Is Collective Bargaining a Term of Art? A Law Prof. as Expert Witness on What the History of Labor Relations Can Teach The Missouri Courts Today

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Intro and Background

This paper discusses an interesting recent development in public sector labor law arising from the Missouri state Constitution, and includes my experiences as an expert witness in two Missouri state courts on the issue. It is a “work in progress” in the sense that I am trying to figure out what to do with this information and research, especially whether I should try to turn it into an article and, if so, what my approach should be in that article.

In 1945, Missouri added the following clause to its state Constitution: “employees shall have the right to organize and to bargain collectively through representatives of their own choosing.” In 1947, the Missouri Supreme Court held that this provision did not apply to public employees, in City of Springfield v. Clouse, 36 Mo. 1239. At this time, no law in the U.S. gave collective bargaining rights to any public workers. The first public sector labor laws providing such rights did not begin to be passed until the 1960s (public sector labor law, unlike private sector labor law, is primarily state law, not federal law).

Sixty years later, in 2007, the Missouri Supreme Court reversed Clouse, and held this Constitutional provision did cover public workers. Independence-Nat. Educ. Ass’n v. Independence School Dist., 223 S.W.3d 131. This was significant, as many government employees in Missouri (notably public school teachers and police) still have no statutory right to bargain collectively (other public employees in Missouri are covered by a limited state public sector law passed in the 1960s).

To this day, Missouri has not passed a statute implementing this Constitutional guarantee or explaining how “collective bargaining” under the state Constitution is supposed to work. Every other jurisdiction that provides public employees the right to bargain collectively has a detailed statute spelling out the rights and obligations of the parties in the collective bargaining process. Still, the Missouri state legislature seems to be in no hurry to pass such legislation.

Thus, after Independence, it is unclear what specific rights Missouri public employees actually have under their state Constitution. Not surprisingly, the issue is hotly contested.

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1I first encountered this Constitutional provision and Clouse when writing my book, Public Workers, which discusses and criticizes the decision. Little did I know then that three years after my book would come out, Clouse would be reversed, and, well, see below.

2This includes the two other states whose Constitutions provide for public sector bargaining rights, Florida and Hawaii.
Public school employers in Missouri have promulgated labor relations rules quite different from what has traditionally been considered “collective bargaining.”

In the fall and winter of 2009, I appeared as an expert witness in two cases challenging these systems. In the first case, the Springfield, Missouri school district insisted that employees be given the option to choose multiple unions to represent the same employees at the same time. This is contrary to the principle of exclusive representation, a staple of all U.S. labor laws.

In the second case, the Bayless, Missouri school district insisted that a bargaining representative could be selected in only one way: each school within the district (elementary, middle, and high school) elects two individual “representatives,” and these representatives (along with a couple of other individuals) then form a body that deals with the employer. This is contrary to the principle in U.S. labor laws that employees are represented by an organization designed to speak with one coherent voice and one that has the power and responsibility to enforce a contract. It also violates the principle in U.S. labor law that the employer cannot dictate to employees the structure of their organization or how leaders of that organization will be chosen.

In both cases, I testified on behalf of a teachers’ union that “collective bargaining” is and has been, historically, a term of art with some specific meanings and requirements. Specifically, I testified about what “collective bargaining” meant under statutes, agency interpretations, and in actual practice in the U.S. up to 1945. I discussed the use of this term and the practice under the early history of the Railway Labor Act, the National Industrial Recovery Act, the War Labor Boards (for both World Wars), and the early years of the National Labor Relations Act (the current private sector labor law in the U.S.). Obviously, this was lots of fun for a labor historian. I testified for about two hours in the Springfield case and about three hours in Bayless.

*Springfield* was decided in the employer’s favor, but *Bayless* found a violation of the Missouri Constitution. Helping to keep my ego in check, neither judge seemed to rely on my testimony. More specifically. . . .

**The Two District Court Cases**

In *Springfield National Education Association v. Springfield School Board*, a school board in Missouri set up a system for union recognition that included the following provisions. Employees in a bargaining unit of teachers could, in an initial ballot, choose to be represented by one union, multiple unions, or no union. Under the multiple union option, more than one union would represent the same group of teachers, *i.e.*, teachers in one bargaining unit would be simultaneously represented by more than one labor organization. There was no requirement that

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the labor organizations consent to this arrangement or have consistent goals. Thus, the employees could choose to be represented, simultaneously, by two different, hostile and competing unions – the exact same employees. This, as noted above, contradicts the universally established principle in U.S. labor law of exclusive representation: only one union represents one group of employees.

