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IMPROVEMENTS OF THE PROCESSES OF COLLECTIVE BARGAINING†

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I am speaking as an individual citizen, by license, an officer of the courts of my home state and of the Federal Courts, to an audience of similar officers. While I am regularly engaged in the representation of employers in labor-management problems, I do not speak as such representative today. There is compounded confusion surrounding this important subject among sincere and honest men in all walks of life. Too often, lawyers have preached what they thought clients wanted to hear. As lawyers, we must seek to point the way to *reason*—to peace among men under law.

The obligation of employers to bargain with their employees collectively through representatives of the employees' own choosing is the "law of the land." The National Labor Relations Act,[1] popularly or unpopularly known as the Wagner Act, clearly establishes that obligation on the part of emloyers whose operations affect interstate commerce.[2] At least nine states[3] have statutes establishing that obligation within their borders.

When employees have indicated a desire for collective bargaining through established legal procedures, and it is required by law, the first and foremost recommendation to be made to an employer by any honest lawyer is the absolute good faith acceptance of the obligation to engage

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1. National Labor Relations Act 49 Stat. 449 (1935), 29 U. S. C. §§ 151-166 (1940).

2. *Id.* § 9c, 29 U. S. C. § 159 (c) (1940).

3. Colorado, Kansas, Massachusetts, Minnesota, New York, Pennsylvania, Rhode Island, Utah, Wisconsin.

in it. Suspicion or belief by an employer that employeees have been misled, or even coerced, into choosing to be represented by a certain union, is no justification for him to try to circumvent his obligation to bargain with his employees collectively through the representative chosen.

Such attempted circumvention by employers in the past has interfered seriously with collective bargaining. That condition is passing away,[4] but it exists today to such a degree as to require mention. As employers, we must keep our own hands clean, if we seek public support for attack on abuses of the other side; and if we want harmonious relations with employes who believe collective bargaining is in their interest.

Employers are quite free under the law to persuade employees against collective bargaining so long as reason is used,[5] but the freedom to choose collective bargaining or to reject it; and, having chosen it, the freedom to select the representative must be left to the employee. Abuses of power by labor organizations must be reached in other ways than by abusing their legal rights if peace is the subject.

However, other improvements are needed. Though collective bargaining is quite generally accepted and practiced in good faith by employers, through enlightened industrial management today, it is far from successful in achieving the stated purposes of the Wagner Act, namely, to safeguard interstate commerce from injury, impairment or interruption.[6] The scope and magnitude of the interruptions to commerce caused by strikes during the past year prove definitely that this purpose was not one of the acomplishments of the Wagner Act.

Probably the most serious problem now arising out of collective bargaining is that of industry-wide strikes, such as occurred twice in the last year in the coal industry, once in the steel industry and once on the railroads. Such strikes are the result of the organization of workers in an entire industry and the decision of that organization to strike the entire industry at one time to enforce bargaining demands. In such a strike, the general public is irreparably hurt, regardless of the merit or lack of merit of the demand, or the success or failure of the strike. Such strikes must be eliminated.

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4. In 1937 unfair labor practice cases represented 72% of all cases handled by N. L. R. B. and representation cases 28%. In 1944, those percentages were reversed. Ninth Annual Report of the National Labor Relations Board (1944).

5. See Morgan, *Employer's Freedom of Speech and The Wagner Act* (1946) 20 TULANE L. REV. 469.

6. National Labor Relations Act § 1 (1935), 29 U. S. C. § 151 (1940).

The question then becomes how to do it under our system of government in which we seek to preserve as much individual freedom as possible. Industry-wide bargaining has some advantages to both parties without loss to society. For example, it removes wages and working conditions from the field of competition between employers. Can the dangers to the public be removed without prohibition of industry-wide bargaining? They can be.

Industry-wide bargaining involves many individual and independent employers on one side of the table. Monopoly is not necessary to cooperative collective bargaining. There has never been, to my knowledge, an industry-wide lockout of employees, although lockout is the correlative of strike in labor-management warfare. It has, in the past, been used by individual employers, and might be by an industrial monopoly, but such a wasteful force strategy is just not agreed upon industry-wide by independent employers who have the responsibility of tehir own decisions.

