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IMPROVEMENTS OF THE PROCESSES OF COLLECTIVE BARGAINING†

LEE PRESSMAN*

The very formulation of the subject under consideration marks a tremendous advance in the field of industrial relations. It wasn't many years ago that the general pattern in the mass production and basic industries was one of open conflict between employers and unions. The issue in dispute was that employers refused to recognize labor unions as the representatives of their employees for the purpose of collective bargaining. To defeat union organization, employers were not loathe to engaging in the most nefarious practices, including the use of spies and agents provocateur, yellow dog contracts, and injunctions.

But today—quite to the contrary—the inquiry based upon reason and good-will is what can be done to improve the processes of collective bargaining. This, of course, necessarily presupposes bargaining between employers and unions chosen by and representing the employees.

One of the first stages to confront both employers and labor unions is the actual negotiating conference. There are a few guideposts which, if followed, may ease the path for both sides and be conducive to the consummation of collective bargaining agreements, which is the mutual objective.

Bona fide collective bargaining presumes that the union which is to be one of the contracting parties must be chosen by a majority of the employees to be covered by the contract. This should preclude so-called back-door agreements between an employer and a union which has not been designated by a majority of the employees as their representative. A practice of this description by an employer to avoid dealing with another labor union which has won the confidence of a majority of the employees can only lead to difficulties and friction within the plant.

On the other hand, where a union enjoys the right to act as the exclusive

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collective bargaining representative for a group of employees, it must recognize a corresponding obligation to represent all the employees who may be covered by the agreement. The union should therefore be ready and willing to accept all the employees into membership. There should be no bars because of race, creed, or color. The United States Supreme Court has in effect decided that a labor union enjoying the right granted by the National Labor Relations Act and the Railway Labor Act to engage in collective bargaining as the exclusive representative cannot discriminate in the bargaining process against non-member employees. It is my belief that the obligation not to discriminate should include the obligation to accept all the employees into equal membership.

The process of collective bargaining requires good faith on both sides, frankness, and an open mind, with the desire and willingness to give and take in the bargaining. Any more detailed definition would be too cumbersome and either through inclusion or exclusion would merely create difficulties and misunderstanding.

It should be clearly understood that bona fide collective bargaining does not impose an obligation on either side to agree to a demand presented by the other. The obligation is merely to bargain in good faith, as has already been described in general terms. It has been commonly stated that the National Labor Relations Act, as interpreted by the Board, imposes an obligation upon employers to agree to demands presented by the union. This is an inaccurate representation and a misstatement of the law. The National Labor Relations Board and the United States Supreme Court have repeatedly stated that the obligation of the employer is merely to bargain in good faith. An adamant and arbitrary position assumed by an employer within a framework of specified circumstances may well reflect a determination not to bargain in good faith. But that of course is a question of fact to be determined in the particular case.

It is of course helpful for the successful conclusion of a collective bargaining conference that both sides be fully prepared on the economic facts relating to the particular employer, the industry, and the national economy. Labor unions within recent years have developed research departments which provide them with complete economic data. All too frequently a labor union, thus reinforced to substantiate its claim for a wage increase or other financial improvements, is met not with an employer's rational arguments in opposition, but rather heated opposition engendered by a sense of inferiority on the part of the employer who has not come equally prepared. Such an

approach does not further industrial peace because the employees who are fortified by facts do not respond with improved morale if they are met by an arbitrary position unbacked and unsubstantiated with equally cold, blunt facts.

Another factor which labor finds bothersome in the course of collective bargaining is the refusal at times on the part of management to recognize the developing types of issues which properly arise for collective bargaining. All too frequently management assumes the attitude that an issue raised by a labor union must rest within the sole discretion of management. The field of collective bargaining is necessarily an evolutionary one. With good faith being practiced and recognized on both sides of the conference table, the parties will soon find that the collective bargaining contract will encompass ever-changing issues and subject matter. When labor unions first entered the mass production and basic industries the seniority issue was one on which management insisted must rest within its sole discretion. Today it is hardly contested by an employer that that problem is one in which a union speaking for the employees has a most vital interest and must be thoroughly covered through collective bargaining.

The issue of health, welfare and pension funds for collective bargaining is being raised with increasing frequency. Until a few years ago this was a matter that had been handled through collective bargaining in but a few scant industries. Progressive and broadminded managements have recognized that this is a subject in which their employees have a direct and abiding interest. For this reason it is not a matter for which management can determine a solution independent of the wishes of their employees as ascertained through collective bargaining and hope to achieve a high degree of morale and productive efficiency. but there are many employers who still become enmeshed in the cliché that since the subject has always been handled by management on a paternalistic basis and within its own discretion it should continue to do so on the same basis. This approach is not conducive to achieving the maximum benefits to be derived from collective bargaining.

