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The Right to Strike and the Public Interest

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THE RIGHT TO STRIKE AND THE PUBLIC INTEREST

With the growth of interdependence in our nation's economy, the worker's right to strike over wages and working conditions has been severely questioned. The focal point of this questioning has centered on strikes affecting the public interest. Since the future promises to bring more economic interdependence, this area of public interest would seem to be ever-growing. It is, therefore, important that an analysis of the right to strike be made before rash solutions destroy the self-determination of America's labor force in relation to its responsibilities and rights.

History

The first judicial treatment of strike controversies in Anglo-American law occurred in eighteenth century England. Small organizations of tradesmen in local communities were formed. Since most of these organizations consisted of skilled tradesmen, the purpose of these early "unions" was to give the worker a determinative voice in wage scales and not necessarily to contest other working conditions. The common law courts of England took a dim view of the trend to organize and strike. Because of the importance of property rights and economic growth in furtherance of international trade, the early English courts considered the strike an unnatural event and an attack upon the law of supply and demand. The courts reasoned that the price of a good should be determined "naturally" through supply and demand. When the workers went out on strike, they coerced the employers into higher wages which, in turn, forced prices of goods upwards. Such a coercion was considered, therefore, to be a criminal conspiracy bent upon destruction of the nation's economy and the employer's property rights.[1]

This view was carried over into post-Revolutionary America. The first recorded American strike occurred in 1786 and culminated in the famous *Philadelphia Cordwainer's Case* of 1806.[2] The shoemakers of Philadelphia, who had formed a guild, demanded a wage increase. When the demand was rejected, the shoemakers went out on strike. The employers immediately pressured the public prosecutor to indict the members of the guild for criminal conspiracy. The guild members were found guilty and the court enunciated the English doctrine of "natural" economics.

This judicial sentiment against labor organizations was amplified with the growth of worker demands. In 1835 the Supreme Court of New York again held a strike to be the implementation of a criminal conspiracy.[3] This time, however, the decision rested upon statutory construction. New York

1 Gregory, Labor and the Law, W. W. Norton & Co., Inc., New York, New York, 1961.

2 Commonwealth v. Pullis (1806), as reported in Commons & Gilmore, Documentary History of American Industrial Society, pp. 59-236.

3 People v. Fisher, 14 Wend. 10 (1835).

had passed a statute designed to protect the public from conspiracy against the public health and morals. The statute was extremely vague. The court construed this statute to include a prohibition against labor unions.

The first legalization of American unions came from the heretofore conservative courts of Massachusetts. In a criminal conspiracy action against union members for striking an employer who hired non-union members, the court held the strike to be a legal act.[4] The court reasoned that the use of the strike weapon to promote union membership was a worthwhile method for strengthening a just and needed social institution. The court strained to prove the social value of unions by stating that in times of distress such an organization might work for the public welfare. In pursuance of cultured goals, the court continued, unions were ideal structures to promote art and give aid to the poor, needy and sick. The weakness of this decision was to be emphasized in early twentieth century decisions.

In 1908 the *Danbury Hatter's Case*[5] dealt a severe blow to union growth. A union of hatters went out on strike because an employer denied the right to organize. The union also boycotted his business. The employer alleged that these union practices were in restraint of trade and prohibited by the Sherman Act. The court sustained his position and held unions to be illegal combinations in restraint of trade.

The *Danbury* decision was carried farther in *Gompers v. Bucks Stove & Range Co.*[6] When a local union applied to the American Federation of Labor for aid against the employer, Samuel Gompers ordered a secondary boycott of the company. Gompers refused to discontinue the boycott upon being enjoined and was later found guilty of contempt. The Court sustained the conviction and held that secondary boycotts were also illegal restraints of trade.

