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Government and Collective Bargaining, by Fred Witney

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BOOK REVIEWS

GOVERNMENT AND COLLECTIVE BARGAINING. By Fred Witney.* Chicago: J. B. Lippincott Co., 1951. Pp. viii, 741. $6.00.

In an earlier recent study[1] Professor Witney focused his attention on a very special aspect of government and collective bargaining, namely the wartime work of the NLRB. In the present, much more exhaustive work he deals comprehensively with the subject, tracing the development of the influence of government on collective bargaining in the United States from early beginnings to the present. Yet, while comprehensive in its chosen field, as to collective bargaining the book confines itself to one particular aspect: governmental influences. Therein it differs greatly from various other recent texts on collective bargaining[2] which, in covering many other matters such as union history, principles of union organization, bargaining procedures and techniques, grievance and strike procedure, dispute settlements, etc., usually devote only a chapter or two to the influence of government.

Thus, as to subject matter, Mr. Witney's book is comparable to Gregory's *Labor and the Law;* but it differs greatly as to treatment, giving far less consideration to the analysis, comparison, and original evaluation of legal opinion, and far more to the recounting of socio-economic developments and circumstances—always appraised in the light of Mr. Witney's unflinching union sympathies. In fact, the book is not meant for the specialized student of labor law, but, according to the author's own statement in the preface, as a text for students of Liberal Arts and Commerce.

The general arrangement is based on the almost dramatic dialectics under which the development of the union movement in the United States appears to its friends. After a brief introduction concerning the nature and significance of collective bargaining, the first major part deals with the phase of "Legal Suppression of Collective Bargaining," reaching from the early nineteenth century to the end of the 1920's: the conspiracy doctrine; the rise and flowering of the labor injunction; prosecutions under the Sherman Act, interwoven with the hopes and disappointments of the Clayton Act. All this is told at the hand of the

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1. WITNEY, WARTIME EXPERIENCE OF THE NATIONAL LABOR RELATIONS BOARD, 1941-45 (1949).

2. *See, e.g.,* CHAMBERLAIN, COLLECTIVE BARGAINING (1951); DAVEY, CONTEMPORARY COLLECTIVE BARGAINING (1951); RANDLE, COLLECTIVE BARGAINING (1951).

long-famous test cases demonstrating the liberal opinions of Holmes and Brandeis as yet outweighed by those of their more conservative colleagues.

The next part, "Government Encouragement of Collective Bargaining," treats the New Deal era. A full treatment is given to the Norris-La Guardia Act (which "strangely enough . . . was not signed by Roosevelt");[3] a rather slight account of the Railway Labor Act of 1934; with full emphasis finally on the Wagner Act, its origins, its content and significance, its operation under the evolving policies of the NLRB, and its general impact on the American labor movement.

With the next two parts, "Restrictions on Collective Bargaining" and "Collective Bargaining: Area of Industrial Conflict," the author makes a somewhat unexpected change in the arrangement. Rather than continuing the historical account with the full story of the Taft-Hartley Act, he turns to a topical treatment of various problems of collective bargaining such as—to name only a few—control of the bargaining unit, union security, enforcement of collective bargaining, the right to strike, national emergency strikes, etc. Relative to each of these the role of government is treated in its historical development, with maximum emphasis on the change from the Wagner Act to the largely, but not summarily, deplorable Taft-Hartley Act. The latter is criticized in general for its anti-union intent and effect and its tendency to inject a legalistic and punitive spirit into labor relations; in particular for its unfair restrictions on union security (notably its indiscriminating prohibition of the closed shop), for the return to the labor injunction, and, most specially, for its interference with the substantive terms of collective agreements.

A further brief part on "Wartime Controls of Collective Bargaining" deals essentially with the work of the War Labor Board, its restrictions of wage increases under the Little Steel formula, and its compromise union-security scheme through "maintenance of membership." There are also glimpses towards the controls under the present emergency.

