View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by University of North Carolina School of Law

UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 27 | Number 2 Article 2

2-1-1949

Effect of the Public Interest on the Right to Strike and to Bargain Collectively

Oscar S. Smith

Follow this and additional works at: http://scholarship.law.unc.edu/nclr

Part of the Law Commons

Recommended Citation

Oscar S. Smith, *Effect of the Public Interest on the Right to Strike and to Bargain Collectively*, 27 N.C. L. REV. 204 (1949).
Available at: http://scholarship.law.unc.edu/nclr/vol27/iss2/2

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

THE EFFECT OF THE PUBLIC INTEREST ON THE RIGHT TO STRIKE AND TO BARGAIN COLLECTIVELY*

OSCAR S. SMITH**

In March, 1948, President Truman for the first time invoked the emergency procedures of Title II of the Labor Management Relations Act.[1] The occasion for this action was a threatened strike of 17 American Federation of Labor unions at one of the atomic energy plants in Oak Ridge, Tennessee. A Board of Inquiry, under the Chairmanship of John Lord O'Brien, was appointed to investigate and report the facts in the controversy.

In its report this Board found six issues of prime importance in dispute. The first of these six prime issues had to do with a union demand for a contractual restriction on its freedom to strike at times of wage reopening or contract renegotiation. In respect to this prime issue, the Board of Inquiry reported:

> "*Assurance of Continuity in Operations.* The Union desires a continuing contract, leaving open the question of arbitration, or specifically providing for arbitration of unsettled issues. The position of the Union may best be presented by direct quotations from the statement of its representative before this Board—'recognizing our grave responsibility to the people and to the Government of this country, and our equity in this plant, we wrote in our contract a clause called "continuity of operation" which would not permit the Union under any circumstances to have a strike, a slow down, a stoppage of work, or a sympathy strike of any nature whatsoever. . . .' The Union proposed its own clause because we do have a decided responsibility to this entire nation in being in this plant.
>
> "The Company proposes that a stated time limit be placed on the negotiation of wage rates, that there be no arbitration of wage disputes, and that the agreement of the Union not to strike shall not apply after the expiration of the stated period."

On the face of it, this presented a rather out-of-the-ordinary situation. Seventeen unions were threatening a strike to obtain certain concessions. One of these concessions was a contract provision which would

* This paper was read at the Round Table on Labor Law at the meeting of the Association of American Law Schools, in Cincinnati, Ohio, on December 28, 1948.

** Director of Labor Relations, United States Atomic Energy Commission, Washington, D. C.

[1] 61 STAT. 152-156, June 23, 1947, 29 U. S. C. A. §§171-182.

foreclose the right to strike for the future. The counter proposal of the private employer, which these unions were unwilling to accept, was patterned after the contract reopening provisions that appear in many labor contracts in other industries, a provision that fixed a reasonable period of notice and negotiations with freedom on the part of both union and employer to utilize economic measures at the end of this period. A study of this dispute cannot be expected to provide final answers to the many questions relating to the effect of the public interest on the right to strike and to bargain collectively. It will, however, reveal the extent of responsiveness of the particular union leaders to this impact and of its effect on the bargaining relationship in this specific instance. Consideration can then be given to whether this situation is typical of other activities and whether a like effect is probable elsewhere. The underlying facts were these:

During the first years of development and operation at Oak Ridge, all forms of union recognition were barred by the War Department, with the concurrence of principal leaders of organized labor. Such action was deemed necessary in part because of restrictions placed on meetings and hearings in the interest of secrecy of information. In part, however, the action was motivated by a belief that this policy would best assure against work stoppages which might be disastrous to both the secrecy and the progress of the wartime atomic energy development.

In 1946, after NLRB elections, unions were recognized in two plants. One of these, the Oak Ridge National Laboratory, the plant involved in the 1948 dispute, was at that time operated by the Monsanto Chemical Company. Monsanto and AFL negotiated a labor contract. This contract was without time limitation and barred stoppages, even of a momentary nature. Provision was made for an annual reopening of the contract upon notice by either party. However, it was agreed that "all provisions of the agreement shall remain in full force and effect until a settlement is reached on the proposed changes and said changes are made part of this agreement."