The *Danbury Hatters* and *Gompers* decisions were negated in 1914 by Congress. The Clayton Act made anti-trust laws inapplicable to unions by stating, "the labor of a human being is not a commodity or article of commerce."[7]

To combat the growth of unionization, and later the power given the unions by the Clayton Act, employers instituted the use of "yellow-dog" contracts. These contracts, in effect, were promises of employees not to join or to disassociate themselves from unions in exchange for being employed. The unions mustered enough strength to have state legislatures pass statutes making these contracts criminal. However, the Supreme Court held these

4 Commonwealth v. Hunt, 4 Metcalf 111 (1842).
5 Loewe v. Lawlor, 208 U.S. 274, 52 L.Ed. 488 (1908).
6 221 U.S. 418, 55 L.Ed. 797 (1911).
7 6, 38 Stat. 731 (1914).

statutes to be repugnant to the Fifth and Fourteenth Amendments as invasions of the freedom to contract.[8]

Since World War I necessitated co-operation between labor and management, this period was one of relative calm in the labor-management sphere. However, out of the depression of the 1930's came two significant pieces of legislation. The Norris-La Guardia Act[9] of 1932 limited the use of the injunction against union strikes and the Wagner Act (National Labor Relations Act)[10] guaranteed the right to organize and bargain collectively through the unions own selected representatives.

With the exception of Taft-Hartley,[11] which gave the government power to temporarily enjoin strikes affecting the public health and safety, the legal rights of the parties remain unchanged today. With the depression legislation underlying union rights, only somewhat limited by Taft-Hartley, and the growth of interdependence in the economy since World War II, the stage was set for the inevitable controversy over workers' rights versus the public interest which is becoming increasingly important today.

Strike Power

The strike is best typified as the emanating force of union power. In reality, the measure of a union's right to strike is a measure of its power. The necessity for the power and, therefore, the right of workers to organize is inherent in the management-labor relationship. If the American ideal of equality is to be realized in management-labor relationships, the power of labor must be equal to that of management. Since it is unreasonable to attempt to split management into unorganized individuals, it is also unreasonable to split labor, for doing so would be to create a guarantee of inequality. The right to strike is, therefore, a necessity in maintaining equality.

The measure of the power of a union and, therefore, the strike power is best typified by Chamberlain's Formula,[12]

$$\text{Bargaining Power}_{A} = \frac{\text{B's Cost of Disagreeing on A's Terms}}{\text{B's Cost of Agreeing on A's Terms}}$$

While the formula is for bargaining power in general, it is also directly analogous to strike power, an ingredient of bargaining power. In a relationship where there is no union representing "A," but merely individual

8 Adair v. U.S., 208 U.S. 161, 52 L.Ed. 436 (1908), Coppage v. Kansas, 236 U.S. 1, 59 L.Ed. 441 (1915).

9 47 Stat. 70 (1932), 29 U.S.C. 101 (1964).

10 372, 49 Stat. 452 (1935), 29 U.S.C. 151 (1964).

11 206, 61 Stat. 155 (1947), 29 U.S.C.A. 176 (1965).

12 Burtt, Labor Markets, Unions, and Government Policies, St. Martin's Press, New York, New York (1963).

workers, the numerator of the fraction is very small since management ("B") may hire other workers to displace the ones now employed. With a union representing "A" the numerator increases, balancing the relative cost.

Applying the formula to the strike situation, the numerator represents lost profits to management and the denominator represents the increase in cost of the union's demand. Therefore, the possibility of the use of strike power and the duration of its use is dependent upon this relationship of profits to costs as calculated by management. The equality exists in trading increased costs in exchange for the chance of loss of future profits, a form of *quid pro quo.*

The advantage of strike power as seen through the use of the formula is self-determination in search for an equilibrium from a position of greater equality. Since the equilibrium is always between the ends of the spectrum the strike power merely seeks to move the spectrum to a more equitable set of alternatives.

The Overflow of Costs

The problem as viewed by millions of Americans is that the cost aspect of Chamberlain's Formula overflows from the labor-management relationship to other interdependent areas of the nation whose only reward comes from a cessation in the polarity of the parties. The public interest thereby becomes affected. W. Willard Wirtz has stated, "The public interest includes, perhaps most significantly today, the achievements of the nation's full capacity for economic growth."[13] In terms of our model, a strike affects the public interest when the costs overflow to the point that the economic growth of the nation is severely injured or, as enunciated in the Taft-Hartley law, when the costs overflow to the point where the nation's health and safety is endangered.

The focal point of the controversy today is the cost overflow and the point where the overflow becomes critical in relation to the nation's economic growth, health or safety. While this overflow does create the conflict, the number of disputes creating "waves" large enough to affect the public interest are few in relation to the total number of disputes.