Progress will be achieved if we come to recognize that industry-wide collective bargaining is not an evil development but rather one which is wholesome and proper and to the advantage of both the employers and the employees. Under the law a labor union cannot compel any group of employers to engage in industry-wide collective bargaining. It is only where the employers have voluntarily agreed to combine for the purpose of collective bargaining with the union that such a development can occur. Thus

it must rest upon the voluntary decision of both parties, namely, the union and the employers.

The process of industry-wide collective bargaining eliminates competition within the industry with regard to wage rates and other matters customarily included in the contract. Where the employers who are competitors in a particular industry know that they are all on the same basis insofar as their wage costs are concerned, subsequent competition must be based on managerial skill, quality and price of their product. This eliminates the mischievous competition which rests on the cutting of wage rates and repressing labor that can only lead to economic chaos.

In 1938 President Roosevelt appointed a commission comprised of representatives of labor and industry to make a study of labor relations in England and Sweden. This commission, after an exhaustive analysis of the conditions in those two countries, unanimously submitted a report in which among other things great stress was placed on the development of industry-wide collective bargaining which more than any other factor, it was claimed, had produced long records of peaceful industrial relations.

As against the approach to probe the methods whereby collective bargaining processes can be improved, there is the campaign to draw our people into a crusade against labor. This is a campaign based, we submit, upon misrepresentation and deceit. During the early part of this century the witch hunt against labor was carried on under the slogan of the "open shop plan." This high-sounding phrase meant little more than the arrogant insistence of some American employers that while they were to be free to organize and to pit their economic strength against the workers, the workers were to be denied the freedom to organize. The courts, unfortunately, also lent their aid to the employers engaged in carrying out the "open shop plan." Injunctions were issued to prevent employees from defending themselves against the aggression of their employers. In addition, the antitrust laws were used to break unions and to ruin them financially.

After the first World War the open shoppers again resumed their own private war against the democratic rights of American workers. This time the battle cry was the "American plan." The campaign against labor was so brutal and lawless that fair-minded citizens were shocked; they realized that some action was necessary to create an atmosphere in which working people could raise their heads and lift the banners of their labor organizations on high.

To this end a number of laws were passed for the protection of labor. The cornerstones of the new policy with respect to labor were the Norris-LaGuardia Act, passed in 1932, which limited the powers of courts to issue injunctions in labor disputes, and the Wagner Act, passed in 1935, which protected labor in the right to organize and to bargain collectively.

Today the basic rights guaranteed to labor by this legislation is being challenged. While the attack takes many forms through diverse legislative proposals, essentially the objective is to weaken if not destroy the most fundamental right of labor, namely, that to strike.

It has become the accepted routine in every legislative measure directed against labor to incorporate somewhere a pious declaration denying any intent to abridge the right to strike or, more usually, denying any desire to interfere with the free right of workers to refuse their services to their employer. The routine insertion of these pious protests has reached the point where the inclusion of such a provision is almost a sure clue to the probability that the rest of the bill involves a studied and extensive attempt to outlaw any effective strike action or to deny any effective exercise by workers of their right to refuse their services.

Before turning to the specific bills which post the issue today it should be helpful to re-examine a few fundamental thoughts. I should like to point to the language of the United States District Court in Chicago in its recent decision declaring invalid the Lea Act. The court there said:

“Under the Thirteenth Amendment the right of any worker to leave his employment at will or for no reason, at all is protected and that right is inviolate. The freedom to quit and refuse to undertake work may as readily be exercised through a group organization as individually.”¹

The Thirteenth Amendment to the United States Constitution outlawed involuntary servitude. In a number of cases since that time—the caption which will come to the mind of most of us is that of *Baile v. Alabama*²—the Supreme Court has given content to that protection. That protection carries with it the guarantee against the use of penalties or governmental sanctions for a refusal by an individual to make his services available.

There has been a studied attempt to draw a line between the right of one worker to leave his job free from governmental interference, and the right of a number of workers to leave their jobs jointly. Those to whom

1. *United States v. Petrillo*, 68 F. Supp. 845, 849 (N. D. Ill. 1946).
2. 219 U. S. 219, 31 Sup. Ct. 145 (1911).

basic democratic rights are not mere abstractions but are living and vital realities must reject such a demarcation.

The right of free speech in our society would have no meaning or value if the exercise of the right could be restricted only to those circumstances in which the speech is ineffective. The right of free speech would have no meaning if I could be told by a governmental agency that while I am free to speak, I may exercise that right only in the privacy of my home and not before an audience. The right of the free press could not be regarded as very significant if it involved merely the right to place one's views on paper but denied the right to publish, promulgate and distribute those views as the only means of making them effective.

