall Street Journal*. The articles reviewed span from November 2005 until September 2006.

¹³⁹ See discussion *supra* pp. 177–179 on competitive negotiations.

¹⁴⁰ See, e.g., Steven Greenhouse & Sewell Chan, *Transit Talks Pass Deadline for a Strike*, N.Y. TIMES, Dec. 16, 2005, at B1.

TWU's Objectives during the 2005 Negotiations: The TWU sought to provide benefits to support the needs of its workers—both for current workers and future retirees.¹⁴¹ With the rising costs associated with living, health insurance and retiring, the TWU wanted a collective bargaining agreement that not only met current needs, but also anticipated rises in cost.¹⁴²

Understanding that the MTA has had some financial difficulties, the TWU wanted to create a collective bargaining agreement that would provide security for the benefits currently offered to workers.¹⁴³ Moreover, a number of transit unions have recently received some-what favorable contracts in their recent collective bargaining negotiations.¹⁴⁴ As a result, another objective of the TWU was to obtain benefits comparable to benefits given to transit workers in other municipalities.¹⁴⁵

TWU's Concessions: After the TWU struck, the MTA and TWU negotiating parties reached a tentative agreement which hinged on the approval of the TWU workers.¹⁴⁶ Although the

¹⁴¹ See, e.g., *id.*

¹⁴² See text *infra* note 236 regarding the one of the last negotiation sessions between the MTA and Union. Leading up to the strike, the TWU maintained a steady position that the retiree age should be lowered, that retirees should pay minimal amounts for their benefits, current workers should receive a significant yearly increase in their salary, to name a few of the negotiating positions. See Greenhouse & Chan, *supra* note 13; see also Jeremy Smerd, *Union, MTA Negotiate As Strike Deadline Passes*, N.Y. SUN., Dec. 16, 2005, at 1 (“[u]nion members, led Mr. Toussaint, characterized the givebacks as ‘selling out the unborn,’ a reference to future members who would be working with an inferior benefits plan.”).

¹⁴³ See, e.g., Smerd, *supra* note 142.

¹⁴⁴ See, e.g. Steven Greenhouse & Sewell Chan, *Transit Workers in Deal to Share Health Plan Cost*, N.Y. TIMES, Dec. 28, 2005, at A1 (“[o]ne union leader close to the talks said Mr. Toussaint was eager to be able to show his union’s members that he delivered a better contract than the one received by 5,000 Philadelphia transit workers after their one-week strike last month.” Further, “[t]he Philadelphia workers received raises of [three] percent a year for three years and their union agreed, for the first time, to have workers pay one percent of their wages toward their health premiums.” Also, “Toussaint agreed to higher premiums but he can say he obtained bigger raises than the Philadelphia union received.”).

¹⁴⁵ See *id.*

¹⁴⁶ See, e.g., Greenhouse, *supra* note 7. The following summarizes the compromises: When Mr. Toussaint appeared before television cameras at 11 p.m. on Tuesday to announce the settlement, he commented little except to read an impressive list of new worker-friendly provisions: raises averaging 3.5 percent a year, the creation of paid maternity leave, a far better health plan for retirees, a much-improved disability plan, the adoption of Martin Luther King’s Birthday as a paid holiday, and increased “assault pay” for bus drivers and train operators who are attacked by passengers. Then Mr. Toussaint announced a big surprise: Some 22,000 workers will each receive thousands of dollars in reimbursements for what are considered excess pension contributions; for several years, these workers paid more toward their pensions than other workers. For those workers, that money will easily offset the fines of slightly more than \$1,000 that most of them face for taking part in the illegal strike. The

TWU initially rejected this proposal,¹⁴⁷ the TWU a few months later overwhelmingly approved this agreement.¹⁴⁸ The MTA, however, would not accept the TWU's approval at that time and wanted the contract to be subject to binding arbitration.¹⁴⁹

In this agreement, the TWU accepted a smaller pay increase and increased health care contributions.¹⁵⁰

Barriers in 2005 Negotiations: The TWU exhibited a number of psychological barriers during the 2005 negotiations. First, reactive devaluation,¹⁵¹ when the TWU did not give adequate consideration of the MTA's last proposal leading up to and following the strike, and instead directed commentary at the MTA regarding its inability to take care of working New Yorkers¹⁵² Second, optimistic overconfidence,¹⁵³ when the TWU believed that its own position would prevail, especially by relying on the result of a recent transit

union itself could still face a \$3 million fine that a judge ordered because of the 60-hour strike.

"The union did especially well, all things considered," said David L. Gregory, a labor relations expert at St. John's University. "Toussaint got everything he needed, and he also got what he needed in terms of the bigger picture. With the strike, he mollified the radical left in his union and helped placate the middle of his rank and file who were demanding to be treated with dignity and respect."

All this is not to say that the transportation authority did not achieve some of its major goals. By getting the union, Local 100 of the Transport Workers Union, to agree to have subway and bus workers pay 1.5% of their wages toward health premiums, the authority took an important step to rein in soaring benefit costs. That provision is expected to save the authority \$32 million a year. Not only that, the union agreed that its workers' contribution toward their health premiums might increase if the authority's health costs continued to climb.

Id. (Toussaint did refuse to settle on a reduction in retiree pension benefits).

¹⁴⁷ See, e.g., Sewell Chan & Steven Greenhouse, *Transit Workers Reject Contract By 7-Vote Margin*, N.Y. TIMES, Jan. 21, 2006, at A1 (the biggest contention among union members was the 1.5% health-insurance contribution, which TWU leaders conceded to the MTA. Complaining about how the concessions may favor older TWU members, "Greg Davis, 35, a bus driver on the B43 [stated]. . . 'I started in 2000 and this contract doesn't benefit me in any way at all as far as getting anything new. There's like one more vacation day, but that's about it. The 1.5 percent is the worst thing.'").

¹⁴⁸ See, e.g., Steven Greenhouse, *The Long March to Jail*, N.Y. TIMES, Apr. 24, 2006, at B5 (Toussaint requested that the MTA agree to the TWU's acceptance of the offer. However, the MTA sees otherwise. "The authority asserts that the original deal was rendered moot as soon as union members voted it down in January. Seemingly eager to walk away from the deal, the authority petitioned for binding arbitration, saying the dispute had reached an impasse, and the state's Public Employment Relations Board agreed.").

¹⁴⁹ See *id.*; see also Chan, *supra* note 18.

¹⁵⁰ See discussion *supra* note 146 on MTA/TWU post-strike compromise.

¹⁵¹ See discussion *supra* pg. 180 on reactive devaluation.

¹⁵² See discussion *infra* note 235 on one of the last TWU/MTA negotiations sessions.