Finally, under "Conclusions," the author introduces somewhat hastily the new topic of wage theories and collective bargaining. He expresses the hope that, at least for normal conditions, government interference with union wage policies will not be needed; that the unions themselves will eventually develop a "national wage policy" which, with a program once agreed upon, would make it "a simple matter to educate top union leadership to the vital economic necessity of a non-inflationary

3. P. 110.

union wage policy;"[4] with the final conclusion—in line with the present-day optimism—that "[controlled] inflation and full employment rather than unemployment, collectivism, or government control over the economic life could be the least of the evils."[5]

Appended are the full texts of the several federal statutes around which the development centers and—very handy for the busy professor—groups of five to six questions to each of the twenty-five chapters.

The above brief description should suggest the great amount of material assembled and organized into this comprehensive, informative account of a most complex development. The book should prove to be very useful, not only as a text for college labor courses, but also for trade unionists wishing to gain a broader understanding of their problems, and to those managers and executives who are willing to listen to "the other side" of the union story.

We wish to add a few critical and general remarks. Considering the liberally broad—at times almost overbroad—scope of the material included, it seems regrettable to this reviewer that the author did not make more use of the thorough and revealing congressional debate on the proposed amendments of the Taft-Hartley Act in the spring of 1949. Of this he mentions hardly more than a few features of the ill-starred Thomas bill. The debate on the Taft amendment of that bill (passed by the Senate) with its many and not inconsiderable concessions to the demands of labor seem a sure indicator of the minimum improvements in the law to be expected. (Senator Taft enumerated 22 such improvements among which, to mention only two, were the abolition of the union-shop elections and of the one-sidedness of the non-Communist affidavit.)

This same debate would also have disclosed the many and varied ideas and amendments proposed (*e.g.* by Senator Morse, and Senators Douglas-Aiken) and difficulties found in the way of improving the provisions for national emergency strikes. Instead, Mr. Witney offers only his own "drastic" solution: government seizure, with workers "expected" to continue work under previous conditions, and, "to balance scales" as to pressure on the two parties, "confiscation of all profits earned by the industry during the period of seizure."[6] This solution appears to be defective in at least two respects. First, to make the unions act their assigned part the hated injunction might, after all, have to be used in case of non-compliance, with no assurance of being effective

4. P. 609.
5. P. 613.
6. P. 513.

(as demonstrated by John L. Lewis' injunction-complying back-to-work order disobeyed by the "rank and file"). Secondly, the pressure exerted on management by the confiscation of all profits would, in most instances, be much stronger than that on the workers who would merely have to continue for a while under previous conditions. This scheme would essentially place the coercive powers of government on the side of the unions, regardless of the merit of their demands.[7]

Next, there is a question regarding the author's treatment of the issue of legislative as contrasted with judicial modes of government interference in labor relations. Mr. Witney expresses himself in principle strongly in favor of legislation,[8] and against judicial lawmaking, especially in the form of injunctions:

> In legislative bodies, the issue of policy is decided by a representative body. But in injunction cases, the judge alone, motivated by his beliefs, attitudes, and prejudices, decides the issues.[9]

In this connection he takes to task a recent decision of the Massachusetts Supreme Court[10] upholding an injunction against a strike for union security, because "[n]o law enacted by the legislature of that state has outlawed such strikes."[11] But in thus leaving nothing between statutes enacted by legislative bodies and the individual prejudices of individual judges, does the author not disregard the whole role of common law, on which non-arbitrary decisions may be based in the absence of statute law? In fact, the Massachusetts Court upheld the injunction on the basis of a whole line of precedents under Massachusetts' common law.