There are basically three factors affecting the seriousness of the overflow upon the public: the type of industry, the relative number of workers involved, and its timing and duration.[14] The Taft-Hartley Act was enacted to deal with overflow situations where these three factors create a national emergency by providing for an 80 day "cooling-off" period. This period is designed to allow collective bargaining while "damming up" the overflow. However, after the 80 day period the "dam" is reopened and the overflow

13 Wirtz, Labor and the Public Interest, Harper & Row, New York, New York, (1963).
14 *Supra* note 12.

may continue. The benefits of the Act, therefore, are only temporary, and upset the delicate balance of the Chamberlain Formula by creating inequality of bargaining positions in favor of management.

Requisites of Power

Unions have been severely criticized for their continued perseverance in maintaining strikes against the public interest. Since our society is pluralistic and the workers of America owe allegiance to other institutions other than the union, it is unfair to attack the strike power and unions without analyzing the necessity for the power.

While a measure of the effect of the strike upon the public interest is the number of employees involved, that same measure dictates the necessity of strike power. The greater the number of laborers involved, the greater the number of laborers deprived of self-determination if the strike power is taken away. Since the growth of interdependence in the economic sphere is continuing, the greater will be the number of laborers deprived. In a wholly interdependent society, all laborers will be deprived of their equality "for their own benefit."

To solve this problem an alternative to striking must be provided which in no way deprives the laborers of their bargaining power if both the public interest and laborers are to be served. Such a solution must include the right of self-determination and equality of bargaining power. The right to strike in itself is not important; the power it gives in achievement of equality is.

Proposed Solutions

There have been many measures proposed to replace the strike. This discussion will cover nine representative solutions and criticisms of each. Since the problems of private employees and public employees are different, the right of public employees to strike will be discussed in a separate section.

Labor-Management Organizations[15]

In such industries as the coal industry and garment industry, labor-management organizations have been created. They are representative bodies of both sides and their chief job is to prevent strikes by defining issues, making factual studies and proposing settlements. At the collective bargaining sessions the organization functions as a mediator.

While this system recognizes the right to self-determination and does not tamper with the equality of the parties, its usefulness ends, except for mediation, when the parties have great difficulty in resolving the problems. Strikes may still ensue and the public interest will still be injured.

15 *Supra* note 13.

PARTIAL SHUT-DOWNS[16]

The theory of partial shut-down is based on the observation that the public interest may still be served in a strike situation if only a small segment of the industry is shut down, thereby providing services and minimizing profits at the same time.

The problems with this method are the determination of the amount of the whole to be shut down, which factories are to be shut down, and how to off-set the competitive advantage created in favor of the firms allowed to operate.

SMALLER BARGAINING UNITS[17]

This proposal suggests that unions be segmented into local bargaining units, preventing national strikes. In this manner no one strike could seriously affect the national interest.

This segmented unionism would create geographic discrimination and a division of union expertise, crippling smaller industrial locals with less bargaining strategy than they had before. This theory would also lead to geographic segregation in an economy which is rapidly going in the opposite direction.

NATIONAL POLL[18]

This proposal suggests that when the government declares that the strike is a national emergency, a national poll of all citizens be taken to determine whether the laborers should go back to work.

This proposal is repugnant to both self-determination of laborers and equality. If the workers are forced to go back to work, their bargaining position is severely limited and the spectrum of alternative settlements shifts toward the management position.

PUBLIC REPRESENTATIVES[19]

Since the public interest is affected, some advocate that representatives of the public be present as a bargaining unit at the collective bargaining sessions.

This proposal is weak, since the public pressure is always present, and at best the third party's presence could be nothing more than as a mediator. A third weakness is that bargaining by this method might lead to political repercussions and influence upon the third party representative.

16 Givens, *Dealing With National Emergency Labor Disputes*, 34 Temp. L.Q. 17 (1963).
17 *Ibid.*
18 Rothenberg, *National Emergency Disputes: A Proposed Solution*, 65 Dick. L. Rev. 1 (1960).
19 Cooper, *Protecting the Public Interests in Labor Disputes*, 58 Mich. L. Rev. 873 (1960).

ANTI-TRUST LAWS[20]

This theory advocates making anti-trust laws applicable to unions when they are in restraint of trade.

Since, in essence, restraint of trade is the bargaining power of unions, such a suggestion would lead to a severe shift in the balance of power between union and management.

LABOR COURTS[21]

Another measure, propounded by Senator Smathers of Florida, is to create a supreme court for labor relations. Unresolved disputes would be submitted to the court, and the court would have the power to enter binding judgments as to settlement.