¹⁵³ See discussion *supra* pg. 180 on optimistic overconfidence.

negotiation in Philadelphia.¹⁵⁴ The TWU exhibited both loss aversion and anticipated regret¹⁵⁵ by expressing disbelief in the PERB arbitration system¹⁵⁶ and in the ability of MTA to manage its finances.¹⁵⁷ The barrier of seeking equity or justice¹⁵⁸ was evident when the TWU relied heavily on the notion that their actions were helping the working individual.¹⁵⁹ The TWU also exhibited biases in assimilation,¹⁶⁰ by constantly questioning the motives of the MTA, especially after it came to light that the MTA had a billion dollar surplus.¹⁶¹

b. Actions by the MTA

MTA's Objectives: The MTA sought to limit spending in wake of a potential deficit, and to reign in personnel costs to meet the standards of other city unions.¹⁶²

MTA's Concessions: The MTA was willing to lower the retirement age to fifty-five and willing to give a higher salary increase than it initially offered.¹⁶³ However, when the union rejected the offer at first and later accepted it, the MTA refused to agree to the acceptance.¹⁶⁴

MTA Barriers in 2005: The MTA's decision to deny additional benefits to the TWU even after the agency obtain over a billion dollars¹⁶⁵ in surplus could be a sign of optimistic overconfidence. Here, the MTA thought its separate financial decision would not impact the negotiations. Perhaps the timing of the surplus (some of the funds distributed to passengers in the form of a bonus ride for monthly pass holders) inflamed the TWU who felt they were being stiffed.¹⁶⁶ The psychological barriers of loss aversion, ambiguity, and dissonance reduction and avoidance are also evident here. By not initially considering simple requests, like recognizing Dr. Martin Luther King Jr. Day as a paid holiday, the MTA ignored a rational offer, even though the risk was a paying the holi-

¹⁵⁴ See discussion *supra* note 144 on the Philadelphia strike.

¹⁵⁵ See discussion *supra* pg. 180–181 on loss aversion and anticipated regret.

¹⁵⁶ See discussion *supra* note 29 on Toussaint and his disgust with ADR.

¹⁵⁷ See discussion *infra* note 235 for discussion of MTA finances.

¹⁵⁸ See discussion *supra* pg. 181 on equity or justice.

¹⁵⁹ See discussion *supra* note 25 for comments on race and ethnicity.

¹⁶⁰ See discussion *supra* pg. 181 for comments on biases in assimilation.

¹⁶¹ See discussion *infra* note 235 for discussion of MTA finances.

¹⁶² See *id.*

¹⁶³ See discussion *supra* note 146 on prior offer.

¹⁶⁴ See *id.*

¹⁶⁵ See discussion *infra* note 235 on MTA finances.

¹⁶⁶ See *id.*

day-pay rate for one additional day in the year.¹⁶⁷ Moreover, the MTA's unprecedented decision to deny the late acceptance by the TWU just further strained the relationship between the two parties and may have made the next round of negotiations more hostile.¹⁶⁸ This attitude might have been an indication to the TWU that the MTA did not want to cooperate. Similarly, the MTA's attitude had another impact on the TWU/MTA negotiation. TWU President Toussaint was annoyed that MTA Chairman Kalikow did not join the bargaining table until right before the deadline.¹⁶⁹

c. Influence of Third Parties

There are a number of outside parties whose actions can affect the nature of the MTA/TWU negotiations.

The Arbitrator: The arbitrator is responsible for ensuring that both sides are able to present their position fairly.¹⁷⁰ However, the arbitrator may come to the table with biases of his/her own.¹⁷¹ Here, the arbitrator refuses to craft a preliminary order until the parties narrow their position or PERB rules on motions from both the MTA & TWU limiting the scope of the arbitration.¹⁷² This indicates that the arbitrator could be exhibiting loss aversion or having anticipated regret by holding off on rendering judgment. However, the arbitrator could simply be recognizing that the situation is complex and recognize that it might make it worse to narrow the scope of the arbitration. Some labor experts believe that

¹⁶⁷ See Cardwell, *supra* note 25 (noting that the Dr. King holiday would cost the MTA \$9 million a year, for an agency with over \$1 billion in surplus that year). Not recognizing Dr. King's birthday is especially surprising given how many other governmental agencies do recognize Dr. Martin Luther King Jr. Day as a paid holiday. See, e.g., *Martin Luther King's Birthday*, N.Y. TIMES, Jan. 15, 2007, at B1 (noting all New York City governmental agencies, schools, most banks, and even the financial markets were closed on Dr. Martin Luther King Jr. Day).

¹⁶⁸ See discussion *supra* note 146 on prior offer.

¹⁶⁹ See Tom Robbins, *A Strike—Partially, in Runnin' Scared*, The Village Voice.com, Dec. 16, 2005, available at: http://www.villagevoice.com/blogs/runninscared/archives/transit_strike_2005/ (noting how annoyed Mr. Toussaint was when Chairman Kalikow came to the table just before the collective bargaining agreement was set to expire); Steven Greenhouse & Jim Rutenberg, *Start and Stops in Transit Talks*, N.Y. TIMES, Dec. 15, 2005, at A1 (the negotiator "hinted that the authority's chairman, Peter S. Kalikow, might join the talks today; he did so at the last minute three years ago to reach a settlement."); Steven Greenhouse & Sewell Chan, *Transit Talks Pass Deadline For a Strike*, N.Y. TIMES, Dec. 16, 2005, at B1 (noting Mr. Toussaint's disappointment that Chairman Kalikow joined the negotiations so late in the process, and that the MTA had not changed its approach since the 2002 contract negotiations).

¹⁷⁰ See discussion *supra* pp. 171–173 of the role of PERB.

¹⁷¹ See Michael A. Scodro, *Deterrence and Implied Limits on Arbitral Power*, 55 DUKE L.J. 547 (2005).

¹⁷² See Chan, *supra* note 18.

the parties may move toward settlement once the chairman of the arbitration panel (and the only neutral party) hints at how a final arbitration award will look.¹⁷³

State Level: Albany has its biases too. New York Governor Elliot Spitzer (while a gubernatorial candidate) was critical of the MTA for not accepting the TWU's later approval of the proposed contract—an unprecedented move.¹⁷⁴ Former Governor Pataki reappointed Kalikow to head the MTA despite criticism of how Kalikow handled the TWU labor negotiations.¹⁷⁵ Pataki's move may show that even though the governor's office opted to stay out of the 2005 negotiations, there may have been an underlying feeling that he supported the MTA's position. Such a stance could further inflame the TWU.

City Level: New York City had two major interests. One, the city was interested in recouping the economic loss from the strike.¹⁷⁶ Two, the city was also concerned about how this contract negotiation would affect other city contracts.¹⁷⁷ Mayor Michael Bloomberg urges the union to negotiate again (and without an arbitrator) as he feels an arbitrator can get in the way.¹⁷⁸ This could be an indication that Bloomberg wants to sizzle any aggressive action by other New York City unions when their contract expires.¹⁷⁹

¹⁷³ *Id.*

¹⁷⁴ As the Democratic Gubernatorial Candidate, Eliot Spitzer believes the MTA should have accepted the TWU's approval of the CBA, and vows to remove the head of the MTA from office if he is elected Governor. *See* Chan, *supra* note 18.

¹⁷⁵ Danny Hakim, *Democrats Accuse Pataki Of Packing Nominations*, N.Y. TIMES, June 23, 2006 at B5.

¹⁷⁶ In fact, the City and the Union settled their dispute. *See* Thomas J. Lueck, *City to Drop Lawsuit Against Transit Strikers*, N.Y. TIMES, May 17, 2006, at B5. When the TWU struck, New York City asked the court to fine the union \$1 million per day and \$25,000 per day per striker. *See id.* The parties settled on \$2.5 million fine. *See id.* Initially the court held that the unions would not directly receive funds from the workers pay checks; but as a part of the settlement agreement, the union could collect funds directly from worker pay checks until the fine is paid off. *See id.*

¹⁷⁷ *See* Jeremy Smerd, *Talks Fail; Union Weighs a Strike*, N.Y. SUN, Dec. 20, 2005, at 1.