Employers, of course, are prohibited by law from combination in restraint of trade.[7] They cannot organize an entire industry into one organization whic hmanipulates that industry to the detriment of the public. Undoubtedly an industry-wide lockout would, if attempted, be a violation of these laws.

The Supreme Court has held that the laws prohibiting combination in restraint of trade are not applicable to labor unions because it did not appear that Congress had so intended, but the court's opinions clearly indicate that the Congress has the power constitutionally to pass such legislation.[8]

In industry-wide bargaining a single centralized labor union with authority to call an industry-wide strike sits across the table. Congress should by statute require the breaking down of centralized National unions, as combinations in restraint of trade.

Such a suggestion is attacked as "union busting" by organized labor and such it is to a degree. "Trust busting" was unpopular among the trusts but it was accomplished by the people without destruction of industry. All organization of labor imposes some restraint on trade, and it is not

7. Monopolies and Combinations, 15 U. S. C. §§ 1-31 (1940).
8. See Apex Hosiery Company v. Leader, 310 U. S. 469, 60 Sup. Ct. 982 (1940), United States v. Hutcheson, 312 U. S. 219, 61 Sup Ct. 463 (1941); Allen Bradley v. Local No. 3, 325 U. S. 797, 65 Sup. Ct. 1533 (1945); Hunt v. Crumboch, 325 U. S. 821, 65 Sup. Ct. 1545 (1945).

proposed that we go back to the days when all labor organization was held entirely illegal as such;[9] but the Congress can and should prohibit by law the combination of workers into unions, with centralized authority and control, covering more than one employer; or onee local group of employing units where employment is fluid as in the building trades and the maritime industry. The combination of such unions for the purpose of simultaneous strike should also be prohibited as restraints on trade.

Such legislation would not destroy the basic value of organization for collective bargaining to the worker. Like we have had no industry-wide lockouts, it would probably effectively prevent simultaneous strikes in any crippling percentage of an industry without the compulsion of law, through the better compulsion of small unit responsibility of decision.

Such legislation would limit labor monopoly and would improve the cimate for collective bargaining. The freedoms and the restrictions on freedom of the disputing parties would be fairly balanced. Large employers would have to deal with large unions. Strikers against substandard conditions would still be protected by the social opprobrium attached to strike breaking, and existing legal protection for strikers.[10] Either the union or the employer could effectively prevent continuation of the enterprise except on mutually satisfactory conditions, and both could still profit more from its continuation and improvement by finding agreement on such conditions.

Public Utility strikes impose the second most serious threat to public security, and they are not reached by controls on the present monopoly of organized labor. Closing down electricity, transportation, water, or communication services in a single community cannot be tolerated. Strikes must be prohibited in public utilites, and arbitration of bargaining stalemates under the jurisdiction of the rate setting authority should be substituted. Adoption of this proposal will not remove private enterprise from public utilities, or seriously restrict such freedom as it now enjoys. Public utilities are monopolies by necessity. Their rates and earnings are regulated by government now. Wages paid to workers and conditions of

9. See Commonwealth v. Carlisle, Brightly N. P. 36 (Pa. 1821); Commonwealth v. Hunt, 45 Mass. 111 (1842); Crump v. Commonwealth, 84 Va. 927 (1888). See also GREGORY, LABOR AND THE LAW (1946) cl l.

10. National Labor Relations Act § 2(3) (1935), 29 U. S. C. § 152 (3) (1940) (employee on strike retains status as such); 18 U. S. C. § 407 (a) (1940) (provides notice of strike in advertisement for workers during strike).

employment in this restricted field of public service should also be a public responsibility through the same public body. Free collective organized workers in so far as it could produce mutually satisfactory agreement, but in public utilities government must step in to prevent breakdown.