Another of our scruples concerns the way in which the author enlists numerical data to support his views. As one of several instances we cite his repeated contention that union-membership figures *prove*

7. The Douglas-Aiken amendment, to which Mr. Witney's proposal bears a certain resemblance, also provided for Government seizure under proper safeguards. But instead of "confiscation of profits" it contemplated "just compensation for the owners," with the Government merely deducting its own operation costs. It also provided for the "duty of labor organizations" to keep their members at work during the period of seizure, but with provision for the United States President to ask for an injunction in case of non-compliance. The difference between such an injunction and that provided under Taft-Hartley, Senator Douglas emphatically pointed out in the debate, was that it would require workers to continue work for the Government, not for private employers. 95 CONG. REC. 7798 (1949).

8. Occasionally however, when disapproving of a particular piece of legislation, Mr. Witney labels it as mere "government edict." P. 278. Also he criticizes legislative interference with practices established by the NLRB, *i.e.*, Board-made law "even upheld by the Supreme Court." P. 317. By contrast, Dr. William Leiserson, as a member of the NLRB, dissented repeatedly from decisions amounting to Board-made law as "unauthorized by Congress." See *e.g.*, Rutland Court Owners, Inc., 44 N.L.R.B. 587 (1942).

9. P. 50.

10. Colonial Press, Inc. v. Ellis, 321 Mass. 495, 74 N.E.2d 1 (1947).

11. P. 49.

the detrimental effect of the Taft-Hartley Act on the union movement which indeed, due to this law, has "ground to a halt."[12] This "proof" lies essentially in a single figure supposedly showing an abnormally small increase in membership during the first year after Taft-Hartley, in comparison to the much greater increases in the "peacetime years of the Wagner Act."

On the one hand, this increase—only very approximately known—is hardly significantly smaller than those in immediately preceding years.[13] On the other, the asserted causal nexus with the Taft-Hartley Act is largely open to question. While the almost explosive growth in union membership in 1937 was doubtless due primarily to the protection given to the right to organize by the Wagner Act, it was co-conditioned by the previous retardation of union organization in the mass production industries; so that, with automobile, steel, oil, rubber, electrical appliances, etc., suddenly organizing, membership figures naturally soared. A persistently diminishing rate of increase was discernible by about 1943 (especially when taken relative to the increasing labor force); apparently indicative of the greater resistance to unionization in the remaining non-union areas, due partly to the nature of the industries, notably trade and agriculture, partly to the social backwardness and local mores of the working population, plus unfavorable state laws, especially in the South. That the Taft-Hartley Act has in various ways added to the difficulties of organizing these areas, is more than likely. But the "proof" is certainly not in the figures cited.

We mention this point not so much for the sake of the particular facts in question, but for that of a principle. There is so much biased citing of statistical figures in the world around us—through press and radio, in politics, and in the pleadings of all special interests. Hence, it would seem especially desirable that students be taught to cautiously, critically, and objectively interpret statistical figures. This objective will be difficult to attain so long as their teachers persist in indiscriminately using statistical material to substantiate their own views.

Finally, there is a broader question of principle regarding government and collective bargaining, apropos not merely of the present

12. P. 474.

13. According to the United States Department of Labor (Bur. of Labor Statistics Bull., No. 937) annual variations in union membership since the Wagner Act have ranged from an all-time high of about 3 million in 1937 to an actual decrease by about 100,000 in 1940; rising fluctuatingly to an average of about 1 million per year during the war, and down again to an average of about 300,000 per year between 1945-47; wherefore the roughly 260,00 increase for 1948 can hardly be regarded as out of the ordinary, especially since Mr. Witney himself points out that current membership figures are not known with any degree of accuracy. (The 1951 World Almanac gives the last years' membership as somewhere between 14 and 16.8 millions).

author's views, but of those of a whole school of thought. This question concerns the explicit or implicit claim that the proper and legitimate role for government is to "guarantee free collective bargaining," but that it is highly improper and, indeed, detrimental for government to "intervene in the substantive terms of collective agreements." To have entered upon this course is, according to many, among the very worst features of the Taft-Hartley Act.[14] The present book abounds in assertions to this effect.[15] This thesis we wish to challenge.