¹⁷⁸ Steven Greenhouse & Janon Fisher, *Union Leader, Out of Jail, Vows to Fight No-Strike Law*, N.Y. TIMES, Apr. 29, 2006, at B1.

¹⁷⁹ *See* Jeremy Smerd, *Talks Fail; Union Weighs a Strike*, N.Y. SUN, Dec. 20, 2005, at 1 (noting that other city labor contracts would soon expire, "Mr. Bloomberg called the union's no compromise position on the retirement age and medical benefits 'intolerable,' and said it is 'disingenuous' for the union to argue that any changes in pension plans could have a negative impact on other workers.").

IV. CONCLUSION

The negative attitudes and behaviors exhibited by the TWU and the MTA combined with the actual strike itself demonstrate that the Taylor Law did not meet its objective of stopping devastating labor strikes.¹⁸⁰ The failure is much deeper than the financial loss suffered by the New York metropolitan area (which was of course significant).¹⁸¹ The 2005 strike highlights what happens when attitudes and animosity cloud what would have otherwise been an effective negotiation session. It further shows that ADR methodologies are not perfect, and that any ADR system should include appropriate checks.

Policy leaders and those involved with public labor matters should work to address the problems associated with the 2005 negotiations. The chief objectives of any reform should be to create a more effective contract negotiation process and to minimize the impact on everyday New Yorkers.

Revamping the Taylor Law should have two major prongs. First, any revision should specifically address the constant bitter negotiations between the TWU and MTA.¹⁸² After three strikes and countless threats of strikes, it can be argued that the negotiation system used by the TWU and MTA flaws.¹⁸³ The proposed change should be tailored to untangling extrinsic factors such as attitudes and behaviors¹⁸⁴ which may be the impediment to less painful negotiation sessions between these two parties.¹⁸⁵ Second, any revision should also encourage all public unions and employers to stay at the negotiation table. While most New York public unions remain at the bargaining table, the current Section 210 penalties have not deterred some unions from engaging in prohibited acts.

¹⁸⁰ See discussion *supra* pp. 167–168 on prior strikes.

¹⁸¹ See discussion *supra* pp. 163–167 on effects of 2005 Strike.

¹⁸² See discussion *supra* pp. 163–169 on prior TWU/MTA relations.

¹⁸³ The counter-argument relies on the notion that just because there is a strike or a threat of strike, it does not necessarily mean that the negotiation has failed. At times, economic pressure is a legitimate tactic to use against an employer. See discussion *supra* pp. 177–179 on the nature of labor CBA negotiations.

¹⁸⁴ See discussion *supra* pp. 179–183 on how attitude, mood and behavior affect negotiation styles.

¹⁸⁵ See discussion *supra* pp. 183–189 analyzing the behavioral aspects to the 2005 TWU/MTA negotiations.

A. Proposed Change #1—Appoint Negotiation Specialists
To Counsel the MTA and TWU On Their
Bargaining Attitude

Newly elected Governor Spitzer should appoint negotiation specialists to work with the negotiator for the TWU and the negotiator for the MTA. These specialists must ensure that both parties maintain a positive and productive attitude when they meet at the bargaining table.¹⁸⁶

Each side's specialist will work with its designated client to accomplish two goals. First, the specialists will help each side come to terms with its individual weaknesses. Second, the specialists will help each side develop effective and productive negotiation strategies. This includes developing mechanisms to prevent each side's weaknesses from getting the better of them at the negotiation table. For instance, each side's specialist could help each party prioritize its demands.¹⁸⁷ To assure that this process works as effectively as possible, each specialist should be bound to a confidentiality agreement in order to encourage candid responses from the TWU and the MTA.¹⁸⁸ This specialist would not negotiate for either party but would be available to provide advice and encour-

¹⁸⁶ See, e.g., Jonathan I. Charney, *Central East Asian Maritime Boundaries and the Law of the Sea*, 89 AM. J. INT'L L. 724, 744 (1995) (noting how Asian nations use specialists to aid negotiations and arbitrations related to boundary settlements issues).

¹⁸⁷ See, e.g., Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 50 (1982). Harter notes:

The prime benefit of negotiations is that the parties affected by a decision can identify the issues involved, scale their respective importance, trade positions, and work out novel approaches in an effort to maximize their overall interests. Parties may yield on issues that have lower priority to improve their position on issues that have higher priority. This scenario, of course, assumes that there are multiple issues to trade. Negotiations are likely to be difficult when there is only one issue with a binary solution involved in the decision. In such a situation, because there will be a clear winner and a clear loser, there would be virtually nothing to negotiate.

Id.

¹⁸⁸ See, e.g., *id.*, at 83–84 (discussing the advantages and disadvantages of keeping negotiations confidential). Harter notes, in his discussion of regulation negotiations, the importance of keeping the public abreast of the negotiating. *See id.* He also raises several reasons why negotiations should be kept private. *See id.* Specifically, Harter argues confidentiality: (1) allows negotiators to effectively make concessions to maximize their goals; (2) gives negotiators the ability to speak openly with their clients; (3) enables parties to include helpful data that the public should not be privy to; and (4) provides the negotiating parties the opportunity to avoid constant public scrutiny. *See id.*

agement to keep the parties engaged and interested in bargaining.¹⁸⁹

The best support for this proposal is the Federal Mediation and Conciliation Service (FMCS). The chief responsibility of FMCS is to minimize the effects of labor disputes on the industries heavily represented by labor unions.¹⁹⁰ Specialists with FMCS receive labor specific training and are taught to use different techniques to help unions and management bargain more effectively.¹⁹¹ FMCS, in fact, created several model bargaining methodologies, and each one can be modified to fit the particular needs of the individual parties.¹⁹² Unlike the arbitration provisions under PERB and other states, FMCS has a more bottom-up approach. FMCS specialists begin working with the parties from the moment the parties want to negotiate, rather than waiting until things fall apart before acting.¹⁹³ FMCS specialists work with each party to ensure that each stays engaged in productive bargaining dialogue.¹⁹⁴

Governmental intervention is not foreign to New York State labor relations. In fact, the New York State Employees Relations Board (SERB)¹⁹⁵ has the power to step in and moderate a labor

¹⁸⁹ See Sternlight, *supra* note 98 (discussing how attorneys representing clients as mediators should use different techniques to keep their clients interested in the ADR process).

¹⁹⁰ See Carolyn Brommer, George Buckingham & Steven Loeffler, *Cooperative Bargaining Styles at FMCS: A Movement Toward Choices*, 2 PEPP. DISP. RESOL. L.J. 465 (2002); Ann C. Hodges, *Mediation and The Americans with Disabilities Act*, 30 GA. L. REV. 431, 490 (1996) (“[c]urrently, the first priority of the FMCS is mediation of labor disputes. These disputes are likely to receive first priority absent contrary congressional direction because a great number of people are impacted by such disputes, timeliness is critical, and the mediators” will be more likely to take these disputes because they have experience in this field).

¹⁹¹ See Brommer et al., *supra* note 190; *but see* Hodges, *supra* note 190, at 489 (“[t]here is . . . some debate among mediation scholars as to whether the approach to mediation used by the FMCS in labor disputes is appropriate. . . . In labor disputes, settlements reflect the power of the parties. A labor contract negotiation is, in essence, a power contest.”).

¹⁹² See Brommer et al., *supra* note 190.