The Springfield judge decided that this background and history was, essentially, not relevant because current dictionary of definitions of “collective bargaining” resolved the matter. Specifically, the judge quoted the Independence decision, which had referenced “collective bargaining” briefly in a footnote.

The dictionary definition says “collective bargaining” is “negotiation for the settlement of the terms of a collective agreement between an employer or group of employers on one side and a union or number of unions on the other. [Springfield] at 138, n. 6 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1993)).

The [Missouri] Supreme Court thereafter quoted BLACK’S LAW DICTIONARY (8th Ed. 2004), which says: “collective bargaining” means “negotiations between an employer and the representatives of organized employees to determine the conditions of employment, such as wages, hours, discipline, and fringe benefits.” . .

None of the definitions referenced by the Supreme Court suggest the phrase “collective bargaining” mandates exclusive representation.

As a matter of Constitutional interpretation, one wonders about using modern dictionaries to define terms used more than 60 years ago.

As a practical matter, the possibility of multiple union representation would seem unworkable, at least in cases (such as was the case in Springfield) where the two competing unions were quite hostile to each other.

The practical effect of this decision, however, was largely mooted (at least in this case) by subsequent events on the ground. After this decision came out, the teachers voted to use the “one union representative model” – and voted in the union on whose behalf I was testifying. Among other things, this makes an appeal of this case less likely.

A few months later, the union won a victory in court. In Bayless Education Association v. Bayless School District, the union successfully challenged a different system the local school board had created. In the Bayless system, the employer required employees in each school in the District to select two individual representatives and two alternates; these representatives, plus one representative designated by the union with the largest employee membership, would then be allowed, as a group, to bargain with the employer. Bayless held this did not satisfy the
constitutional right to bargain collectively.

Bayless did not disagree with Springfield, but rather distinguished it. The judge in Bayless explained that under the system in Springfield, employees were at least permitted to choose a traditional exclusive representative. The Bayless decision explained that the system at issue in Bayless “mandates collaborative bargaining, not collective bargaining through a union representative.”

It is not clear where the judge got the term “collaborative bargaining,” which is certainly not a term of art in labor law. Also, the Missouri Constitution does not literally require a “union” representative. It would have been better, in my view, for Bayless to have held that, among other things, this system would not have allowed the employees a “representative of their own choosing” (per the Constitutional language), at least not in the sense that term was and is understood in labor law. But as I said, these judges are keeping my ego in check.

It is unclear if the employer will appeal this decision. But more broadly, unless and until the Missouri state legislature enacts a statute specifying would “collective bargaining” means under its constitution, it would seem likely that some case on this topic would eventually wind up in the Missouri Supreme Court. And presumably there could even be a challenge to the existing, limited public sector labor statute, if either an employer or union doesn’t think the statutory definition meets the meaning of the state Constitution.

Analysis and Possible Directions for Future Work

This all raises a variety of interesting questions: some involve public sector labor law, some involve interpreting constitutions, and there are even some involving the role of law professors as expert witness.

Most narrowly, as to black letter doctrine, it’s far from clear to me that Springfield and Bayless are sufficiently distinguishable on the facts such that the first system does satisfy the Constitutional requirement of collective bargaining through representatives of the employee’s choosing, and the second system does not. Personally, I think both cases should have found a constitutional violation. But the obvious, broader question remains, what guidelines should Missouri courts use to determine whether a given system constitutes “collective bargaining” under the Missouri constitution?

As to public sector labor law, one question is whether “collective bargaining” is/was a “term of art.” At least one court, interpreting a different law, has held that it is. In National Treasury Employees Union v. Chertoff, 452 F.3d 839 (D.C. Cir. 2006), the court was dealing with the statute authorizing the creation of the Department of Homeland Security (DHS). That statute provided that the DHS could devise a new labor relations system, one different from the existing statute that governed labor relations in the federal government. But the law also requires that the employees have a right to bargain collectively. The law did not define “bargain collectively.”
The DHS then set up a system which was, to put it mildly, quite restrictive as to this right. Among other things, under the system, the employer (DHS) could unilaterally reject/void any provision of any collective bargaining agreement that it had previously agreed to. The union sued, claiming this system was not “collective bargaining” as the statute required. The D.C. Circuit agreed. “Collective bargaining” was a term of art, and it could not mean a system in which one side was not bound by collectively bargained contracts.