The first question is, why should government have to intervene at all to "guarantee" free collective bargaining? Why was it not enough to have the Norris-La Guardia Act protect union activities against interference by injunctions, and thus leave unions and management truly "free" to settle their mutual issues? Why did government have to enter under the Wagner Act with all its far-flung machinery to set up bargaining units, hold representation elections, certify majority unions, and stop employers from committing "unfair labor practices?"

The pertinence of the question appears when it is noted that most other industrial countries with well developed trade unionism do not have any government interference of this particular kind. The reason why this was necessary on the American scene was because of the American employers' widespread and extreme hostility, fighting unionism and collective bargaining with a degree of success unparalleled in other countries. Thus, a peculiar problem called for this solution through an unusual form of government intervention in labor relations.

Secondly, when the government admittedly needed to get and keep collective bargaining rolling, why should it be so categorically undesirable for government also to regulate certain terms of collective agreements where this is found necessary to prevent socially undesirable, or to insure socially desirable, policies?

Let us take, as an example, the case of union security. To prevent certain well-known abuses under such contracts government can intervene either by regulating the unions themselves (*e.g.* specify fees and dues, proscribe exclusive admission policies, and regulate the adminis-

14. In Taft-Hartley there are four such instances of interference with the substantive terms of collecting agreements, all but the first, in our opinion, quite defensible on grounds of intrinsic merits and fairness: 1) restrictions on union-security contracts, 2) prohibition of feather-bedding, 3) regulation for the joint administration of industrial pension and other welfare funds, and 4) provisions for the final determination of jurisdictional disputes through the NLRB, failing their settlement through the unions' own machinery. All these four instances are fully and critically discussed in Professor Taylor's GOVERNMENT REGULATION OF INDUSTRIAL RELATIONS, c. 6 (1948). Mr. Witney's specific criticism of this type of government interference is chiefly turned against the union-security provisions. Pp. 311 *et seq.*

15. See Pp. 278, 280, 281, 410, and 619.

tration of union discipline); or it can leave the unions alone and restrict union-security contracts, thereby "interfering with the terms of collective agreements." The former, apparently "legitimate" method is strongly opposed by the unions as "interference with their private affairs;" nor is it used by the Taft-Hartley Act. But it has been used in varying degrees of stringency and fairness by a number of states, in particular under Fair Employment Practice laws prohibiting exclusion from union membership on account of race, creed, national origin, etc. This method is also advocated by many legislators and authors, including Mr. Witney.[16] The latter, supposedly "illegitimate" method was used first under the New Deal Railway Labor Act of 1934 prohibiting all union-security contracts;[17] next by the Wagner Act's restricting them to the duly designated majority bargaining agent;[18] next by a number of state laws regulating such contracts more narrowly than the Wagner Act (some of them, in our opinion, very fairly by balancing security to the unions with protection for individual workers);[19] then by a number of obviously anti-union state laws altogether forbidding union security, (anti-union because operating in exactly those areas where the extant weakness of the unions makes union security most necessary); and finally by the Taft-Hartley Act's prohibition of the closed shop and narrow limitations on the union shop.

Either form of intervention, we find, may be used fairly or unfairly, wisely or unwisely. Why is the one, on principle, more objectionable than the other?

Or consider as another most important example the economic terms, notably wages and hours, of collective bargaining agreements. In the United States the Federal Government has "interfered" with such terms only indirectly, in two ways, both eventually accepted as necessary in spite of being limitations on "free" collective bargaining. First, the fixing of legal minimum terms under the Fair Labor Standards Act and similar laws in an attempt to strengthen labor's bargaining powers

16. Pp. 335 *et seq.*

17. This prohibition, for which there were fairly good reasons at the time, was enacted over the protests of the Railroad Brotherhoods. See BERNSTEIN, THE NEW DEAL COLLECTIVE BARGAINING POLICY 51 (1950). Recently, yielding to the persistent demand of the unions, this prohibition was repealed and replaced by a union-shop formula similar to that of the Taft-Hartley Act. Pub. L. No. 914, 81st Cong., 2d Sess. (Jan. 10, 1951).

