SETTLEMENT OF LABOR DISPUTES IN INDUSTRIES AFFECTED WITH A NATIONAL INTEREST*

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RECENTLY WIDELY publicized labor disputes reveal a serious need for re-evaluation of collective bargaining and also of the procedures being used for dealing with critical work stoppages. The initial postulate should be the preservation of the free collective bargaining system. Yet we must be willing to admit honestly that the freedom to bargain cannot be allowed always to prevail. Prolonged strikes in some critical areas cannot be tolerated. Further, we have recently begun to realize that contract settlements without work stoppages in some industries may have such permeating effects on the economy that public concern for the bargain is inescapable.

These considerations make it impossible to define with precision those labor disputes which affect the national interest. There is a broad difference between critical production stoppages and inflationary wage settlements, yet both situations evoke the national interest. In some instances the national interest in labor disputes will be only generally involved, but in others it will be intense and immediately demanding. These differences must guide in the development of solutions to the problems created by these labor disputes.

The first of the two major inquiries in reaching toward the solution of problems posed by labor disputes affected with the national interest is to consider the extent to which collective bargaining can serve this function. The more effective collective bargaining is, the less need there will be for extreme and regimented measures. But the bargaining process will not be effective in every case where the public property is deeply concerned about a work stoppage. So the second major line of inquiry must be into additional needed measures where collective bargaining fails adequately to protect the public interest.

Collective Bargaining Is Fundamental, but Stagnant

Collective bargaining has been the fundamental national approach to the resolution of economic disputes between employees and employer for well over a generation.[1] Yet the most noteworthy circumstance surrounding our governmental approach to collective bargaining today is that there has been little attempt to improve the process since its creation. Governmental policy-making has constantly been concerned with balancing bar-

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1. National Labor Relations Act, 49 Stat. 449 (1935), as amended, 29 U.S.C. Sections 151-167 (1958); Railway Labor Act 44 Stat. 577 (1926), as amended, 45 U.S.C. Sections 151-163 (1958).

* Here is the winning paper in the 1963 Ross Essay competition sponsored by the American Bar Association under a bequest from the late Judge Eskine Mayo Ross. Mr. Williams declares that collective bargaining must be nurtured and strengthened so that the drastic measures that might be necessary to settle national-emergency strikes may be kept within narrow bounds.

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THE PHYSICIAN'S . . . (Continued from page 358)

Considering the present trend towards the medical profession which beats by a mile other academic professions, the question may be asked: Is there need of **moratorium** in the study of medicine in the Philippines? Many will no doubt give an affirmative answer bearing in mind that in this era of science, technology and industrialization there is more need of technical and scientific men than men of letters, philosophy, law and medicine. Our country is endowed with rich natural resources which remain untapped and await only the hands of technical men to make them productive, thus contributing to our economic advancement. Technology is the thing we need coupled wth the promotion of vocational courses to give impetus to our economic growth and natural wealth. Dr. Juan Salcedo, President of this Association, who is the Chairman of the National Development Science Board, will bear me out in this imperative need for technicians in our country.

But there are many, to be sure, who will differ from this way of thinking, for they know that the study of medicine is as essential to society as the food to men. They will argue that medicine is studied not alone as a **modus vivendi** but to be useful in society and in the healthy growth of our population. In fact, many study medicine not to engage in private practice but to make use of it in the service of the government and in the promotion and conservation of the Filipino race. The truth is that knowledge of medicine is essential to the individual not only for the protection of his health and of his family but also to advance his social stature and culture. Weghty reasons, therefore, exist in favor of the continuation of the study of medicine.

The question may be asked whether physicians who are engaged as college professors or doctors in private enterprises are entitled to organize themselves within the meaning of the Magna Carta of Labor which is Republic Act 875. The answer is in the affirmative. It is now settled that doctors, lawyers, teachers, and other professional people can organize themselves into unions if they want to promote their rights and defend their economic security. Medical societies and bar associations are sometimes referred to by laboring peoples as "doctors' unions" and "lawyers' union." It must, however, be born in mind that such right is qualified by the circumstance that the employing institution must be one operated for profit. If the employer is a non-profit organization it does not come within the purview of the Act. This means that while professors can organize themselves into a union they cannot however make use of a strike as a weapon to enforce their demands nor can they file an unfair labor practice charge against their employer. As an example we may cite physicians who are employed in the Red Cross Organization or in hospitals, public or private, that are organized not for profit but for humanitarian reasons.

As members of a respectable profession in our society, your activities should not be confined to the narrow circle of your calling. You must also do your part in promoting the welfare of your community. You must take part in the crusade to which good citizens are now dedicated for the moral uplift of our people. This is especially so at this time when the moral of our youth is at its lowest ebb. In doing so you will not only contribute to the healthy growth of our youth but to the moral and spiritual regeneration of our people.

gaining strength,[2] limiting union attempts to spread labor disputes through secondary pressures[3] and increasing protection of the rights of individual union members.[4] But there has been no similar continuing drive to infuse bargaining with new life. The bargaining process has largely remained stagnant in an otherwise dynamic area of law and policy.

Much can and should now be done to achieve the potential of collective bargaining. There have been some encouraging developments of a voluntary nature emanating from companies and unions. One of these is the use of third parties, brought in by employers and unions themselves, to participate in the bargaining. This private third party can sit in on the bargaining sessions to serve as an independent, objective mediator.[5] He may well be more effective than a government mediator since he has been voluntarily chosen by the parties and can be expected to know better their interests and situation. He can feel freer to suggest settlement terms.