¹⁹³ See *id.* The Taylor Law’s mediation/arbitration provisions do not come into effect until either the parties agree to use PERB’s ADR services or PERB, based on its own independent judgment, recommends the negotiation to its ADR services. See N.Y. CIV. SERV. LAW § 209 (Consol. 2007). While the Taylor Law allows parties to negotiate independently, the current system does not offer any mechanism for parties to receive guidance as it creeps closer to impasse. Given the impact of attitude on bargaining behavior, see discussion *supra* 179–183, of attitude during bargaining, it is possible that unguided parties put on blinders and forget to voluntarily opt into PERB’s ADR system. Moreover, the fact that PERB did not act until after the TWU commenced its strike, raises doubts on its willingness to interfere with a current labor negotiation.

¹⁹⁴ See Brommer et al., *supra* note 190.

¹⁹⁵ The New York State Employee Relations Act (NYS-SERA) gives New York employees the right to organize and the necessary protection to enjoy that benefit. See N.Y. LAB. LAW

dispute.¹⁹⁶ Unlike under the Taylor Law, SERB is not required to wait until one of the parties files an action with its office, it may act proactively.¹⁹⁷ Specifically, SERB may encourage the parties to use mediation services, such as FMCS. SERB's power does not stop there; the agency has a duty, with the consent of the governor, to hold a conference with the disputing parties, analyze the facts, and assist the parties in negotiating appropriate terms to settle the dispute.¹⁹⁸ Furthermore, to encourage the parties to be candid in working with SERB, all arbitrations (including documents and associated communications) are kept confidential.¹⁹⁹

B. Proposed Change #2—Amend the Taylor Law To Include Harsher Punishments

As many ADR experts theorize, if a party is not interested in negotiations in the first place, it is often difficult to convince that party to be engaged in the process.²⁰⁰ Ideally the TWU and the

§§ 700–701 & 703–704 (McKinney 2007) (individuals protected by the National Labor Relations Act or the Taylor Law are not covered by NYS-SERA). NYS-SERA gives authority to SERB to enforce the rights of workers. The Act offers many protections, namely allowing either the employer or the employee to bring an unfair labor practice proceeding against a side it believes is not bargaining in good faith. See N.Y. LAB. LAW §704(6)(McKinney 2007).

¹⁹⁶ See N.Y. Lab. Law §702-a(1) (McKinney 2007).

Upon its own motion, in an existing, imminent or threatened labor dispute, the board may and, upon the direction of the governor, the board shall take such steps as it may deem expedient to effect a voluntary, amicable and expeditious adjustment and settlement of the differences and issues between employer and employees which have precipitated or culminated in or threatened to precipitate or culminate in such labor dispute.

Id.

¹⁹⁷ See *id.*

¹⁹⁸ See *id.*

¹⁹⁹ See N.Y. Lab. Law §702-a(5)(McKinney 2007). This provision provides: Members of [SERB] and all other employees of [SERB], including any arbitrator serving on an arbitration panel established by the board, shall not be compelled to disclose to any administrative or judicial tribunal any information relating to, or acquired in, the course of their official activities under this article, nor shall any reports, minutes, written communications, or other documents of the board pertaining to such information be subject to subpoena; except that where the information so required indicates that the person appearing or who has appeared before [SERB] has been the victim or subject of a crime, said members of [SERB], the executive secretary and all other employees of [SERB], including any arbitrator serving on an arbitration panel established by the board, may be required to testify fully in relation thereto upon any examination, trial, or other proceeding in which the commission of a crime is the subject of inquiry.

Id.

²⁰⁰ See Barendrecht & de Vries, *supra* note 100.

MTA would, on their own free will,²⁰¹ opt to stay the course at the bargaining table. However, seeing as the TWU has flatly ignored the Taylor Law penalties on multiple occasions,²⁰² the chief objective of the current Taylor Law has failed. Albany policy makers should consider harsher penalties.

Given the animosity between bargaining parties, the history of bitter contract negotiations,²⁰³ and the costly and devastating effects of strikes on the general public,²⁰⁴ it is necessary to revamp the Taylor Law with harsher, but appropriate penalties. Such penalties should not be exclusively directed at public unions; governmental entities with unionized workers should also face consequences for their behavior.

The revision must ensure that the law has enough incentives to meet two key goals. One, the Taylor Law must entice the bargaining parties to come to the table ready to negotiate. Two, the Taylor Law must have enough power to make the PERB ADR system a more attractive alternative to resolve a potential impasse than engaging in a devastating economic action (such as work stoppage).

The proposed change has three aspects to it. First, if a union votes to strike or engage in any other unlawful work stoppage/slowdown, then the governmental agency is allowed to contact PERB and declare an impasse; otherwise it waives any action to enforce other PERB-mandated penalties.²⁰⁵ Second, if after voting to strike, the union feels that it may not be able to bargain effectively, it may declare an impasse to access the PERB ADR system. Third, if a union engages in a strike or any other unlawful work stoppage/slowdown, then not only is it current and following collective bargaining negotiations automatically sent to binding arbi-

²⁰¹ Or with a little encouragement from the governor's office using negotiation specialists as discussed above. *See* discussion *supra* pp. 191–193 on policy recommendation #1.

²⁰² *See* discussion *supra* pp. 167 & 168 on prior strikes.

²⁰³ *Id.*

²⁰⁴ *See* discussion *supra* pp. 163–167 on financial loss from 2005 Strike. *See, e.g., Albany v. Helsby*, 317 N.Y.S.2d 955, 958 (Sup. Ct. Albany County Ct. 1971) (“[t]he State Legislature. . . reposed the final determination in a matter involving economic considerations and the public interest of the political subdivision involved, as well as the interest of its employees, in the legislative body of the public employer.”).

²⁰⁵ Currently under the Taylor Law, if a union votes to strike or engage in a work slowdown, the municipality/governmental agency must wait until the union actually strikes before calling an impasse. *See Yonkers Federation of Teachers v. Helsby*, 357 N.Y.S.2d 141 (App. Div. 3d Dep't 1974) (holding that a union, which threatened to strike if its demands were not met by a certain date, purposely created a threat of strike. However, an employer acting on that threat has violated the Taylor Law). This system differs significantly from NYS-SERA, where SERB may intercept a dispute before an impasse. *See* discussion *supra* pp. 192–193.

tration, but also the current union could be decertified as the representative of these workers.²⁰⁶

i. Current Penalties Under the Taylor Law

Taylor Law Sections 209-a and 210 offer a number of penalties that can be imposed on a party that disobeys its provisions.²⁰⁷

One penalty is to dock workers two days of pay for each day spent striking.²⁰⁸ New York City sought this type of penalty following the 2005 transit strike.²⁰⁹ However, ultimately, the union was fined \$2.5 million and workers were not fully docked the two-day penalty.²¹⁰

Another penalty is suspension of the dues check-off.²¹¹ By losing this easy access to support, unions must set up an administrative process to have the funds paid directly to the union in order to pay the hefty fines and to continue the operation of basic union work.²¹²

A municipality may also seek an injunction to judicially end a strike.²¹³ Union leaders defying an injunction may be subject to a

²⁰⁶ Currently the Taylor Law provides that when a union engages in any form of work stoppage, union officials may be arrested, face a per day fine for each striker, and suffer the loss of the “check off” option to collect dues. See N.Y. CIV. SERV. LAW § 210 (Consol. 2007).