18. This Wagner Act restriction is often classed as being not "interference with the terms of collective bargaining," but merely as "setting the rules of the game" by government. We fail to see the merit of this distinction.

19. Notably those of New Hampshire and Massachusetts. N.H. REV. LAWS c. 195 (1947) (later repealed because too much in conflict with Tart-Hartley); MASS. GEN. LAWS c. 657 (1947).

where it was too weak on its own account. Secondly, the placing of ceiling limitations on wage increases to prevent inflation, used in wartime and the present emergency. Otherwise our traditional devotion to "voluntaryism" has operated against direct interference. Even in deadlocked disputes giving rise to "emergency" strikes, federal law, both under the Railway Labor and Taft-Hartley Acts, has strictly refrained from prescribing the terms of settlement to be imposed.[20]

Other undeniably democratic countries, on the other hand, have felt no compunction about government intervening directly in fixing various terms of agreements; *e.g.* through more or less continual regulation of wages and hours; the laying down of legal minima for paid vacations; legally extending the scope of representative agreements to the whole industry; or, in deadlocked disputes, making temporarily binding awards either through permanent wage boards, or state conciliators, or through special legislation.[21]

It thus appears that there are many different ways in which democratic governments can and do attempt to solve problems of labor relations through legislative means, with controls applied at whatever point deemed suitable. Why then this insistence among us that, whatever the controls are to be, they should not be applied to the "substantive terms of collective agreements?"

The chief, if not the only, reason which these advocates of "free" collective bargaining seem to offer is that every instance of this particular kind of government interference is a breach in the ramparts of our "free economy," threatening to lead to "all-out" regulation,[22] to totalitarianism, if not dictatorship. In the words of the present author:

> If the present law [Taft-Hartley] is a precursor of still greater government control, the terms of employment will not be determined by employers and employees in the collective bargaining process, but by government edict. (sic!) Such a state of affairs . . . is wholly incompatible with a free economy, for government control of the terms of employment could easily be the prelude to general control of all economic activity.[23]

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20. State laws have occasionally resorted to direct interference. Examples are the Kansas Industrial Court of the 1920's, and the more recent laws for settling disputes in public utilities in the last resort by binding governmental awards, under simultaneous prohibition of strikes. These laws have, partly at least, been held invalid either under the Constitution or under the Taft-Hartley Act.

21. A great variety of such regulations is discussed in *Extent of Collective Bargaining in Seven European Countries*, 64 MON. LAB. REV. 1019 (1947); See also MARQUAND, ORGANIZED LABOR IN FOUR CONTINENTS (1939).

22. TAYLOR, *op. cit. supra* note 14, at 371.

23. P. 278.

These dire predictions, we believe, are quite unfounded. Government regulation of economic enterprise, it is true, is likely to increase in modern industrial society, notwithstanding our unshaken faith in the ideal of maximum voluntaryism, just as more regulation is needed for city automobile traffic than for driving buggies on country lanes. And of such regulations labor relations will receive the greater share the less capable—subjectively and objectively—the bargaining parties are to do the right and wise thing by the community as well as by themselves.[24] The forms which such government intervention assumes will vary with the nature of the problems to be solved, with the institutional set-up, and with the traditions of the communities. The criterion for their appraisal, however, should be merely their fairness, practicability, and effectiveness, not the exact place in the economy where they are applied.

Moreover, there seems nothing inevitable about the "course" which a government such as ours may enter upon. Far from being bound to stay on any set course, a democratic government is—in the language of *Cybernetics*[25]—a highly sensitive "feedback" system, perpetually readjusting its course by way of reacting to the effects of its previous actions. Where particular regulations of the terms of agreements are found impractical and unsound they can easily be altered or withdrawn and replaced by other methods. Hence, no great point of principle seems indeed involved in this issue of "government regulation of the terms of agreements."

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