Compulsory arbitration is not a satisfactory answer, however, in any other field. It is only the answer where the right to strike, and the right to lockout or cease business, must be subordinated to the public welfare; and where the direct relation of business cost to ultimate consumer prices can be recognized and balanced by the same public authority which, of necessity, already exists. Prohibition of strikes and provision for compulsory arbitration under the jurisdiction of the utility regulating authority would improve the process of collective bargaining in public utilities, but further answers must be found in the general field of relations between free private enterprise and free organized labor.

Temporary local and peaceful demonstrations of economic force between organized employees and their employers must be tolerated, if any freedom is to be preserved for either. Preservation of equality of the parties, with as much individual and collective freedom as possible consistent with the public welfare, should be our goal.

However under present law, such equality does not exist. Labor unions have been given unrestricted rights, and have not accepted corresponding duties. The process of collective bargaining would be improved by balancing the rules through legislation to correct the following:

1. Labor unions as voluntary associations under the common law still in effect in many states cannot be sued in their own names, but all members must be joined as defendants,[11] and even if suable, they frequently avoid responsibility even for contractual obligations by maintaining no visible assets. Unions should be established as legal entities and held accountable in damages for breach of contract as well as for fines for violation of laws against breaches of the peace. Failing in such responsibility, a union should be denied the right to act as collective bargaining representative.

2. Labor unions are not now required by Federal law to bargain with them.[12] Such an obvious inequality should be corrected by making bargaining the obligation of both.

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11. Montgomery Ward Co. v. Franklin Union, 323 Ill. App. 590 (1944). See CYCLOPEDIA OF FEDERAL PROCEDURE (2d Ed. 1943) § 2113.

12. National Labor Relations Act § 8 (5) (1935), 29 U. S. C. § 158 (5) (1940).

3. Labor unions are certified as exclusive bargaining representatives for *all* employees in a given unit upon selection by the majority of such employees.[13] Thereafter, there is no legal compulsion to determine the wishes of a majority of the employees, or any of them for that matter, prior to calling a strike to enforce bargaining demands. This would seem to be an accepted duty of any responsible representative of a group. Legislation should provide that a union would lose its rights as bargaining representative upon calling a strike without a majority vote, on secret ballot under impartial supervision, on the choice of strike or acceptance of the latest offer of the employer.

4. Labor unions now may legally strike and thereby interfere with the operation of the employer's business and cause public inconvenience, to attain ends for which peaceful legal procedures are provided, such as strikes to obtain recognition as bargaining representative; or to attain ends which the employer is powerless to grant, such as strikes to obtain or discourage government action, to prevent encroachment on its claimed jurisdiction by another union, to lend support to demands of another striking employees of the same or another employer, etc. Such strikers should not have the protection of law, and organized strikes which seek to enforce demands whic hthe employer cannot grant or which seek to circumvent legal procedures should be prohibited. A union which employs such strikes should be subject to action for damages and to fine.

5. Labor unions quite generally make, as a primary bargain-demand, a requirement of union membership as a condition of continued employment. Employers are prohibited from making the opposite condition.[14] Compulsory membership in any organization, including compulsory obedience to the directions of its officers and subscription to its principles or aims against one's own will and beliefs, is as abhorent to our traditions of individual freedom of thought as is the converse. Compulsory union membership should be prohibited by law as is interference with voluntary union membership. Organized labor has earned no higher place in modern society than has organized worship. We believe in freedom of religion and we should maintain freedom of economic thought. Collective bargaining should be abandoned as national policy if it cannot be maintained on a vountary basis. The State of Nebraska, in which we are meeting today, has

13. *Id.* § 9 (a) 29 U. S. C. § 159 (a) (1940).
14. *Id.* § 8 (3) 29 U. S. C. § 158 (3) (1940).

recognized this principle by amendment to its Constitution,[15] as have at least four other states.[16]

Legislation should not go further at the present time in regulating the parties to collective bargaining. Government regulation can easily be substituted for free collective bargaining, as it was of necessity by the War Labor Board. No one who cherishes freedom wants labor courts. The bargaining itself, aside from the legal obligation of both parties to bargain, should not be invaded by government. The full extent of government participation in collective bargaining should be the making available of impartial and competent conciliators. They can be helpful in the event of bargaining stalemate by bringing the parties together. They can also point out to each the cost of failure to agree. This if often a real help to both parties in time of emotional tension and obstinacy caused by dispute.