²⁰⁷ See discussion *supra* pp. 169–171 & 195–196 on the purpose of the Taylor Law penalties; see also Nelson Seitel, *Transit Strike Again Proves Taylor Law Not a Deterrent*, N.Y.L.J., Apr. 7, 1980, at 1 (offering general discussion of the Taylor Law penalties); Monroe Y. Mann, *The Taylor Law: Strike Penalties and Strike*, 51 N.Y. St. B.J. 118 (1979) (analysis of the Taylor Law remedies).

²⁰⁸ See N.Y. CIV. SERV. LAW § 210 (Consol. 2007); see also David Westfall & Gregory Thusing, *Strikes and Lockouts in Germany and Under Federal Legislation in the United States: A Comparative Analysis*, 22 B.C. INT'L & COMP. L. REV. 29, 34 n. 35 (1999):

The most stringent anti-strike legislation is New York's Taylor Law. . . . Section 210 of the statute prohibits strikes, and subsection 2(f) provides what is often referred to as a “two for one” penalty on striking employees, requiring deduction of two days' pay for each day on strike. However, since one day's pay is lost because the employee was not working, it might be more accurately described as “one for one.”

Id.

²⁰⁹ See Lueck, *supra* note 176.

²¹⁰ See discussion *supra* notes 18 & 147 on the settlement agreement between the TWU and New York City.

²¹¹ See Westfall & Thusing, *supra* note 209 (“[t]he most stringent anti-strike legislation is New York's Taylor Law. . . . penalties include suspension of the dues check-off for the striking union” under N.Y. Civ. Serv. Law §210(3)(a)).

²¹² See Lueck, *supra* note 177 for discussion of why TWU did not fully lose its check-off revenue.

²¹³ N.Y. CIV. SERV. LAW §209-a(4) & (5) (Consol. 2006). Interestingly, the standard to maintain a charge of improper employer/employee practice is much higher under the Taylor Law, than under NYS-SERA. Under the Taylor Law, in order for a party to sustain a charge of improper practices, it must show:

host of penalties, including incarceration.²¹⁴ Though penalties for striking exist, some commentators question whether the threat of an injunction can effectively halt a strike.²¹⁵

A number of public municipalities and private citizens may sue unions for damages resulting from a strike.²¹⁶ However, this course of action may not be successful or be an effective threat to a union on the verge of striking.²¹⁷ Moreover, New York courts have maintained a strong presumption that the Taylor Law does not give private citizens a cause of action.²¹⁸

(i) there is reasonable cause to believe an improper practice has occurred, and (ii) where it appears that *immediate and irreparable* injury, loss or damage will result thereby rendering a resulting judgment on the merits ineffectual necessitating the maintenance of, or return to, the status quo to provide meaningful relief.

N.Y. CIV. SERV. LAW §209-a(4)(a)(2007) (emphasis added)(provision to expire and be repealed on July 1, 2009). Whereas, under NYS-SERA, there is no statutorily mandated standard, SERB must weigh the evidence and make a determination. N.Y. LAB. LAW §706 (3)(2007):

If upon all the testimony taken the board shall determine that the respondent has engaged in or is engaging in any unfair labor practice, the board shall state its findings of fact and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unfair labor practice, and to take such further affirmative or other action as will effectuate the policies of this article.

Id. SERB's system gives the agency much more discretion to simmer unrest between bargaining parties; PERB is restricted to action in limited factual scenarios. The Improper Practice proceedings provided for under the Taylor Law does have certain advantages to it. For instance, PERB is required to respond within ten-days of when the charge is filed. N.Y. CIV. SERV. LAW §209-a(4)(b)(2007). Under NYS-SERA, the SERB "shall consider all complaints or petitions filed with it and conduct all proceedings . . . with all possible expedition." *See* N.Y. LAB. LAW §706(6)(2007).

²¹⁴ *See, e.g.,* *New York City Transit Auth. v. Transp. Workers Union of Am.*, 822 N.Y.S.2d 579 (App. Div. 2nd Dep't October 3, 2006) (criminal penalties are applicable under New York's Judiciary Codes).

²¹⁵ *See Developments in the Law—Public Employment*, (part 2 of 2) *supra* note 70, at 1705. Article notes that:

Nevertheless, enforcement of no-strike laws generally has been "so lax and erratic as to approach to de facto recognition of 'illegal' public employee strikes." Even when employers have obtained injunctions, striking unions have frequently defied the court. The strikes by Chicago firefighters and New York City transit workers in 1980 are two notorious "examples of an apparently increasing willingness of striking public employees to ignore court injunctions." One commentator claims that judges "know before they issue these [injunctions] that they're not going to be obeyed." Another commentator believes that union leaders, instead of fearing or respecting back-to-work orders, actually welcome the chance to be punished for defying an injunction: "Their attitude has often been that this is a small price to pay in furthering the cause of public employment unionism, and in fact elevate[s] them to the status of martyrs, [and gives] them a 'badge of honor' rather than a punishment."

Id.

²¹⁶ *See id.*

²¹⁷ *See id.*

²¹⁸ *See Burns Jackson Miller Summit & Spitzer v. Lindner*, 451 N.E.2d 459 (N.Y. 1983). In response to the 1980 TWU strike, Burns Jackson Miller Summit and Spitzer, a New York law

ii. Proposed Amendment to the Taylor Law Penalty Provisions

The Taylor Law should be amended as it no longer fully serves its chief purpose. Since the enactment of the 1967 Taylor Law, there have been two transit strikes and countless threats of strikes that have threatened the livelihood of our government.²¹⁹ In the interest of public safety, it is critical that workers are stopped as much as humanly possible from striking.²²⁰ Implementing the above referenced recommendations²²¹ will further the goal of the Taylor Law²²² by encouraging parties to use the PERB ADR process to bring about peaceable resolve to labor disputes.²²³ These amendments would give the bargaining parties more incentive to approach negotiations with a positive attitude.²²⁴ Following the logic of offering binding interest arbitration in exchange for a no-strike provision, these amendments,²²⁵ serve as a mechanism to show a union on the verge of striking that it better off using the PERB ADR process rather than resorting to a strike or other unlawful work stoppage.²²⁶

firm initiated a suit against the TWU for tort and public nuisance claims. *See id.* The objective of the suit was to obtain lost earnings for the firm and other similar businesses for each day of the strike. *See id.* The New York Court of Appeals affirmed the lower court holding that while the Taylor Law provisions were designed to penalize unions and to protect the public; it did not create a private right of action as the provisions of the Taylor Law were particularly complex and comprehensive. *See id.* Taylor Law did not create a private right of action. *See id.* Specifically, the nuisance claims failed due to lack of peculiar injuries. *See id.* Moreover, since the law firm did not allege that the TWU injured the public and the firm by a lawful act, it did not meet the prima facie tort standard. *See id.* The enforcement scheme of the statute was very comprehensive and did not include a private cause of action. *See id.*

²¹⁹ *See* discussion *supra* pp. 163–168 on history of Transit Strikes.

²²⁰ *See, e.g.,* Albany v. Helsby, *supra* note 205 discussing the importance of stopping the economic effects of a strike.

²²¹ *See* discussion *supra* pp. 191–205 on proposals.

²²² *See* N.Y. CIV. SERV. LAW § 200 (Consol. 2007) (“it is the public policy of the state and the purpose of this act to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government.”).