The use of this third-party device has also appeared in accomplishing impartial studies and analyses of the information underlying the bargain which must be made.[6] Called well in advance of any contract termination, such a person can investigate the economic and other conditions surrounding the bargain and can make recommendations on a sensible pattern of settlement.

There is progress in another facet of voluntary settlements between management and labor. This is manifested in contract terms designed to ease later contract renewals.[7] Cost-of-living wage provisions and automatic productivity increases are examples of these bargaining-easing improvements. The use of a joint committee to make a continuing study of difficult deadlocked issues is a newer, effective development. This was the means of handling the work-rules dispute in settling the prolonged steel strike of 1959.[8] It has also just been used in disposing of the workcrew issue in the longshoremen's labor dispute of 1962.[9]

The committee device achieved a most successful fruition in the relationship between the Kaiser Steel Company and the United Steelworkers. In the 1959 settlement of their bargaining dispute, a tripartite committee was given a broad charge to recommend a plan for equitable sharing of economic progress by employees, the company and the public.[10] The plan was made public in December, 1962. Its goal is to eliminate deadline bargaining over economic issues. In general, wage increases are keyed to a sharing of all increased productivity and all savings in the use of materials. Further, it contains a guarantee to employees against loss of income resulting from automation.[11]

These examples are tangible steps taken by the parties to collective bargaining in attempting creatively to improve it. Such successful efforts undoubtedly lead others to experiment also. Yet in a society which is properly competitive, it cannot be expected that private innovations will of themselves develop the full potential of collective bargaining. The government must step in to give additional stimulus.[12]

Government Should Provide Better Mediation

The most obvious means for governmental aid to improve collective bargaining is bettering mediation. A larger staff of professional mediators is needed in the Federal Mediation and Conciliation Service.[13] Infusion of governmental mediation before a crisis in bargaining is reached is another indicated advance. Early mediation proved most effective in the steel settlement of 1962. There the government insisted that bargaining begin four and one-half months before contract deadlines. When the parties broke off negotiations during bargaining, a proper bargaining technique to test strength and determination, the government mediators dogged the parties back to the bargaining table.[14]

The Department of Labor is now undertaking a broader role in providing economic data useful to successful collective bargaining. Cost-of-living statistics and productivity-increase analyses have been a valuable contribution for many years.[15] Further steps are now being taken to make the Department of Labor the source of detailed and intensive economic studies needed for enlightened bargaining.[16] More specifically, the Department has just begun to hold itself open to make studies on precise issues for parties who have been stymied in their bargaining. A study is to be made of workcrew composition, as one aspect of the settlement of the longshoremen's strike of 1962.[17] This development of a governmental role to supply data for collective bargaining is a commendable major advance.[18]

A governmental activity of a different nature should also be mentioned. This is the labor-management "summit" conference.[19] Its current form is the President's Advisory Committee

2. E.g., in the Labor-Management Relations Act, 1947, outlawing the closed shop, Section 8(a) (3), 61 Stat. 40, 29 U.S.C. Section 158(a) (3) (1958); defining and limiting the obligation to bargain, Section 8(d), 61 Stat. 142, 29 U.S.C. Section 158(d) (1958); restricting the nature of bargaining units, Section 9(b), 61 State. 143, 29 U.S.C. Section 159(b) (1958); permitting states to outlaw the union shop, Section 14(b), 61 Stat. 151, 29 U.S.C. Section 164(b) (1958). In the Labor-Management Reporting and Disclosure Act of 1959, regulating organizational picketing and publicity, Section 8(b) (7), 73 Stat. 844, 29 U.S.C. Section 158(b) (7) Supp. III, (1962).

3. E.g., Labor-Management Relations Act, 1947, Section 8(b) (4), 61 Stat. 141, 29 U.S.C. Section 158 (b) (4) (1958).

4. Labor-Management Reporting and Disclosure Act of 1959, Titles I-V, 72 Stat. 522, 29 U.S.C. Sections 411-15, 431-40, 461-66, 481-83, 501-04, 521-31 (Supp. III, 1962).

5. Hildebrand, The Use of Neutrals in Collective Bargaining in ARBITRATION AND PUBLIC POLICY (Proceedings of the Fourteenth Annual Meeting, National Academy of Arbitrators) 135 (1961); Report of the President's Advisory Committee on Labor-Management Policy, Free and Collective Bargaining and Industrial Peace, Sec. III C, 50 LAB. REL. REP. 25, 42 (1962), (LAB. REL. REP. is the Labor Relations Reporter, published by the Bureau of National Affairs.)

6. Chamberlain, Neutral Consultants in Collective Bargaining, in COLLECTIVE BARGAINING AND THE ARBITRATOR'S ROLE (Proceedings of the Fifteenth Annual Meeting, National Academy of Arbitrators) 83 (1962); Report, supra note 5, Sec. III B, at 42.

7. Address of Secretary of Labor Willard Wirtz, National Academy of Arbitrators, 52 LAB. REL. REP. 133, 165 (1963).

8. Steel Memorandum of Agreement, Section 6, 45 LAB. REL. REP. 207, 208 (1960)

9. 52 LAB. REL. REP. 81 (1963).

10. Kaiser Steel Corporation and United Steelworkers, Memorandum of Agreement, Section 6, 45 LAB. REL. REP. 7, 8 (1959).

11. The text of the agreement will be found in 52 LAB. REL. REP. 35 (1963.)

12. Cox, LAW AND THE NATIONAL LABOR POLICY 48 (1960).

13. Report, supra note 5, Sec. III D, at 43.

14. Under urging by the government the parties began bargaining on February 14, 1962. 49 LAB. REL. REP. 359 (1962). Negotiations were broken off indefinitely by the parties on March 2, but were resumed on March 14 in response to a telegram from the President, id. at 460. Settlement was reached on March 29, id. at 523.