By the same token, the right of a single employee of the giant United States Steel Corporation to leave his job is of relatively limited significance. The act of a single employee in leaving his job will have little effect and impact on the willingness or unwillingness of the corporation to better his working conditions. The right of that employee to leave his job becomes really significant and important only when it includes the right to act in conjunction with his fellow employees. The right of each of them becomes of importance only by virtue of the fact that they may leave their jobs in unison, and may hope and expect that that action will have value and meaning and significance for the betterment of their working conditions.

We must reject any notion that constitutional rights are meaningless abstractions. And if the right to refuse to make one's services available is to have real vitality it must encompass the joint exercises of that right by many workers.

The proposals to restrict and prohibit strike action take many and complex forms. Frequently the proposals themselves are ill-defined, but encompass in a broad sweep a variety of activities including the strike itself. The proposals relate to many different laws. Sometimes they are offered as amendments to the Wagner Act; sometimes, as amendments to the anti-trust laws; sometimes, as amendments to the Norris-LaGuardia Act, and sometimes as new statutes apparently unrelated to anything that has gone before.

The Ball-Taft-Smith Bill (S. 55), for example, has the usual declaration that it is not to be constructed as requiring individual employees to render labor or service without their consent. But the Ball-Taft-Smith Bill includes among the ingredients of the warmed-over hash which constituted the Case Bill of last year the following:

(a) A cooling-off period of at least sixty days before a strike may be called.

(b) A provision imposing both criminal penalties and injunctions on workers who join in a refusal to work on materials made by an employer operating under substandard conditions.

(c) A provision imposing criminal penalties and injunctions on workers who join in an effort to require their employer to recognize and bargain with their organization, even where such recognition and bargaining is thoroughly legal.

We are told in one section of the bill that it is not to be constructed as requiring an individual employee to render labor or service without his consent. But in another section of the same bill we are told that if a group of employees undertake to refuse their services in connection with certain kinds of materials or articles, their act is criminal, punishable by a fine of up to \$5,000.00 and imprisonment of up to one year.

We are told in one section that the bill is not to be construed as permitting any court to issue any injunctions to compel performance of service by any individual employee. But another section of the same bill declares that if a group of employees refuse their services under certain conditions the district courts are to have jurisdiction on application of the employer to issue injunctions. In fact, for this purpose the provisions of the Norris-LaGuardia Act are to be set aside so that such injunctions may be issued without notice, without open court hearing, and regardless of any of the other specific requirements outlined in the Norris-LaGuardia Act.

It is this kind of double-talk which characterizes so much of the drive behind the largest portion of the anti-labor legislation now under debate in Congress. Uniformly these bills violate basic principles, principles which the sponsors of these bills would not dare openly to attack. Uniformly the intent and effect of the bills is shrouded in general slogans while hypocritical lip service is paid to the very principles which the bills attack. They would not dare, for example, to suggest a repeal of the Clayton Act declaration, adopted over three decades ago, that the labor of a human being is not a commodity or article of commerce. But when American workers gather together in free and democratic organizations with the aim of fostering and advancing industrial democracy and opposing the autocratic and anti-social domination of our economy by giant monopolies, then there are those who actually dare to attempt to turn the clock of history backward by

seeking to decimate labor organizations under a fallacious anti-monopoly slogan.

Restriction on the right to strike is a most important part of the general drive against labor. It poses a number of basic legal and constitutional issues, to some of which I have made reference. As a matter of economics and policy it poses an equally basic issue as to whether the powers of the government in this country are to be subverted and aligned against the efforts of American workers to achieve for themselves a decent standard of life and for the nation as a whole the maximum possible protection against the ravages of inadequate power, mass unemployment and general economic decline.

Two quotations from Abraham Lincoln which cannot be too often repeated should be borne in mind. Lincoln said:

“All that harms Labor is treason to America. No line can be drawn between these two. If any man tells you he loves America, yet hates labor, he is a liar. If any man tells you he trusts America, yet fears labor, he is a fool.

“There is no America without labor.”

Lincoln further said in 1860:

“I am glad to see that a system of labor prevails under which laborers can strike when they want to, where they are not obliged to work under all circumstances, and are not tied down and obliged to labor whether you pay them or not. I like a system which lets a man quit when he wants to, and wish it might prevail elsewhere. One of the reasons why I am opposed to slavery is just here.”

Another case in point in which vituperation rather than the resort to facts has been the order of the day is that involving current litigation commonly referred to as “portal to portal claims.” A number of suits have been initiated by individual employees against their employers requesting back compensation under the Wage-Hour Law on the basis of a recent decision of the United States Supreme Court in the *Anderson v. Mt. Clemens Pottery Company*³ case.