²²³ *See* discussion *supra* pp. 171–173 on the purpose of PERB’s ADR process. Generally speaking, ADR has a number of unique advantages to it. *See* Hernandez, *supra* note 31. First, it is a process that tends to bring about more peaceable resolve to disputes. *See id.* Parties leave the table feeling as if their interests were truly heard. *See id.* Second, arbitration could be cheaper than regular bargaining. *See id.* An objective arbitrator is in a position to get a neutral bird’s eye look at all the materials to ensure that the best possible deal is being made. *See id.*

²²⁴ *See* discussion *supra* pp. 179–183 on how a negative attitude that allows emotions to get the best of a negotiating party makes it more difficult to effectively present ideas and bargain.

²²⁵ *See* discussion *supra* pp. 191–205 on proposals.

²²⁶ Parties may want to avoid striking or stoppages for fear of severe penalties such as decertification.

a. Challenges Associated with the Proposal

There are a number of challenges associated with this proposal. Some argue that mandatory arbitration does not ensure adequate protection of the union and worker demands.²²⁷ Specifically, some may argue that this proposal can destroy the free dialogue of traditional labor negotiations. Similar critics may also contend that this proposal is a mechanism to suppress the wishes of either management or the workers (via their union).²²⁸

Having the remote possibility of a strike may lead to better contractual terms, as economic might can yield favorable results.²²⁹ One of the chief reasons the right to strike has been taken away from many public employees, is because “a right to strike would give public sector employees a weapon more powerful than the strike weapon that their private counterparts.”²³⁰ A strike could force a municipality/government agency to shuffle finances in order satisfy the union’s demands and to keep the government functional.²³¹

The increased use of arbitration in the development of techniques to approach a labor collective bargaining agreement makes some commentators weary.²³² In fact, these same commentators contend that there are clear advantages to pure bargain-for negotiations over arbitration.²³³ Since the union and management must work with each other during the life of the contract (for grievances and non-collective bargaining arbitration), the parties develop a rapport.²³⁴ After years of negotiating, both sides develop a clearer

²²⁷ See *Developments in the Law—Public Employment*, (part 2 of 2), *supra* note 71 (“[a] prohibition on strikes, however, would hardly be a matter of concern if public employees had a satisfactory alternative means of impasse resolution. Although arbitration has been touted as such an alternative, it is not a fully satisfactory substitute for the right to strike.”).

²²⁸ See *Developments in the Law—Public Employment*, (part 2 of 2), *supra* note 70, at 1705–06.

²²⁹ See *id.* For example, SERB has not taken away the employees right to strike. See N.Y. LAB. LAW § 706(5) (McKinney 2007) (“[t]he board shall not require as a condition of taking action or issuing any order under this article, that employees on strike or engaged in any other lawful, concerted activity shall discontinue such strike or such activity.”).

²³⁰ Hanslowe & Acierno, *supra* note 33.

²³¹ See *id.*

²³² See *Developments in the Law—Public Employment*, (part 2 of 2), *supra* note 70, at 1705–06 (“negotiating parties generally understand the relevant facts better than an outsider does. Typically, negotiators for unions and employers have spent years learning about the problems and conditions of their constituents.”).

²³³ See *id.*

²³⁴ See *id.*

understanding of the issues facing the other party.²³⁵ An outside arbitrator, who walks fresh into the dispute often after hostility,

²³⁵ See *id.* For instance, in the case of the MTA & TWU negotiation, the TWU, due to its long history negotiating with the MTA had knowledge of the MTA's financial status. On the Thursday before the strike, the following happened during the negotiations, as reported in *The New York Times*:

Yesterday, the union and the authority seemed to dig in on two of the main issues in the talks: pensions and health coverage. Pointing to its soaring pension and health costs, the authority, a state agency, is demanding that the union agree to a lesser pension and health plan for newly hired workers . . . [T]he authority wants new workers to pay [two] percent of their wages as premiums for health insurance; current workers pay no premiums for the basic plan. "The M.T.A.'s long-term financial outlook, like every business and government in this country, is seriously clouded by the extraordinary growth in pensions and health-care costs," Mr. Kalikow said . . . Mr. Toussaint portrayed the authority's proposals as repugnant because they would make life worse for future generations of workers *Accusing the transportation authority of mismanaging its pension funds and not putting enough money into them, Mr. Toussaint said the agency, despite having a \$1 billion surplus, was trying to put the burden of fixing its pension problems on the shoulders of newly hired workers.* But the authority warned that it faced an \$800 million deficit in 2008, caused in large part by fast-rising pension and health costs In essence, the two sides took irreconcilable positions that cried out for one side or the other—or perhaps both—to blink. The authority has insisted on a less generous pension and health plan for newly hired workers, and the union has consistently rejected these demands. Mr. Toussaint said he was convinced that Mr. Pataki and Mr. Bloomberg were urging the authority to insist on a new, lower pension tier for newly hired workers in order to get transit workers to accept a pattern that the mayor and governor can then pressure municipal and state unions to accept. Gary J. Dellaverson, the authority's chief negotiator, said the authority's pension costs were skyrocketing and had to be contained. Pension contributions for the transit workers have tripled since 2002, to \$453 million this year. Going into yesterday, the union was demanding raises of [eight] percent a year. The union hinted it might lower its wage demand, but only if the authority agreed to a [twenty-five] percent reduction in the number of disciplinary actions; 15,200 such actions were taken last year against the workers. Several negotiators said yesterday that one possible solution was for the authority to increase its wage offer, and in return the workers might agree to start paying modest premiums for health insurance. Narrowing Mr. Toussaint's ability to maneuver are pressures from a clamorous dissident group that is pressing him not to make concessions *Charles D. Jenkins, a union organizer, said the authority had tried to hide its \$1 billion surplus to avoid giving it to workers in wages and benefits. "On Dec. 15, you're going to have to show us the money, because if you don't, we're going to shut you down," he said from a lectern. Joseph Semien, a subway-car mechanic, held a placard reading, "T.W.U. Must Strike to Win. Arbitration is a Trap." He said, "Basically the M.T.A. is seriously attacking the union and future workers because they're trying to give less to new workers than the little we're getting."*

Greenhouse & Chan, *supra* note 140 (emphases added). This excerpt shows how the TWU, due to its knowledge of the financial history (the surplus) was able to jump on the fact that the MTA may have been "low-balling" the TWU on pension benefits. In the public light, the TWU put the MTA on the defensive to explain why it opted not to share its surplus on a basic labor issues issue like pension that effects many blue collar workers include the TWU members.

may be unable to get a full and deep understanding of the unique issues facing the parties.²³⁶

Similarly, arbitrators are unrepresentative of the parties at the table.²³⁷ Given that many unionized employees are not of the same demographic as the arbitrator,²³⁸ unionized employees may continue to believe that the system does not understand their viewpoint.²³⁹

Furthermore, many argue that arbitration should be voluntary.²⁴⁰ Forced arbitration may devalue the effectiveness of ADR.²⁴¹ Parties may feel they receive less from the arbitration process.²⁴² Commentators question whether penalties will fix a deeply seeded attitude against arbitration.²⁴³

There may be more peaceable means to bring resolve to labor disputes. For instance, entities falling under the Taylor Law could

²³⁶ See *Developments in the Law—Public Employment*, (part 2 of 2), *supra* note 70, at 1705–1706

²³⁷ See Hernandez, *supra* note 30 (noting that the policy is forced on the party; the arbitrator is selected from a standard pool of white men); see also Andrea L. Myers, Note, *Mandatory Arbitration of an Employee’s Statutory Rights: Still a Controversial Issue or are We Beating the Proverbial Dead Horse?*, 2001 J. DISP. RESOL. 145 (2001).