When the Atomic Energy Commission took over the responsibility for the Atomic Energy Program from the War Department, it requested an Advisory Committee of three well-known experts in the labor relations field to review this contract and appraise its adequacy. This Committee reported: ". . . Taken literally, the Monsanto contract cannot run out; the no-strike clauses and all other provisions remain effective till something is put in their place by mutual agreement. . . . On its face, therefore, the Monsanto agreement appears to afford complete protection against strikes over contract terms, insofar as such protection can be

afforded by contract. But the Monsanto agreement is subject to two weaknesses: (1) As a matter of law, a contract cannot be made to run on indefinitely; either side may terminate it after a 'reasonable time,' the test of reasonableness being up to the courts; (2) if the company should hold out inflexibly against any contract changes, a very disturbed labor relations situation might develop. . . ."

In early 1948, the Carbide and Carbon Chemicals Corporation succeeded Monsanto as operator of the Oak Ridge National Laboratory. That company undertook to negotiate an agreement with AFL covering the future operation of the plant. In essence, AFL asked for a continuance of the terms of its Monsanto contract plus certain wage increases. Carbide asked for a contract with provisions, including a contract reopening clause that was generally similar to the clauses in other labor contracts covering its many private plants. These plants in general embraced various activities in the chemical industry, as distinguished from atomic energy. The deadlock in negotiations resulted as reported by the O'Brien Board of Inquiry. At the end of the injunction period provided in Title II of the Labor Management Relations Act, the Board of Inquiry reported that the dispute was still unresolved.

In the meantime the Joint Congressional Committee on Atomic Energy in a report to the Congress advised: "The Committee is unanimous in its conviction that the national security demands uninterrupted operation of the critical facilities of the Atomic Energy Commission." The International Presidents of the AFL unions involved met with the Chairman and other representatives of the Atomic Energy Commission. The effect of a work stoppage at the plant was discussed as was the action that the government would be required to take in the event of a stoppage.

An election on the employer's last offer was held by the National Labor Relations Board and the employees voted 771 to 26 to reject the offer. The strike deadline arrived and the employer unilaterally installed the conditions proposed in the rejected last offer. Negotiations continued with the aid of the Federal Mediation and Conciliation Service, however, and no strike occurred. A settlement was finally reached but only after strong expression to the employees by top AFL leaders of their conviction that the strike was not appropriate for use under the circumstances. The final settlement included substantial wage increases but also involved less favorable provisions as to certain employment conditions than previously existed. Throughout the dispute it was abundantly clear that top AFL leaders were sensitive to the impact of the public interest. When the injunction was discharged, sober judgment made it

clear that because of this public interest a strike was not appropriate and no strike occurred.

Our national labor policy is premised on the theory that in the face of organization of employers in the corporate or other forms of ownership association an inequality of bargaining power results unless government assures that workers possess full freedom of association and actual liberty of contract including the right to select their own representatives and to engage in concerted activities for the purpose of collective bargaining and other mutual aid and protection. Such an inequality of bargaining power has been found to lead to strikes or other forms of industrial unrest with a resulting burden on the flow of commerce and to aggravate recurrent business depressions. This premise has withstood the test of experience over many years and is given specific recognition in the statements of policy in both the National Labor Relations Act and the Labor Management Relations Act.

In a study of the Oak Ridge dispute, the question arises, whether an inequality of bargaining power, itself conducive to strife, was created in this situation where the strike was not appropriate as an effective bargaining aid, and where no adequate substitute for this adjunct of bargaining had been provided. The freedom of employees to engage in concerted activities for mutual aid was clearly impaired. The public interest must also have had an impact on the employer. However, any affirmative economic action to force a settlement would have had to be initiated by the union. If a strike had occurred, the stoppage of work would have been a result of union action and the public would have reacted accordingly. Both the Executive and Legislative branches of the government, through their responsible officials, had made it clear that a stoppage could not be permitted and that the facilities of government would be utilized to maintain continuous operations in the face of any walkout of employees. Action by government to carry out this necessary intention would have had direct consequences in relation to the employees and their union far beyond any relating to the employer. It follows that the impact of the public interest in the situation at Oak Ridge impaired the bargaining power of the union with a resulting unbalance between the respective freedoms of action of the disputants. Stated in another way, the responsiveness of the unions to the public interest so limited their freedom of action as to upset the bargaining relationship and create a situation that of itself might be conducive to strife.