The parties themselves, organized labor on the one hand and employer management on the other hand can do several things to improve the process of collective bargaining. Acceptance by employers of the duty to bargain with employees ollectively has been mentioned. Acceptance of a legal duty to bargain, and avoidance of starting negotiations with a threat of economic force, might be suggested to organized labor.

Both parties can well start negotiations by recognizing the legitimate functions of the other and with a desire to reach agreement. As bargaining representative for employees, unions can be expected to bargain for all the benefits "the traffic will bear" for their constituents. Labor, however, should recognize a collective bargaining contract, when signed, as the *consummation* of bargainng for the period covered, and not as a starting place for further bargaining within the period. Receiving certain guarantees on wages, hours, and conditions of employment, and assurance of impartial arbitration of questions of interpretation and application of the agreement, labor should not hesitate on a strong and positive no-strike clause, with individual and collective penalties for violation. Labor should also gladly subscribe to a management clause which says in effect that management shall retain full discretion in all matters not specifically covered by the agreement. Any lesser provisions leave management without the degree of certainty and confidence necessary to operate a business.

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15. Approved by Referendum November 5, 1946, 19 LAB. REL. REP. 3004.
16. Arizona, Arkansas, Florida, and South Dakota.

On this same point labor should not seek to undermine management by organizing representatives of management into the same or connected organizations wit hthe rank and file workers. Foreman are the first line of management as labor will freely admit. Collective bargaining for them, if they should insist upon it for themselves in their own organization, is one thing; but their acceptance into a union of the men they supervise is a deliberate attempt to divide their loyalty or compromise their duty.[17] Business management cannot function with such division. Unions will not profit from the breakdown of management. Unions of workers should not stoop to such a "divide and conquer" technique. It will not improve the processes of collective bargaining.

Complete honesty with each other in the presentation and evaluation of facts is another way that both parties can improve the chances for agreement and understanding. A meeting of minds cannot be achieved so long as either side continues to "play to the gallery" with "facts and figures" obviously designed to mislead. Such tactics are always unmasked by the other side and can breed only distrust and contempt. Both sides can and should sincerely try to see that they are both talking about the same thing, and should work only from proven and accepted facts.

Labor might give consideration to the sanctity of agreements, aside from legal liability for breach thereof. It should not seek interpretations of laws which do violence to common understanding between employers and employees. If anything was settled between the working man and his employer, it was the time which was considered by both to be working time. Although the involvements varied from industry and from job to job there was no misunderstanding, and variations in wage rates were understood to make up for the differences. It is no credit to the lawyers or the courts that such understandings were upset in recent years through strained and unnecessary interpretations of the Fair Labor Standards Act, which clearly were not even contemplated by the Congress. Particularly, for our purpose here, however, it is to the everlasting discredit of those in organized labor, having been parties to fully executed wage agreements, that they now are willing to ask billions of dollars in back "portal-to-portal" wage payments for periods on which the books are closed. Such attempts do not improve the processes of collective bargaining.

17. See American Steel Foundries v. N. L. R. B., (C. C. A. 7th) Dec. 1946. See also concurring opinion of member Reynolds in Chicago Pneumatic Tool Co., 72 N. L. R. B. no. 3 (1947).

Finally the processes of collective bargaining can be immeasurably improved through the recognition of both parties of two basic economic "facts of life." The first is the fundamental truth that employer and employee rise or fall together. They need each other. Each is impotent without the other. They may bargain over the risks and the spoils of their joint production of wealth, but if either allows disputes to make him forget the other basic truth—that production of goods is the only source of wealth—they are like the two jackasses tied together who starved to death pulling in opposite directions toward different piles of hay, when they could easily have worked together to first one pile and then the other. *Joint production* of needed goods by labor and management is the *only* means of preserving and improving the American way of life. Joint recognition of this fact, in place of the supposed "class struggle," will not only do much to improve the processes of collective bargaining, but more important it will help those processes improve the "standards of living" for all men.