²³⁸ See *id.*

²³⁹ See discussion *supra* note 25 on ethnicity of transit workers. One barrier that the TWU members faced during the 2005 negotiations is that they had socio-economic differences from management, so having an arbitrator that comes from a different socio-economic group could continue to lead to distrust and animosity toward the arbitration process.

²⁴⁰ See Barendrecht & de Vries, *supra* note 100 (noting that to overcome the psychological barriers in a negotiation, the party must want to use ADR of his/her own free will); see also *Developments in the Law—Public Employment*, (part 2 of 2), *supra* note 70, at 1707–1709 (“voluntary agreements reached by the parties themselves are far better than agreements imposed by an outside arbitrator,” and that “compulsory arbitration . . . should not take the place of collective bargaining, but rather should be used as a supplement or aid.”).

²⁴¹ See Barendrecht & de Vries, *supra* note 100; see also *Developments in the Law—Public Employment*, *supra* note 70, at 1707–08 (part 2 of 2).

²⁴² See Democracy Now Interview with Roger Toussaint, *NYC Union Chief Roger Toussaint Remains Defiant Hours Before Heading to Jail for Leading Transit Strike* (Apr. 24, 2006), available at <http://www.democracynow.org/article.pl?sid=06/04/24/1346222>. In fact, TWU President Roger Toussaint has expressly stated that he is not interested in binding arbitration as he feels it will produce an unfair result for his union. See *id.*; Clyde Haberman, *Trains Stood Still. Mouths Ran*, N.Y. TIMES, Dec. 23, 2005, at B6 (“Mr. Toussaint warned that binding arbitration would take place ‘only over the dead bodies of our leadership.’”); see also Barendrecht & de Vries, *supra* note 100; *Developments in the Law—Public Employment*, (part 2 of 2), *supra* note 70, at 1707–1708.

²⁴³ This argument is similar to when criminologists discuss whether it is the law that deters a criminal act or an inner moral obligation to do what is right. Some could question whether these amendments will actually bring the union to the table as a willing participant that is excited to use many different types of ADR to solve a problem, or if the union will come to the table simply because they must fulfill an obligation. See Barendrecht & de Vries, *supra* note 100; see also *Developments in the Law—Public Employment*, (part 2 of 2), *supra* note 70, at 1707–1708.

use advisory labor arbitration.²⁴⁴ This more peaceable method requires unions and management to agree beforehand how a dispute will be resolved.²⁴⁵ New York teacher's unions and school districts have successfully used this method for a number of years.²⁴⁶

b. Advantages of the Proposal

Though there are potential critiques to this proposal, the clear advantages outweigh its defects. First, this proposal would only be implemented when the traditional negotiations fail or a party does not opt for the PERB ADR options.²⁴⁷ Unlike under the current provisions of the Taylor Law, one party can bring the action to PERB ADR before an actual impasse ensues. Currently, parties either have to wait for an impasse or “agree to disagree” on bargaining provisions before being able to access the PERB ADR system.²⁴⁸

Keeping the no-strike provisions in the Taylor Law is fair.²⁴⁹ In the public labor relations field in order to protect the public, management and the unions must give up some its economic

²⁴⁴ See Mitchell H. Rubinstein, *Advisory Labor Arbitration Under New York Law: Does It Have a Place in Employment Law?*, 79 ST. JOHN'S L. REV. 419 (2005) (parties agree to arbitrate first, though the arbitration award is not binding).

²⁴⁵ See *id.*

²⁴⁶ See *id.* Rubinstein notes the New York teachers' unions regularly use this methodology. See *id.* Unions voluntarily agree to this process because they seek “economic and political power,” notes Rubinstein. *Id.* “The issue is not what the union wants or desires, but what the union can achieve through collective bargaining. In the private sector, a union may not be strong enough to insist on final and binding arbitration to the point of a strike, or, in the public sector, to the point of an impasse.” *Id.* Despite the risk of enforcement proceedings for not adhering to the advisory arbitration, employers agree to this method as:

[A]dvisory arbitration might serve some benefit. Specifically, each side would see their adversary's position and the respective strengths and weaknesses in a party's case might be exposed. Further, if a party simply rejects advisory arbitration, it leaves the dispute open. This does not appear to be in anyone's interest, and one must question the value of such categorical rejections. The employer's ability to reject the award is tempered by the union's ability to commence additional litigation against the employer. These competing policy concerns must be weighed and balanced by both sides in deciding whether advisory arbitration is in their best interests.

Id.

²⁴⁷ In other words, by not eliminating the current penalties, the amended Taylor Law would not negatively affect the unions that have honored its obligation not to strike. This amendment simply adds another layer to the law providing an additional barrier to unions contemplating striking. Striking becomes much more costly and riskier for the union, which may deter them from opting to strike.

²⁴⁸ See discussion *supra* note 205.

²⁴⁹ See *Board of Ed. v. Pisa*, 389 N.Y.S.2d 938 (4th Dep't 1976) (PERB not required to compel employer's action.).

power.²⁵⁰ While the Taylor Law expressly states that unions may not strike or otherwise face harsh penalties, public employers give up their ultimate economic power—the right to lock out employees.²⁵¹ In the private sector, employers may lock out employees who opt to strike.²⁵² Public employers are less likely to lock out employees, as locking out employees would not allow the government to serve the public good.²⁵³ Locking out employees would cause great upset among the general public and possibly put the public in danger.²⁵⁴ Given the circumstances surrounding public negotiations, public employers have lost their prime economic tool—the lock-out—in negotiations. To maintain a level field, unions should also give up their prime economic tool—the right to strike.

Compulsory interest arbitration is not uncommon to unions organized under the Taylor Law.²⁵⁵ In fact, a court may order compulsory interest arbitration if a negotiation during the terms of the contract reaches an impasse.²⁵⁶ Why should we allow a tainted negotiation to erupt into a strike instead of having the adequate check under the Taylor Law, which would require the parties to use ADR in the event of impasse? This is especially true given how cost efficient mandatory arbitration is for disputing parties.²⁵⁷

Decertification of a union is not unheard of in the labor field. Public unions have been decertified in the past.²⁵⁸ For instance, in response to a nearly three day strike by the federal air traffic controllers,²⁵⁹ the D.C. Circuit affirmed the Federal Labor Relations

²⁵⁰ See Hanslowe & Acierno, *supra* note 33.

²⁵¹ See Ellen Dannin, *at 70, Should the National Labor Relations Act Be Retired?: NLRA Values, Labor Values, American Values*, 26 BERKELEY J. EMP. & LAB. L. 223 (2005) (a lock out is the process by which an employer makes its final offer to the union. If the union rejects this offer, the employer then locks all unionized employees out of the office and hires replacement workers.); *c.f.* discussion *infra* pp. 202–203 on the PATCO strike (courts found President Reagan justified in firing all the striking employees. Firing striking employees has the same underlying effect of a lock out.)

²⁵² See Dannin, *supra* note 251.

²⁵³ See Hanslowe & Acierno, *supra* note 33.

²⁵⁴ Not only would people's business not take place, but if police or fire workers were locked out, the public would not have safety protection.

²⁵⁵ See, *e.g.*, *Newburgh v. Newman*, 499 N.Y.S.2d 276 (3d Dep't 1986).

²⁵⁶ See *id.* (“[c]ompulsory interest arbitration may be ordered to resolve negotiating dispute during term of collective bargaining agreement.”).