15. On the role of the Bureau of Labor Statistics in supplying pertinent economic information, see Clague, the Economic Climate of Collective Bargaining in NEW YORK UNIVERSITY THIRTEENTH ANNUAL CONFERENCE ON LABOR 41 (1960)

16. Wirtz, supra note 7, at 166, Secretary Wirtz suggested the possibility of supplying information and aid through an extension service, as in the Department of Agriculture.

17. See column one, supra.

18. The need for more complete data and for a frank interchange between the parties and the government was stated by the President's Advisory Committee on Labor-Management Policy. See Report, supra note 5, Sec III A, at 42.

19. Kramer, Emergency Strikes, 11 LAB. L.J. 227, 234 (1960).

on Labor-Management Policy.[20] In a report dated May, 1962, this committee referred to collective bargaining as "an essential element of economic democracy."[21] Some of the devices stated above were recommended by the committee. But by its nature it cannot be relied upon to carry much of the burden of strengthening collective bargaining.

"Guideposts" Issued for Wage Increases

The means so far described for improving collective bargaining are encouraging developments. By themselves, however, they cannot eradicate all difficulties in the settlement of those labor disputes which can be solved by negotiation. Settlements by collective bargaining may raise questions rather than resolve them. The government may feel it necessary to give attention to the inflationary pressures arising from wage bargains in basic industries. In his economic report to the Congress on January 22, 1962,[22] President Kennedy released and approved the recommendation of his Council of Economic Advisers for "guideposts" in wage price decisions.[23] In brief, the guide invoked was that wage increases should be limited to growth in productivity to avoid the inflationary pressures of higher wages. While there have been general governmental statements in the past concerning the inflationary pressures of wage settlements,[24] outside of wartime this is the first instance of the government's embarking on a definite program.

The over-all productivity increase since the guideposts were stated has almost exactly equalled the percentage increase in wage settlements during the same period.[25] There is some doubt, however, whether the guideposts have been successful or whether admitted signs of stagnation in the economy caused wage increases to be limited.[26] In spite of some opposition to the guidepost concept,[27] it must be accepted as a useful experiment. It is unlikely, though, that something as noncompulsive as the guideposts could be effective in a time of serious inflationary pressures.

Solicitor General Suggests Governmental Representation

A step beyond was offered by the Solicitor General of the United States, Archibald Cox, in June, 1962.[28] He proposed developing a means to introduce governmental representation at an early stage in critical wage bargaining and to carry it on throughout negotiations. He made clear that he did not suggest a governmental veto to the economic bargains made. Rather, he asked only that the government be given "an opportunity to be heard as spokesman of the wider public interest while the decision is made".[29] A reciprocal obligation upon the government to be receptive to the pressing interests of the parties was recognized.

Coming on the heels of the steel settlement of 1962 with the price increase later withdrawn under governmental pressure,[30] this plea by Mr. Cox for formalized procedures is persuasive. The abortive steel price increase exposed the disadvantage of the government's remaining out of the economic bargain until its completion, if the bargain is one where the public interest plainly needs protection. Professor Arthur Ross has said that "any influential national wage policy must be impregnated into the collective bargaining apparatus".[31] And he asserted that "there must be a potent, competent, consultative mechanism capable of producing an authoritative consensus"[32] to make wage restraints effective.

The implications of these suggestions admittedly carry overtones of danger to the collective bargaining process. Insofar as the government issues guideposts or attempts to indicate to particular parties what it considers to be an acceptable economic settlement, governmental planning is intruded into bargains. Yet a realistic appraisal of the intricate balance of the market control mechanisms in our economy shows that public needs are entitled to protection. What is quite certain is that in the past there has been a lack of communication between the parties to labor disputes on the one hand and the government on the other, until that moment of highest pressure when the critical strike is about to occur.

Labor Department Should Develop Industry Sections

Moving beyond present developments, the Labor Department should create administrative sections for the major industries, which would specialize in the labor problems of those industries. These sections could hold useful conferences from time to time with industry and union leaders. They could also concentrate research on the problems of their industries so that fair exchange between the government and the industries could be effectuated in informal, noncompulsory fashion.

But the government must move carefully in developing these devices, limiting their applicability to the minimum governmental intrusion which will reasonably protect national economic policy.

Secretary of Labor Willard Wirtz has stated dramatically that at this time we are seeing "the last clear chance" of collective bargaining.[33] The pressures against the efficacy of the bargaining device are of a different nature and are more threatening than they have ever been before. There are several reasons why this is so. Probably the most salient reason is the development of automation. The underlying concern of the workers in virtually every critical labor dispute since the steel dispute of 1959 has been the fear of being displaced by machines. From the workers' point of view, impending automation makes their strike far more desperate than a strike which is simply the manifestation of their desire for a wage increase.[34]

The development of strike benefits for employees and strike insurance for employers, greater interdependence within the economy, concentration of bargaining units, bargained settlements by wage leaders which affect the entire economy, and the greater dependence by society on the production of goods deemed necessary, all lead to an increased ability of employers and unions to hold out longer in the strike process and a decreased ability of the public to stand the work stoppage.[35] Involved also are the broadest aspects of international fiscal policy. As our nation leads the Free World in the cold war and faces the intense competition of the Common Market, the complexity of the economic structure and the role that the collective bargaining process is designed to play in that structure become matters of unavoidable moment.