The next question is whether this inequality of bargaining power is peculiar to a particular plant, at a particular time, in the atomic energy industry or whether it occurs in other situations where the public in-

terest is great. It is well recognized that there is an area in which the right to strike may exist only insofar as it is not generally used. This area has been variously defined to include government, railroads, the steel industry, public utilities and some other activities. In some of these activities the right to strike may be an important aspect of the bargaining relationship even if used sparingly. However, other situations exist in which the strike is not appropriate at any time and, in fact, the strike has been abandoned either voluntarily or as a result of legislative action.

In firefighting, for instance, a stoppage is never appropriate because the community cannot risk the disaster that could result from the lack of this protection. As long ago as 1930, the AFL firefighters union recognized this and adopted a constitutional provision that "We shall not strike or take active part in any sympathetic strike, since the work of firefighters is different from that performed by any other workers, as we are employed to perform the duties of protecting the lives and property of communities in case of fire or serious hazards." A few other unions, principally those whose membership is confined to government employees, have also included no strike provisions in their constitutions. Certainly the right to strike cannot be an important aspect of the bargaining relationship where the union constitution forecloses the possibility of its use. An equality of bargaining power that is based in part on freedom of employees to engage in a concerted withdrawal of services will not result. As most unions that have voluntarily relinquished the right to strike are composed largely of employees of governmental bodies, a possible alternative for strike action may be provided them in the form of political action. That the firefighters union, after 18 years' experience with a constitutional no-strike provision, does not believe that political action is an adequate alternative for the right to strike is evidenced by the fact that this union has recently advocated compulsory arbitration and has urged legislation to this end.

In the railroad industry care has been taken to maintain a legal right to strike. However, in the single instance in recent years where a strike of some magnitude was attempted on the nation's railroads the strikers were faced within 48 hours with a demand by the President of the United States for legislation of a drastic character. The impact of the public interest on railroad workers is such that they have little more actual freedom to exercise the right to strike than do firemen or than did the Oak Ridge atomic energy workers. The right to strike therefore is of quite limited value in the bargaining process because upon sober judgment the workers, their leaders and the employers all know that it is not appropriate for use in the circumstances.

Certain utility workers are also limited in their use of the strike. The impact on health and safety from complete stoppage of the water supply in a large city might be of disaster proportions. A complete stoppage of gas or electricity over a substantial area could present a similar situation and approximately one fourth of the states have passed laws prohibiting strikes by employees of public utilities.[2]

All of these activities, i.e., certain atomic energy operations, firefighters, certain utilities and national railroads are activities in which the strike is not considered appropriate for use on any substantial scale whether or not there is legislation prohibiting it. If a stoppage occurs in such activities, the public reaction is immediate and focused adversely on the striking employees. In such situations government will act quickly in any manner within its power to bring about a continuance of operations. In the absence of an adequate alternative for the right to strike there will not be that equality of bargaining power which our national labor policy contemplates.

There are occasions when strikes in certain other activities may also endanger the public health or safety. Prolonged stoppages in the basic industries such as steel may do this. However, at the outset of a strike in a basic industry the effect on the public will likely be one of inconvenience rather than of danger to health and safety. There will usually be some stockpiles to cushion the full effect of the stoppage. The reaction of public opinion may be directed toward one or both disputants. Government will not immediately intervene to compel a resumption of operations. Accordingly, the right to strike is still an important aspect of the bargaining relationship even though there is not that full freedom for its use that exists in industries only remotely related to the public interest.

In a different category again, as regards the relationship between work stoppages and public interest, are the large mass production industries. Strikes in mass industries do create great public inconvenience but there is not a direct threat to health and safety. The reaction of the public to a stoppage in mass production will be slower and the public will be better informed as to the issues. The reaction may be directed at either or both disputants and may contribute to the endurance power of one disputant at the expense of the other. This is the opposite of a public response that is so immediate that actual freedom of action of the employees is impaired without comparable risk to the other disputant.

In view of the quite different effects of the public interest in these

[2] See (Note, 1948) Compulsory Arbitration of Labor Disputes, 47 MICH. L. REV. 242. Compare Local 170, Transport Workers Union of America, C.I.O. v. Gadola, 34 N. W. 2d 71 (Mich., 1948) and Van Riper v. Traffic Telephone Workers Federation, 61 A. 2d 570 (N. J. Ch., 1948). [Ed.]

various activities, the role of the government needs to be flexible and vary with each type of activity. Restrictions on the normal and fundamental freedoms of action of either employer or employees may create an unbalance of bargaining power which in the long run may be conducive to strife. The placing of corresponding restrictions on both employer and employees might result in equality of restriction but might not result in equality of bargaining power because there might be no area left for bargaining. In any event, it would appear wise to move slowly and first meet the particular problems of the areas of activity where the public interest is greatest.