Many of these cases have been filed in situations where a union representing these employees has a collective bargaining agreement outstanding with the employer. This fact has been used to condemn labor for the initiation of these law suits.

3. 66 Sup Ct. 1187 (U. S. 1946).

Before any criticism is expressed an understanding of the entire background is important.

It was in 1939 that the Wage and Hour Administration issued one of its early bulletins in which it was plainly stated that the term "work-time," as contained in the Fair Labor Standards Act, includes more than merely that portion of the time spent by an employee for the benefit of an employer for which compensation was customarily paid by the employer. Since 1939 there has emanated from the Wage and Hour Administration a long series of opinions and rulings in which the Administrator definitely stated either in general terms or for specific industries that certain types of travel time and preparatory work for which employees were not customarily paid by their employers constituted work time within the meaning of the Fair Labor Standards Act.

In March of 1941 the Wage and Hour Administrator issued a ruling that travel time underground for miners, exclusive of coal mining, constituted work time. This issue was contested in the courts and in 1944 the United States Supreme Court affirmed the Administrator's ruling.⁴ It was in this case that the Court gave its definition of work time under the Fair Labor Standards Act. This definition in effect was predicated upon three factors: time which involved either mental or physical exertion; time spent under the direction of or under the control of the employer; and time spent in the interest of or for the benefit of the employer.

In 1945 the United States Supreme Court further held that travel time underground in the case of coal miners also constituted work time for the purpose of the Fair Labor Standards Act.⁵ But more particularly it was in this case that the Court stated that a collective bargaining agreement covering the coal miners and which expressly, as interpreted by the parties, excluded travel time for the purpose of compensation could not deprive the individual employees of their rights guaranteed to them by the Fair Labor Standards Act.

In June of 1946 the United States Supreme Court, in the *Anderson v. Mt. Clemens Pottery Company* case, held that travel time within a plant to and from the job and preparatory work performed by an employee incident to his job constituted work for the purpose of the Fair Labor

4. *Tennessee Coal, Iron & R. R. v. Muscoda* L. No. 123, 321 U. S. 590, 64 Sup. Ct. 698 (1944).

5. *Jewell Ridge Coal Corp. v. Local No. 6167*, 325 U. S. 161, 65 Sup. Ct. 1063 (1945).

Standards Act. The Court remanded the case to the federal district court to take testimony as to the actual amount of time involved in either travel or preparatory work and to award back compensation except for such time as might be deemed "de minimis." The federal district court in its recent decision ruled that no recovery was obtainable in that case because the maximum total time under the interpretation of the Supreme Court was 8 minutes per day, which the district court held to be "de minimis."

It was following the Supreme Court's decision in the *Mt. Clemens Pottery Company*, case, and after the Supreme Court denied a petition for reconsideration, that many employees, advised of their rights under the Fair Labor Standards Act, authorized suits to be brought in their behalf to recover claims for back compensation subject to the various statutes of limitations of the respective States. For this they have been viciously condemned.

It should be borne in mind that from 1939 until suits were actually initiated following the decision of the Court in the *Mt. Clemens* case, no attempt was made by a single representative of any large corporation or employers association to obtain from Congress legislation amending the Fair Labor Standards Act. This absence of action occurred in spite of the background of administrative interpretation and the decisions of the United States Supreme Court between 1939 and 1946. Under the ordinary canons of legislative interpretation it certainly can be said that failure on the part of Congress to enact any amendment in the face of this rich background of interpretation of an outstanding law constituted an affirmation by Congress of the interpretation given by the Administrator of the Fair Labor Standards Act and the United States Supreme Court. It is difficult to understand how criticism can be directed against the employees who seek to obtain recovery in accordance with the decisions of the highest court of the land where industry has been put on notice over a period of years that the Fair Labor Standards Act was subject to the interpretation which was finally adopted by the Supreme Court.

In the face of these facts, it would seem to be clear that the attack against labor is but another example of the effort to becloud the issue rather than seek public support on the basis of the clear and unadulterated facts.

Our nation has available a profound opportunity to achieve an ever-expanding economy with an improved standard of living for all the people. The most crucial factor in determining whether this golden chance will be

grasped or lost is that of the relations between labor and management. Organized labor anxiously and earnestly is searching for the avenue toward industrial peace. Anti-labor legislation on the other hand will invite difficulties, provoke disputes, and encourage industrial warfare. This path, if followed, must result to the detriment of all the people. As a nation we must reject it.

It is the sincere judgment of organized labor that the answer to many of our current problems is the furtherance and expansion of the process of collective bargaining.