20. The committee was set up under Executive Order No. 10918, 26 Fed. Reg. 1427 (1961).
21. Report, supra note 5, introduction, at 25.
22. 108 CONG. REC. 489 (daily edition, January 22, 1962).
23. The "guidepost" section of the report of the Council of Economic Advisors is printed in 49 LAB. REL. REP. 306 (1961).
24. Ross, Wage Restraints in Peacetime. Address before the Western Economic Association, 51 LAB. REL. REP. 50 (1962).
25. The figure runs three per cent or a little over. 51 LAB. REL. REP. 173, 277 (1962).
26. Ross, supra note 24, at 52.
27. E.g., George Meany, President, AFL-CIO, responding to an address by Secretary of Labor Goldberg, 49 LAB. REL. REP. 436, 437 (1962); Walter Reuther, President, United Automobile Workers, 50 LAB. REL. REP. 49 (1962), J. Ward Kenner, President, B F. Goodrich, 50 LAB. REL. REP. 119 (1962); John Davenport, Assistant Managing Editor, Fortune Magazine, 52 LAB. REL. REP. 64, 66 (1963).
28. Cox, Address at Harvard Law School, Wall Street Journal, June 14, 1962, page 3, column 1.
29. Ibid.
30. 49 LAB REL. REP. 605, 606 (1962).
31. Ross, supra note 24, at 54.
32. Id., at 53.
33. Wirtz, supra note 7, at 163.
34. Killingsworth, Industrial Relations and Automation, 340 ANNALS 69 (1962); Reuther, Policies for Automation: A Labor Viewpoint, Id. at 100.
35. Wirtz, supra note 7, at 162.

Some will assert that the burden is too great. Collective bargaining cannot bear the pressures here briefly suggested. If this is so, governmental planning must take over a large segment of what has been relatively free economic determinism. Certainly this regrettable development should be averted at all reasonable cost. There must be a resolute willingness to strengthen collective bargaining to make it work. This cannot be done simply by asking labor and management not to engage in strikes. There will have to be governmental intervention to a degree. A realistic acceptance of this fact will enable evaluation of the techniques of governmental intervention which can keep it in the posture of protecting and implementing collective bargaining, rather than subverting it. The ferment which has brought about the many nascent developments outlined above is a healthy sign. But much creative improvement lies ahead if the potential of collective bargaining is to be fulfilled.

Evaluating Work Stoppages in Critical Industries

The second inquiry must be as to work stoppages in critical industries when the public cannot stand prolonged loss of production. Here it is already accepted that there must be governmental intervention,[36] although to some extent the collective bargaining process is undermined. What is needed is a straightforward, objective evaluation of the right of employers and unions to engage in critical work stoppages.

A fundamental aspect of authentic collective bargaining is the right to strike. Only by the device of withholding labor can the ultimate relative bargaining strength of the parties be determined.[37] While it is unfortunate in a given case that no agreement is reached and a strike occurs, the threat of the strike must always be present or the employees have no bargaining power. So the right to strike, the complete antithesis of totalitarian economic devices, must be preserved wherever possible to do so. This is the first tenet and beginning proposition for any analysis of the problem of emergency strikes.

The second step must be a frank recognition that the right to strike in an absolute sense does not and cannot exist throughout our economy. We recognize this in government employment and forbid strikes against the government.[38] During World War II we prohibited strikes and set up a system of establishing wages and working conditions through a process other than collective bargaining.[39] But there are other situations not so unusual where the right to strike likewise cannot exist.

Pragmatically, there is no right to strike all the nation's railroads at the same time. Such strike action is not forbidden by law, but it simply cannot be tolerated,[40] as some past experiences show.[41] A work stoppage for a few days might be allowed, but the right to strike for a few days is not a right to strike effectively. In the coal and steel industries, the right to strike is directly related to the size of the stockpile. If there is a large stockpile, there is a right to strike. If there is no stockpile, then a strike simply cannot be tolerated.[42] A demonstration of this principle was given in 1959 when the steel production stoppage was permitted to continue for 116 days because of the stockpile. As soon as the stockpile was gone, the national emergency occurred, and the Taft-Hartley injunction was invoked to force the employees back to work.[43]

A more extreme and more dramatic example of the practical disappearance of the right to strike is made evident by considering what would be the effect of cutting off electric power in any major city. Unions engaged in this and other similar critical production seem to realize that there is no right to strike, and they work out some sort of soft strike technique which causes discomfort, but keeps essential services flowing. Can there be a right to strike in any real sense today in the aerospace industry? Surely not. In the cold war and the race for space, the strike which runs its course cannot be permitted.[44]

Intervention Might Furnish Bargaining Impetus

The next proposition in a step-by-step analysis is that collective bargaining is not fully available in all of its connotations where there is no complete right to strike. Bargaining can still be carried on, but the bargaining cannot be based on the threat of strike. Rather it must be based upon the threat of governmental intervention to resolve the dispute. This threat constitutes an effective pressure upon the bargaining parties in many instances. Yet these pressures simply are of neither the same nature nor magnitude as the ultimate threat of strike, and the bargaining is less satisfactory for this reason.

In spite of the extent to which the efficacy of collective bargaining is undermined, it is necessary that governmental intervention be accepted in these disputes. Without something to take the place of the right to strike, the union would be forced into the position of trying to bargain without bargaining strength. Insistence upon bargaining under these conditions would surely lead to a complete loss of faith in bargaining and a demand by workers for drastic governmental controls.[45]

36. Labor Management Relations Act, 1947, Sections 206-10, 61 Stat. 155, 29 U.S.C. Sections 176-80 (1958) (the "national emergency" provisions of Taft-Hartley); Railway Labor Act, Section 10, 44 Stat. 586 (1926), as amended, 45 U.S.C. Section 160 (1958).