²⁵⁷ See Hernandez, *supra* note 30 (discussing the cost effectiveness of arbitration).

²⁵⁸ See Neil Fox, *PATCO and the Courts: Public Sector Labor Law as Ideology*, 1985 U. ILL. L. REV. 245 (1985) (on the decertification of the Air Traffic Controller Union).

²⁵⁹ See *id.* (The Strike ended when President Ronald Reagan fired the over 11,000 PATCO workers who struck).

Authority's ability to decertify PATCO (the federal air traffic controller's union).²⁶⁰ The union knew that the strike was unlawful, and it opted to do nothing to remedy the situation.²⁶¹ Putting public safety and the stability of the larger economy ahead of the union's right to maintain representative status, the D.C. Circuit sent a clear message to public unions authorized under the Labor-Management Relations Act of 1978.²⁶² There have been no further PATCO strikes after the 1981 incident.

These proposed amendments are also stronger than other penalties that could be added to the Taylor Law. For example, to encourage parties to remain at the bargaining table, some labor collective bargaining use impasse bargaining.²⁶³ In the event the parties reach an impasse, management may unilaterally implement its last proposal.²⁶⁴ In theory, the proposal gives unions an incentive to stay at the bargaining table over fear of being subject to an employer's unilateral proposal.²⁶⁵ However, courts have given a liberal interpretation to use of this type of bargaining.²⁶⁶ Such an interpretation gives more power to management at the bargaining table.²⁶⁷

With respect to New York public employees, impasse bargaining is less desirable than the proposed amendments. First, looking at the bargaining style of labor negotiations,²⁶⁸ impasse bargaining is disadvantageous to public unions because the practice places a heavy burden on the union. Faced with both a no-strike provision²⁶⁹ and an impasse bargaining clause in effect strips unions of some of its economic bargaining power. The result: unions may be

²⁶⁰ See *Prof'l Air Traffic Controllers Org. v. Fed. Labor Relations Auth.*, 685 F.2d 547 (D.C. Cir. 1982) (relying heavily on the Congressional intent to the Labor-Management Relations Act of 1978).

²⁶¹ See *id.*

²⁶² See *id.*; Fox, *supra* note 258; see also Labor-Management Relations Act of 1978, 5 U.S.C. §§ 7101–7135 (2007) (arguably similar to the Taylor Law, in that it grants Federal Employees the right to organize in exchange for no-strike provisions).

²⁶³ See Thomas C. Albus, Note, *Head 'em Off at the Impasse!: A Victory for Management in the War to Implement its "Last Best Offer,"* 1996 J. DISP. RESOL. 429 (1996).

²⁶⁴ See *id.*

²⁶⁵ See *id.*

²⁶⁶ See *id.*

²⁶⁷ See *id.* (arguing that as long as management demonstrates that it came to the table in good faith, it is then free to use its economic powers to render a solution that is best for the company. Management holds the purse strings as to whether to keep the company open).

²⁶⁸ See Hanslowe & Acierno, *supra* note 33 (noting how some negotiating parties prefer using its economic power over its counterpart).

²⁶⁹ See N.Y. CIV. SERV. LAW § 210 (Consol. 2007).

more likely to give concessions to management.²⁷⁰ While the no-strike provisions stop the union from causing economic harm,²⁷¹ unilateral implementation²⁷² may lead to the union not fully pushing the employer's position. Unions may fear that too much hard bargaining may lead the employer to believe that the parties have reached an impasse, which would result in management unilaterally implementing its proposal.²⁷³ Unions will have no power left at the bargaining table except to just negotiate.²⁷⁴ Second, impasse bargaining disincentivizes management from being an active bargainer.²⁷⁵ Third, allowing New York governmental agencies to unilaterally implement terms to a labor contract is arguably contrary to public well being. Some governmental agencies are mismanaged, and the diligence conducted by the labor unions in preparation for the negotiation makes governmental agencies justify their spending decisions.²⁷⁶

Without a doubt, tempers of the bargainers, third-parties, and the public flair with even the threat of a strike. These enhanced penalties offer an incentive for the bargainers get over their psychological barriers.²⁷⁷ On the one hand, the government entity is forced to overcome any resistance to ADR of the other side's

²⁷⁰ See Albus, *supra* note 263.

²⁷¹ See discussion *supra* pp. 163–168.

²⁷² See Albus, *supra* note 263.

²⁷³ See *id.*

²⁷⁴ Unions could arguably negotiate in good faith enough to avoid an unfair labor practice charge from PERB, wait until the current collective bargaining agreement expires, and then allow the Triborough Amendment to become effective. However, although the Triborough Amendment may have begun, New York Courts have put limitations on when it may be used. See discussion *infra*. In effect, significantly limiting the use of the clause and limiting one economic remedy of a union who is unable to strike to lodge a complaint against management.

There are a number of exceptions to the Triborough Amendment. One, an employer is not required to implement a cost of living increase, as there was a preset time table as to when cost-of-living could be calculated under the collective bargaining agreement. See *Greece Support Serv. Employees Ass'n v. PERB*, 672 N.Y.S.2d 926 (3d Dep't 1998).

²⁷⁵ *But see* N.Y. CIV. SERV. LAW § 204 (Consol. 2007) (unions and management have a duty to bargain in good faith). This means participants must attend negotiations sessions ready to talk and go back and forth on substantive matters. However, no party is required to fight tooth and nail for their position.

²⁷⁶ See discussion *supra* note 235 on MTA financial trouble and TWU commentary.

²⁷⁷ See, e.g., *On the Road to Arbitration*, N.Y. TIMES, Jan. 29, 2006, at 11. The article notes: Roger Toussaint, the blue-collar union leader, and Peter Kalikow, the well-tailored white-collar M.T.A. chairman, are likely never to have a “walk in the woods” kind of relationship, where great differences might be worked out over a cordial give and take. A mediator's nudge to the table could, however, at least get a dialogue started. What's needed now is a reworked contract offer that can be sent back to the membership for a vote, and soon.

Id.

views, and trigger the PERB ADR process; otherwise the entity is stripped of the power to fine a striking union. On the other, unions – faced with the prospect of decertification – may question if their quest for “equality” or lack of trust in the other side is worth striking over.

Moreover these amendments are for the public good. Strikes are expensive and frustrating to the general public. With hundreds of millions of dollars lost by three transit strikes, strikes have a devastating effect on the public, especially the business community. Ideally, all unions would make a firm commitment not to threaten or engage in a strike and management would come to the table ready to bargain; however, it is impossible to fully change everyone's attitude about the benefits of ADR. Though Toussaint vehemently denounced the arbitration process, he knew that ADR has its benefits (especially after the TWU received the final arbitration award in December 2006). Despite the argument by some commentators that public unions do not make economic decisions before opting to strike, in the case of large unions contending with a large agency, economics do matter. Toussaint and his union officers weighed the costs and benefits of its negotiation strategy; if he had believed that the arbitration process would have given the TWU what it demanded, he would have strongly considered arbitration. Arguably, the MTA performed a similar cost/benefit analysis. By MTA Chairman Kalikow not coming to the bargaining table until the very end of the negotiations, not addressing some of the TWU's smaller requests, and spending its surplus without consideration of other financial obligations, the MTA also thought these self-directed actions outweighed the costs of further embittering the TWU. These amendments become another cost/benefit factor for bargaining party during the late stages of a CBA negotiation session. For the public good, it is imperative that the Taylor Law be enhanced to incorporate these harsher penalties.