So, should a 21st century case by the D.C. Circuit interpreting a 21st century statute covering federal workers influence the Missouri courts in interpreting a mid-20th century provision of the Missouri constitution covering only workers in Missouri? I would say “yes,” in that “collective bargaining” was a term of art then and now.

On the other hand, “collective bargaining” does not have a universal meaning on all issues. State public sector labor laws vary considerably on some issues: e.g., on how bargaining impasses are resolved (only a minority of states allow any public workers to strike; a plurality use some combination of mediation, fact-finding, and arbitration). State public sector labor laws also vary considerably on what topics unions may legally bargain about.

Still, public sector labor laws do have some fundamental rules in common with each other. Indeed, the term “collective bargaining” throughout all U.S. labor laws always meant some specific things, including exclusive representation. My analogy at the Bayless hearing was to basketball. If a Constitution provided a right to play basketball but didn’t give the rules to the game, there could be disputes over some rules, as certain things vary between college and pro versions of the game, and mens’ and womens’ versions (where the three-point line is, the shot clock, etc.). But “basketball” has some core meanings: it would still involve putting a round ball in a basket and not, say, a hockey puck and skates.

Complicating the issue here, though, is that none of this diversity in public sector law was present in 1945. Back then, there were no public sector labor laws, on private sector labor laws. Those laws had (and have) much less diversity in their rules. “Collective bargaining” was a term that, in 1945, had only been used in statutes to apply to private sector workers.

Also, while arguably not directly relevant to interpreting the state Constitution, it seems worth considering how labor relations could actually function under the schemes Missouri employers have proposed. For example, if different unions represent the same employees what happens if they differ in their approaches to contract negotiations or grievance handling? Note that the Springfield policy did not say anything like, “and if Union A gets 70% support and Union B gets 30%, Union A gets 70% of the leadership positions.” Who would have the power and responsibility to enforce the contract? Would there be a duty of fair representation, and to whom would it run? These questions are even harder in the Bayless system, which proposed a “representative” made up of individuals who don’t necessarily come from any organization or group, need not have any common goals, and have no formal legal power or authority as a group. These could be very real questions for a large number of public workers in Missouri.
Second, this all raises questions concerning theories of Constitutional interpretation. I believe I am urging an original public meaning theory: “collective bargaining” had a well-established meaning (or at least a well-established meaning on some topics, like exclusive representation) in 1945, when this provision was passed. Not only was this meaning shared by folks in the field of labor relations, but also it was established in practice, statute, and court and agency decisions under several different statutes. It would be far more appropriate for a court to consult these sources and this history than to look at modern, generic dictionary definitions. This is especially true since, as best I can tell, there is no relevant legislative history from the debates leading up to the passage of the Constitutional provision.

Another aspect of this I find interesting: what is the proper role of a law prof testing in a case like this? The first thing I thought when asked to do this – and the first thing some of you may have thought of already – was, “aren’t you just talking about the law? Witnesses aren’t supposed to talk about the law.” That’s partly true. But, first, these old, historical materials are hard to find, and I’m not sure state court judges want to read – with no background – administrative decisions from the old National Labor Board which existed briefly under the National Industrial Recovery Act in the early 1930s. Second, I testified that these systems were contrary to what the drafters of various labor laws meant by collective bargaining and their purpose in creating labor laws. Third, I talked about how these systems would be unworkable in practice.

Finally, I would like to follow up on this topic, perhaps in an article, but there is a question of timing because the dust still hasn’t settled. Springfield probably won’t be appealed, again because after the decision, the workers voted to reject the “multiple union representation” option and successfully chose exclusive representation instead. So the union folks got what they wanted. Bayless still may be appealed, and if the union loses at the appellate court level, it’s likely to appeal to the state Supreme Court. Unlike the system in Springfield, the Bayless procedure does not allow any way for the teachers to choose a traditional union representative, so the union can’t get what it wants without litigation. Someday the Missouri legislature is probably going to step in, but if that doesn’t happen in the middling term, the Missouri Supreme Court is likely to hear a case on this issue.

So, should I write an article about this in the not-too-distant future, while all this stuff is still pending? Or should I wait until there are more court decisions? If I wait until the Missouri legislature does something, that risks making the project seem not terribly relevant, and less attractive to law review editors. But if I do it sooner, my article could well be overtaken by events (cases, statutes) by the time it comes out.

I welcome your thoughts.