37. Frey, Democracy, Free Enterprise, and Collective Bargaining, in LABOR RELATIONS AND THE LAW 24, 30-31 (2d ed, Wollett and Aaron, eds., 1960).

38. Labor Management Relations Act, 1947, Section 305, 61 Stat. 160, repealed by Act of August 9, 1955, 69 Stat. 624, 5 U.S.C. Section 118p (1958), which continues the prohibition against strikes by government employees.

39. War Labor Disputes Act of 1943, 57 Stat. 163.

40. Smith, The Effect of the Public Interest on the Right To Strike and Bargain Collectively, 27 N.C.L. REV. 204, 208 (1948).

41. The history of the many crises in threatened and actual nationwide railroad strikes is detailed in LETCHT, EXPERIENCE UNDER RAILWAY LABOR LEGISLATION, Chapters X-XIV (1955); Kaufman, Emergency Boards under the Railway Labor Act, 9 LAB. L.J. 910 (1958). The history of the most recent crisis, that concerning work rules, is told in Brotherhood of Locomotive Engineers v. Baltimore & Ohio Railroad, 372 U.S. 284 (1963), upholding the right of the railroads to act in accordance with the report of the presidential commission.

42. Williams, The Steel Seizure: A Legal Analysis of a Political Controversy, 2 J. PUB. L. 29, 35 (1953).

43. The history of this dispute is related in the joint concurring opinion of Justices Frankfurter and Harlan in United Steelworkers of America v. United States, 361 U.S. 39, 44 (1959). See also, Seidman, National Emergency Strike Legislation, in SYMPOSIUM ON LABOR RELATIONS LAW 474, 480-84 (SLOVENKO ed. 1961).

44. Brief work stoppages at missile sites have been much in the news the last two years. On May 26, 1961, the President created the Missile Sites Labor Commission, Exec. Order No. 10946, 26 Fed. Reg. 4629 (1961). Senator McClellan has introduced a bill to outlaw strikes at missile sites and other defense facilities. S. 288, 88th Cong., 1st Sess. (1963). He has introduced similar bills in earlier sessions. In August, 1961, Secretary of Labor Goldberg warned that the administration would seek strike-banning legislation if work stoppages continued in the missile construction field. 48 LAB. REL. REP. 423 (1961). For a thorough study, see Van de Water, Applications of Labor Law To Construction and Equipping of United States Missile Bases, 12 LAB. L.J. 1003 (1961).

45. After the National Aeronautics and Space Administration obtained an injunction against picketing of a missile site, President Neil Haggerty of the AFL-CIO Building and Construction Trades Department said: "Labor must have a place to go with its problems if it is to abide by the no-strike pledge." 51 LAB. REL. REP. 209 (1962).

The question, then, is as to the nature of the governmental intervention. Here there should be no opposition to the basic proposition that governmental intrusion should be kept to the minimum needed to prevent strikes which cannot be tolerated.

In evaluating the various techniques of governmental intervention, the tendency must be resisted to fasten upon a supposed panacea. The current demand for placing unions under the antitrust laws is such a shibboleth. Much of the earlier monopolistic aspects of union activity, such as the secondary boycott, have been specifically eliminated by statute.[46] The push for placing unions under the antitrust laws appears to result from the desire to limit each labor union to existence in only one company, thus eliminating industry-wide bargaining.[47] This would unquestionably mean that there would be fewer critical industry-wide work stoppages, because all production in a given commodity normally would not cease.

The great weakness of this approach has been revealed in the recent New York newspapers strike. Only four of the New York newspapers were struck. The other five shut down voluntarily.[48] In industries where there are only a few producers, one cannot afford to be shut down while his competitors are operating. So the producers join together to avoid partial showdown. This has been the great spur to the development of industry-wide bargaining.[49]

It has been proposed that the transportation industry be placed under the antitrust laws to avoid industry-wide transportation strikes.[50] But the kind of pressures which are involved in round-robin strikes, with each competitor being struck separately and at a different time, have led the American Trucking Association to take a firm stand in favor of industry-wide bargaining.[51]

If unions are to be fragmented, the constant economic turmoil caused by employer-by-employer work stoppages,[52] together with the lessening of union bargaining strength which might put it significantly out of balance with employer strength, [53] would almost surely lead to political remedies. This is the past history of unbalanced collective bargaining, and in any democratic country it can be expected that the government will play the role of equalizing undue disparities in bargaining power.

Another sweeping proposal is the so-called nonstoppage strike, which would set up monetary penalties to create bargaining pressure upon both employers and unions.[54] The complex problem of creating and defining the penalties makes its utility most doubtful. Pressures on the parties should be related to the bargaining strength of the parties. In the nonstoppage strike they are not, but are simply a legislative fiat applicable to all disputes.

Taft-Hartley Postpones, But Doesn't Resolve

The present Taft-Hartley procedures have a history of successes and failures.[55] The most obvious weakness of the procedures is that they have no terminal point. While they postpone a strike, they have no way of ultimately resolving one. If the proposition is accepted that strikes simply cannot be tolerated in certain phases of our national life, then having as our only procedure one which cannot terminate such a dispute is a serious weakness.

In addition, any procedure which takes away the right to strike even temporarily, substituting nothing for it, is bound to alter sharply the relative bargaining strength of the parties. Failure of the Taft-Hartley provisions to authorize the fact-finding body to make recomendations is an example of the operation of the law with an uneven hand. Senator Taft realized this weakness and later recommended that the board be empowered to suggest settlement terms.[56]

There are several unwieldly facts to the Taft-Hartley provisions. The last-offer vote has not been successful.[57] The requirement that the President must go to court to get an injunction seems unjustifiably indirect.[58] Of far greater concern is the fact that the statute leaves the government largely impotent until the emergency occurs. Only then is the fact-finding board created, and it must hurry to report at once before the strike can be postponed by injunction. All of these matters establish an undue rigidity in the Taft-Hartley provisions.