This method is repugnant to the self-determination theory and places the workers in a position of accepting terms which they consider wholly inadequate. A great secondary problem also arises. Governmental intervention into a private dispute leads to greater inflexibility on the part of both labor and management. By exaggerating their demands and refusing to compromise both sides will seek to influence the court. Thirdly, the political factor of not offending either party, especially in election years, would be present.

ADMINISTRATIVE AGENCY[22]

Another theory is to create an administrative agency of national emergency strikes which would define the issues, make fact findings, publicize the issues, and invoke sanctions against unwarranted action.

This theory has the same weaknesses as the labor court theory in that political decisions may enter into the considerations.

HAZARD PLAN[23]

The Hazard Plan would create an industrial Peace Commission of men appointed by the President. In case of a national emergency strike, either labor or management could call upon the IPC to define issues, hear third parties, make fact findings, and recommend solutions. If management rejected the recommendation, labor could strike. If labor rejected, the IPC would conduct a vote involving all union members. If the members voted for the proposal it would become binding. If the proposal was rejected by the union members they could strike.

20 *Ibid.*
21 61 Lab. Rel. Rep. 42 (1966).
22 *Supra* note 19.
23 Sherman, *Critique of the Hazard Plan—Strikes and People*, 28 U. Pitt. L. Rev. 391 (1967).

There are three problems with this plan. The first problem is that it becomes ineffective if management or the rank and file reject the proposal. Secondly, the rank and file are, generally, as demanding or more so than their union representatives, making the vote provision meaningless. Thirdly, the union vote undermines the representative functions of the union representatives.

A New Proposal

All of the above proposals in relation to employees of private industry have the same weaknesses: (1) failure to ultimately protect what they seek to, *i.e.*, the public interest; (2) failure to protect self-determination for laborers; (3) failure to protect equality of the parties; and (4) failure to insulate the problem from political considerations. The issue must be handled in a different form.

Since protection of the public interest in these national emergency strikes is one determinant of a successful proposal, strikes in these areas must be abolished in favor of another method. Since self-determination and equality of the parties are determinants, normally in opposition to the public interest, the substitution must provide for preservation of these principles.

To facilitate these principles a National Finance Trustee Commission should be created. The members would be appointed by the President with the advice and consent of the Senate. If a strike was to be called in an industry which the President considered to be in one of the following categories he would order the NFTC to assume jurisdiction.

Strikes under jurisdiction of NFTC:
(1) Strikes affecting the national defense.
(2) Strikes severely affecting the balance of payments.
(3) Strikes having a substantial effect on Gross National Product.
(4) Strikes affecting the national health and safety.

The NFTC would then be authorized to seek a strike injunction against the union. The agency would then create two separate trust funds. The first trust fund would be a Wage-Pension Trust Fund, the "res" of which would consist of contributions wholly from the industry equal to an amount prescribed by the following formula:

$$\text{"Res"} = \frac{\text{(Union demands-Present wage)} - \text{(Management offer-present wage)}}{2}$$

If in the discretion of the NFTC the payments were too high or low, it would be empowered to adjust. The payments would be made monthly. The fund would be held in trust until settlement and be used to pay workers retroactive benefits plus interest earned from the date of injunction.

The second trust fund would be a Profit Trust Fund, into which man-

agement would pay their quarterly profit figure adjusted to a seasonal average. All declarations of future dividends and future investment would be illegal. The corporation would be excused from performance of all contracts involving reinvestment entered into within the previous twelve months until settlement of the dispute.

The NFTC would have no further function except to manage the trust funds and receive periodic payments unless: (1) both parties requested NFTC to act as a mediator, or (2) both parties requested NFTC to arbitrate the dispute.

The effect of this proposal would be to protect the public interest. The union would be protected, since collective bargaining would continue and retroactive wage benefits would be paid. Management would gain no profit advantage until settlement, since all new equity financing and disbursal would be curtailed. To insure that the corporation would not seek outside financing on the basis of their Profit Trust Fund, all declarations and facilitations toward reinvestments projects could be declared illegal. This would not be in violation of the Constitution since no governmental taking would be involved, only a trust created.

The incentives to settle the dispute would still be present. Management would be pressured by stockholders and the unions would be pressured for the increased benefits by the rank and file.