The first need is to restore an equality of bargaining power to employees in those activities where it does not now exist because of the inappropriateness of strike action. Until an adequate method of doing this has been determined, it would seem advisable to caution against the possible creation of new inequalities elsewhere by the elimination of the right to strike in areas where it still does contribute to stability. Such an approach, of course, does not foreclose supplementing the usual government role of conciliation by devices for dealing with emergency situations. There are many such devices. It is important, however, that the usual government role be confined to conciliation and that it be uncertain to the disputants whether the government will play any other role in a particular dispute. Only if this condition exists will the disputants put forth maximum efforts to reach a settlement of their own.

In those activities, however, where the strike is rarely, if ever, appropriate, an alternative for the right to strike may need to be provided as a regular adjunct of bargaining. Within the Atomic Energy Commission itself, and in discussions with the private employers and the unions participating in the development of this industry, a great amount of attention has been given this subject and many possible alternatives have been explored. None has been found that all interested persons were willing to accept. And we have considered that acceptance on a voluntary basis by the bulk of the persons affected is essential to workability. Another requisite has been that any device selected should be sensitive to economic change in order that the working conditions and wage rates of employees may be at least as favorable as those in other industries. We have also considered it important that resort to any alternative, like resort to the strike itself, should not be too easy and should involve an element of risk which will compel the exercise of sober judgment. At the same time it has appeared that the alternative should be available without creation of a state of emergency, the threatening of a strike or like action. It has been recognized also that the alternative may on occasion involve the necessity for a decision by a

third party which will be accepted by the immediate disputants as a resolution of the issues. The majority of unions in our industry by and large have indicated willingness to accept some form of pre-established arbitration coupled with a recognition of the relative lack of freedom to strike. The private employers in general have been reluctant to commit themselves to arbitration. They have expressed the conviction that they could not live under the limitation on management freedom and prerogative that might result.

It has also been suggested that there would be no strikes in the industries where the public interest is greatest if there were no unions here. The Atomic Energy Commission, however, is convinced that the new industry of atomic energy should be developed to the fullest extent possible within the framework of current industrial practice; that there is a need for labor organizations of employees working on atomic energy and that accordingly labor organizations should be welcomed in the industry; that the national policy of assuring an equality of bargaining power between employer and employees is particularly important in this industry. As a step toward these ends, the Atomic Energy Commission several months ago lifted the war-time restrictions on labor organizations and opened all of its installations to permit union recognition by the private employers operating its plants.

The problem has been to bring about an equality of bargaining power without the imposition of restrictions that although equal as between employer and employees might discourage the resourceful, aggressive, and imaginative leadership needed on the part of both management and labor in the development of this new industry. An approach that has seemed to offer some hope has been establishment of industry policies on major items of wages and working conditions. There has been substantial acceptance of the idea that a wage policy could be developed which would define general standards to which representatives of employers and of employees could address themselves in the negotiation of wage scales. Wide differences of opinion have appeared, however, as to the treatment of benefit plans. In its Metal Trades Bulletin the AFL has proposed government-established, industry-wide benefit plans determined after consideration of proposals by the unions and the employers, with appropriate procedures for redetermination of such plans as circumstances warrant. The employers here already have benefit plans on a company-wide basis covering all of the activities of the employer. They have not considered it practicable to establish atomic energy benefit plans which would be different from the plans in their plants outside of atomic energy.

Both employers and unions in the atomic energy program have

accepted the recommendations of the President's Labor Management Conference of 1945 in respect to contract provisions relating to the handling of grievances and in respect to disputes as to the meaning and interpretation of agreements.

The work we have done in atomic energy in trying to solve these various problems has not provided many answers in our own industry. We have made progress. In the meantime, the Joint Congressional Committee on Atomic Energy has held public hearings on the matter. In addition, the President has appointed a special commission of three experts to study the problems and make recommendations to him. Any principles that we may have developed as basic requisites for a solution may or may not be applicable elsewhere. An effort has been made in this paper, however, to outline the problems and to indicate some of the requirements that need to be met if a workable solution is to be found in our industry.