Critical labor disputes differ. Each has its own stumbling-blocks to settlement. The impact upon the public differs. Sometimes the public can tolerate a work stoppage for quite a while, even though in a critical industry. At other times a strike for one minute, as in the case of electric power, could be disastrous. These considerations indicate that there should be a choice of procedures for use in resolving critical work stoppages.[59]

There might well be concern that the choice-of-procedures approach leaves too much to the discretion of the President. But power must be lodged somewhere, and it cannot be lodged in a more responsible place than in the executive. To have these procedures available is not to give the President a bludgeon consisting of threats of many different kinds of procedures. The

46. Levitan, **An Appraisal of the Antitrust Approach**, 333 ANNALS 108 (1961); Sovern, Address before National Association of State Labor Relations Agencies, 51 Lab. Rel. Rep. 68, 80 (1962).

47. Ladd Plumley, President of the United States Chamber of Commerce, has strongly urged putting unions under the antitrust laws. 52 LAB. REL. REP. 103, 104 (1963). Joseph L. Block, a member of the President's Advisory Committee on Labor-Management Policy, expressed a similar views in the May, 1962, report of that body. See Report, supra note 5, at 45.

48. Wall Street Journal, December 10, 1962, page 2, column 3.

49. Cox, op. cit. supra note 12, at 51.

50. S. 2573, 87th Cong., 1st Sess. (1961), sponsored by Senators McClellan, Byrd (Virginia), Thurmond, Curtis, Case (South Dakota) and Bennett

51. Report, Industrial Relations Committee, American Trucking Association, 52 LAB. REL. REP. 91 (1963).

52 Kramer, supra note 19, at 232; McPherson, Cooperation Among Auto Managements in Collective Bargaining, id. at 607, 608. Pierson, Cooperation among Managements in Collective Bargaining, id. at 621. See also McDowell, Labor and Antitrust: Collective Bargaining or Restraint of Trade? 20 FED. B.J. 18 (1960)

53. Cox, op cit. supra note 12, at 52.

54. Marceau & Musgrave, Strikes in Essential Industries: A Way Out, 27 HARV. BUS. REV. 286 (1949); Goble, the Nonstoppage Strike, 2 LAB. L.J. 105 (1951). But cf. Marshall & Marchall, Nonstoppage Strikes and National Labor Policy — A Critique, 7 LAB. L.J. 299 (1956).

55. Pierson, An Evaluation of the National Emergency Provisions, in EMERGENCY DISPUTES AND NATIONAL POLICY 129 (Bernstein; Enarson and Fleming, eds. 1955); Taylor, The Adequacy of Taft-Hartley in Public Emergency Disputes, 333 ANNALS 76 (1961).

56. Seidman, supra note 43, at 478.

57. Id. at 479

58. The President's Advisory Committee on Labor-Management Policy proposed that the injunction be eliminated and the President be empowered to direct the continuation of operations subject to judicial review. Report, supra note 5, Sec. IV, at 44.

59. The literature on the choice of procedures approach is voluminous. Of particular value are Cox, op. cit supra note 12, at 56; Wirtz, The "Choice of Procedures" Approach to National Emergency Disputes, in EMERGENCY DISPUTES AND NATIONAL POLICY 149 (Bernstein, Enarson and Fleming, eds. 1955); Fleming, Emergency Strikes and National Policy, 11 LAB. L.J. 267, 336 (1960).

The Schlichter Law in Massachusetts is a choice of procedures law. MASS. GEN. LAWS, Ch. 150B (1957); Shultz, The Massachusetts Choice of Procedures Approach to Emergency Disputes, 10 IND. & LAB. REL. REV. 358 (1957).

power should be given to the President, instead, because of the need for flexibility, since the disputes differ so much in their attributes.

Variety of Procedures Should Be Available

The remaining issue, then, is the nature of the procedures which should be available in handling critical labor disputes. Properly, the most usually recommended procedure is the development and refinement of the process of fact finding by an independent board, coupled with the additional power of that board to suggest terms of settlement.[60] The theory is that there will be strong pressures upon the parties to settle in close conformity to the recomendations, if the recomendations are reasonable. Public opinion, reacting to a sensible proposal for settle, could make it quite difficult for the parties to refuse to accept it.

One serious need is for the fact finding boards to be activated before the emergency develops. The investigation should be made and the recomendation should be ready before the strike occurs. Earlier governmental intervention is receiving increasing acceptance, as is shown through its approval by the President's Labor-Management Committee.[61] We should experiment with the operation of fact-finding boards, and the details need not be explored here.[62]

From time to time the government has used the device of seizing businesses to bring about the end of critical strikes.[63] But seizure as the sole governmental intervention disregards the rights of employees. It takes away the source of bargaining strength, the right to strike, and gives nothing to take its place. Seizure should be used only as an enforcement device to aid in effectively carrying out other procedures, such as fact finding with recommendations. Seizure was used merely as an enforcing device during World War II.[64]

It is necessary to accept the need to have available additional means for the governmental intervention more stringent than fact-finding. There are some work stoppages in which, because of the nature of the goods withdrawn from the market, the public automatically opposes those who strike, regardless of the merits of the dispute. In these situations employers would be enabled effectively to hold out against any board-recommended settlement properly favorable to workers. It follows that when necessary the government should have the power to introduce a fact-finding board's recomendations as the work conditions actually to be used for a temporary period.[65] It is true this device would tend strongly to establish the recommended settlement as the final settlement of the dispute, since the parties would be forced to operate under these conditions for a time. Yet where the strike cannot tolerated, some such procedure is justified. It must be stressed again that in this kind of situation collective bargaining in the usual sense cannot exist. Since it cannot, wages working conditions must ultimately be established in another way if the parties fail to reach agreement under the threat of governmental intervention.