In this way national emergency strikes would not occur and the union power would not be undermined. The balance of bargaining power would remain. The parties would still be allowed to collectively bargain. Privacy of the settlement would be maintained.

The Strike and Public Employees

The strike power in relation to public employees is significantly different. Legal treatment of the right to organize and strike has been conservative.[24] Even the mere value of the strike power itself is questionable. Since governmental agencies are non-profit making, the relative costs under Chamberlain's Formula shift considerably. The cost of government in disagreeing with the union's demands are the same to the employers (the people) as they are to the employee, who becomes as adversely affected as anyone else. Therefore, the value of the strike power is questionable.

Calvin Coolidge said that there is no right to strike against the public at any time, at any place, and for any reason. This is the reiteration of the sovereignty theory.[25] This theory holds that a strike against government is

[24] See Sullivan, *How Can the Problem of the Public Employees' Strike Be Resolved?*, 19 Okla. L. Rev. 365 (1966).

[25] Hoffman, *Right of Public Employees to Strike*, 16 DePaul L. Rev. 151 (1966).

illegal, since the government is the implementation of the sovereignty of the people. This theory overlooks the various functions of governmental employees. Its dogmatism rests upon the fear of police and firemen strikes and grows weak when we consider bench painters working for a park district.

A second anti-strike theory is the prestige theory.[26] This theory maintains that strikes by public employees are intolerable, since they damage the prestige of government. This theory seems to be as outdated as the theory of the divine right of kings. Government's prestige is based upon how it serves all the people. It cannot serve well, and, if you wish, prestigiously, if it forsakes any group under it.

Without self-determination these public employees are becoming second class citizens. If strikes are ineffective or too dangerous to the public health and safety, an alternative must be found.

Solutions

If a solution to the problem is to be found, it must again protect the public interest and the workers' interest. Most of the already suggested solutions are unsatisfactory and will be enumerated and criticized below.

Political Persuasion and Pressure[27]

This theory maintains that public employees have the sympathy of the people, who, if aroused, can exert pressure upon their elected officials to increase their benefits.

This "nice guy" approach is based upon two misconceptions. The first is that political action in a representative democracy is direct and immediate. More often than not, the exertion of power at the level of the people in non-election times is unfelt at the top, the representative level. This is evidenced by the existence of power groups who must exert considerable effort to effectuate their policies into governmental action. Secondly, sentiment for public employees is not uniform and varies from policeman to garbageman.

Mediation[28]

Mediation is helpful but mediation without strike power or third party compulsion is dictatorial and a mere sham.

Arbitration[29]

Arbitration is excellent for those employees who, because they serve the national health and safety, cannot strike, since third party decision is better

26 *Ibid.*

27 Moberly, *The Strike and Its Alternatives in Public Employment*, 1966 Wis. L. Rev. 549 (1966).

28 *Ibid.*

29 *Ibid.*

than unilateral decision by the government. It overlooks, however, the government employees who may strike without harming the interest of the people.

PICKETING[30]

Picketing is a mere facilitation of the political persuasion theory with its inherent weaknesses and has been declared illegal where it exerts a coercive force upon a more important government function.[31]

THREAT TO STRIKE

This is useless without the right to strike.

A NEW PROPOSAL

Governmental employees should be classified into three categories and dealt with separately.

Public Employees in Protective Roles

These employees include all those who, if they went on strike, would create imminent danger to the public health or safety, such as policemen and firemen. They should be allowed to organize but not to strike. Compulsory arbitration should be required so that an outside third party could determine the equities.

Public Employees in Ministerial Roles

These employees include all those who would not create imminent danger to the public health and safety if they went on strike, but who could create severe problems if the strike were a prolonged one, such as clerical workers. These employees should be able to organize and strike, but if the strike is prolonged should be required to submit to compulsory arbitration.

Public Employees in Non-Essential Roles

These are the employees who can in no way affect the public health and safety such as park bench painters. They should be allowed to organize and strike at will.

CONCLUSION

The right of self-determination and equality must be maintained for every American worker. If a strike adversely affects the national interest, a substitute should be used which maintains the same integrity. If public employees are to maintain equality with other workers they must be allowed to organize, and either arbitrate or, in the case of non-essential jobs, strike.

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30 *Supra* note 25.

31 Bd. of Education v. Redding, 32 Ill. 2d 567, 207 N.E.2d 427 (1965).