Compulsory Arbitration May Be Justified

Even the final step, so bitterly opposed both by management and labor, is justified by the analysis here set forth. The compulsory arbitration of wages and working conditions to settle a dispute in an industry in which a work stoppage would be disastrous to the national interest is a proper procedure to have available. We used compulsory arbitration in wartime because we could not tolerate strikes.[66] It needs to be an available ultimate weapon in those instances in which the right to strike simply cannot exist.

Compulsory settlement procedures should not ever be the only available procedures in a given industry, no matter how critical. Often mechanisms short of compulsory settlement could bring the parties to a resolution of the labor dispute. It must be frankly realized that the availability and use of compulsory arbitration tends seriously to weaken bargaining; the party most likely to benefit from a forced settlement may negotiate only perfunctorily.[67] But the premise here stated is that at least sometimes there can not be a right to strike. When this is so, bargaining is not available as the ultimate solution to the dispute, and the fact that compulsory settlement seriously weakens the bargaining does not outweigh the necessity that a means of settlement without stoppage must be ready for use, although only in the most extreme situations.[68] If the right to strike is gone, something else must take its place.

The most common objection stated both to compulsory arbitration and to fact finding with recommendations is that they put the government in the business of fixing wages, leading inevitably to a managed economy.[69] We already have enough ex-

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60. Authorization of the fact-finding board to make recommendations has been the established procedure under the Railway Labor Act. On fact finding with recommendations generally, see Fleming, supra note 59, at 275; Seidman, supra note 43, 487; Wallen, National Emergency Disputes, 12 LAB. L. J. 61, 64 (1961).

61. Report, supra note 5, Sec. IV, at 43.

62. Solicitor General Archibald Cox has proposed the setting up of Boards of Public Responsibility in major industries. The function of the boards would be to organize and expedite bargaining procedures to try to head off emergency disputes. This could well take the form of early fact finding with recommendations. Cox, op. cit. supra note 12, at 55.

63. Justice Frankfurter's concurring opinion in Youngstown Sheet & Tube Company v. Sawyer, 343 U.S. 579 (1952), contains two valuable appendices giving the history of governmental seizure of business enterprises. Appendix I is an analysis of legislation authorizing seizure (page 615); Appendix II lists the instances of seizure (page 619).

On seizure generally see Cox, Seizure in Emergency Disputes, in EMERGENCY DISPUTES AND NATIONAL POLICY 224 (Bernstein, Enarson and Fleming, eds. 1955); Teller, Government Seizure in Labor Disputes, 60 Harv. L. REV. 1017 (1947).

64. War Labor Disputes Act of 1943, Section 3, 57 Stat. 164.

65. Cox, op. cit. supra note 12, at 56; Givens, Dealing with National Emergency Labor Disputes, 34 TEMP. L.Q. 17 (1960); Seidman, supra note 43, at 491.

66. War Labor Disputes Act of 1943, Section 7, 57 Stat 166; Boudin, The Authority of the National War Labor Board over Labor Disputes, 43 MICH. L. REV. 329 (1944). On the history of the development and use of the compulsory arbitration device see Williams, Compulsory Settlement of Contract Negotiation Labor Disputes, 27 TEXAS L REV. 587, 591-619 (1949).

67. The Cole Committee in New Jersey, which recommended the repeal of that state's public utility arbitration law in favor of a choice of procedures approach, found a serious weakening of collective bargaining. Document, 8 IND. & LAB. REL. REV. 408, 415; 423 (1955). Seidman, supra note 43, at 488; Secretary of Labor Wirtz, address before National Academy of Arbitrators, 52 LAB. REL REP. 133, 164 (163).

68. Impartial observers tend to accept, albeit reluctantly, the principle of compulsory arbitration in the ultimate situation where a work stoppage must be absolutely forbidden. The Committee on Labor Arbitration Law, Section of Labor Relation Law, American Bar Association, in 1960 took a position opposed to compulsory arbitration, yet recognized that "national interest may be so imperiled as to make some form of compulsion essential". PROCEEDINGS, SECTION OF LABOR RELATIONS LAW, 166, 167 (1960). To the same effect are Feinsinger, Comment on National Emergency Strike Legislation in SYMPOSIUM ON LABOR RELATIONS LAW 493, 495 (Slovenko ed 1961); Seidman, National Emergency Strike Legislation, id. at 489; Smith, supra note 40, at 210. The American Trucking Association officially favors compulsory arbitration, 52 LAB. REL. REP. 104 (1963).

69. Frey, The Logic of Collective Bargaining and Arbitration, 12 LAW AND CONTEMPT. 1/4ROB 264, 275 (governmental enforcement of wage rates "would open a Pandora's box of governmental regulation . . ."). A recent statement in opposition to recommendations as part of fact finding, seeing the procedure as an undue governmental intrusion, was made by Henry Ford II as a member of the President's Advisory Committee on Labor-Management Policy. Report, supra note 5, Sec. IV (footnote), at 44, and separate statement, at 46.

I

Lucio Libarnes, petitioner vs. The Hon. Executive Secretary, et al., respondents, G.R. No. L-21505, Oct. 24, 1963, Concepcion, J.:

1. PUBLIC OFFICERS; REMOVAL OR SUSPENSION; CHIEF OF POLICE OF ZAMBOANGA CITY; CANNOT BE REMOVED OR SUSPENDED EXCEPT FOR CAUSE.—It is conceded that the Chief of Police of Zamboanga City is a member of our civil service system (Section 5, Republic Act No. 2260). Hence, he cannot be "removed or suspended except for cause as provided by law and after due process" (Sec. 33, Republic Act No. 2260).
2. ID.; ID.; CASE COMPARED WITH CASES OF LACSON VS. ROMERO AND DE LOS SANTOS VS. MALLARE.—It cannot be denied that the attempt to terminate the services of plaintiff herein, as de jure holder of the office of Chief of Police of Zamboanga City, entailed his removal therefrom. even more than the attempt to transfer the provincial fiscal of Negros Oriental and the City Engineer of Baguio City without their consent was held in Lacson vs. Romero (47 Off. Gaz. 1778) and De los Santos vs. Mallare (87 Phil. 289) to constitute illegal removal from their respective offices.
3. ID.; ID.; POWER OF PRESIDENT TO REMOVE CHIEF OF POLICE OF ZAMBOANGA CITY AT PLEASURE UNDER SEC. 34, COMMONWEALTH ACT 39 ELIMINATED BY SEC. 5, REP. ACT 2259.—Defendants argue that the provision of Section 5 of Republic Act No. 2259 is inapplicable to the case at bar because plaintiff herein has not been removed from office, his term of office having merely expired when the President terminated his services. Suffice it to say, that this attempt to terminate plaintiff's services was predicated upon said Section 34 of Commonwealth Act No. 39, pursuant to which the Executive may "remove at pleasure" the Chief of Police of Zamboanga City, and that this is the reason why section 5 of Republic Act No. 2289 speaks, also, of removal to indicate that it seeks to withdraw or eliminate precisely such power to "remove at pleasure" under Commonwealth Act No. 39, among other pertinent legislations.
4. ID.; ID.; STATUTORY CONSTRUCTION; REPEAL; WHEN MAY A SPECIAL LAW BE REPEALED OR AMENDED BY SUBSEQUENT GENERAL LAW.—The question whether or not a special law has been repealed or amended by one or more subsequent general laws is dependent mainly upon the intent of Congress in enacting the latter. The discussions on the floor of Congress show beyond doubt that its members intended to amend or repeal all provisions of special laws inconsistent with the provisions of Republic Act No. 2259, except those which are expressly excluded from the operation thereof. In fact, the explanatory note to Senate Bill No. 2, which, upon approval; became Republic Act No. 2259, specifically mentions Zamboanga City, among others that had been considered by the authors of

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SETTLEMENT . . . (Continued from page 364)

perience to show that this is not necessarily so. We have had a number of past instances of fact finding with recommendations forming the basis of settlement.[70] There is a clear distinction to be made. The wage settlement proposed with regularity by a government agency is a far greater intrusion by the government than is the recommendation of an ad hoc fact-finding board or board of arbitration which has been chosen to bring about settlement of one particular dispute. Insofar as the independent board can approximate the settlement that the parties themselves would have reached if the strike had been allowed to run its course, the settlement has no more effect upon the economy than would the settlement of the parties themselves. Of course, just what the settlement of the parties would have been can never be known exactly. But there is enough experience with collective bargaining settlements and voluntary arbitrations of wage disputes to know that, given the facts, the economic pattern which should be followed can be ascertained.[71]

Collective Bargaining

Is Absolute Requisite

The key to the resolution of the emergency dispute problem is therefore revealed. The matter of pressure in settlements by governmental intervention through emergency-dispute processes will not disrupt the role of collective bargaining so long as the settlements brought about follow collective bargaining patterns rather than establish them. The maintaining and strengthening of effective collective bargaining then becomes the absolute requisite to the keeping of emergency procedures in narrow bounds. If the basic labor-cost decisions in the American economy are made by collective bargaining, we have little to fear from the occasional emergency settlement dictated by ad hoc governmental intervention. The dictated settlements can follow the pattern established by bargaining.

So it is that the newly awakened emphasis on improving collective bargaining is as significant a part of the solution to the emergency strike problem as are the techniques for dealing with such strikes. Governmental intervention in emergency work stoppages need not bring about governmental management of the economic bargains in our society if collective bargaining is strengthened to maintain its proper role in making these economic decisions.

We must endeavor to reach this balanced approach. Realistically speaking, we cannot continue to hold a false belief that the right to strike is unlimited. We cannot insist that all bargains must be made through the collective bargaining process. We can and must make every effort to hone the keen edge of collective bargaining so that it is an effective tool in all but the very hardest of cases. But we must be courageous enough to handle the hardest cases another way.

The alternative is facing the resolution of each crisis after the crisis occurs. Drastic measures which will destroy the process of collective bargaining seem the inevitable outgrowth of such a passive approach when the spectrum of the kinds of crisis which can arise is viewed. Advance preparation for emergencies by creating the structures to meet them is needed to preserve our economic freedom. Freedom does not flourish in chaos, but in enlightened order.

70. See note 41, supra for citations to the fact-finding-with-recommendations experience under the Railway Labor Act. In the 1949 steel pension dispute, President Truman bypassed the Taft-Hartley provisions and appointed a fact-finding board empowered to recommend. The dispute was settled in close compliance with the recommendations. The Board report is printed in 13 L.A. (BNA) 46 (1949). A recent example of the fact-finding board empowered to recommend terms is the Missile Sites Labor Commission, see note 44, supra.

71. There is extensive literature on wage patterns. E.g., BERNSTEIN, ARBITRATION OF WAGES (1954); NEW CONCEPTS IN WAGE DETERMINATION (Taylor and Pierson, eds 1957).