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## PROTECTING THE PUBLIC INTEREST IN LABOR DISPUTES

*Frank E. Cooper\**

**T**HERE exists general agreement that an effective means must be found, in the public interest, to curb strikes in basic industries that imperil the national health or safety. This principle, indeed, has been a part of our basic law for more than a decade. The trouble has been that the limited means provided to meet this need fail to give effective expression to the public interest. The only significant remedy is that which the steel strike has made so well known: an 80-day injunction followed by an election in which the employees may indicate for publicity purposes whether they wish to accept the employer's last offer rather than continue the strike.

How are we to bring the force of public opinion to bear, in the search for labor peace? This question is at the heart of the most impelling domestic problem facing the United States today.

In the feverish crisis brought on by the 1959-60 strikes, many suggested answers were urged. The trouble with most of them is that they do not reflect enough of the facets of that many-sided composite of views which, in total, represents the true public interest.

Three principal proposals have been widely urged as offering a solution to our present unhappy situation. These are (1) bringing "public representatives" into the bargaining process; (2) making the antitrust laws applicable to labor unions; (3) creating "labor courts" with powers of compulsory arbitration.

These three proposals may be separately examined, in light of the one underlying test: will they effectively subserve the public interest in fair settlement of industrial disputes?

Then, in light of the inadequacies of these proposals, as disclosed by such examination, a new approach will be suggested which, it is believed, may be effective to protect the interests of employees, employers, and — most important — the general public.

### I. THE PUBLIC CANNOT BE BROUGHT INTO THE BARGAINING PROCESS

One frequently-voiced suggestion is that a panel of "public representatives" be brought into the bargaining process. This is a

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comparatively simple and superficially attractive device — it would appear to offer a method of bringing representatives of the public interest right into the negotiating rooms, to sit at the head of the bargaining table.

But history has shown that this approach does not work. In World War II, labor disputes were submitted to tri-partite panels of War Labor Board members, comprising equal numbers of labor union officials, representatives of company management, and “public members.” All had an equal vote, and the public members had the balance of power. But that power was exercised, in too many cases, to effectuate motives that were less than idealistic. It is inevitable that it should be so.

The “public members” did not really represent the public in any true sense. They perforce carried with them into the performance of their task whatever social and economic ideologies they had acquired in their work-a-day jobs. A typical three-member “public” panel might be comprised of a college professor, a holder of public office, and a professional arbitrator. They could accomplish some good by bringing to bear the views of three individuals not directly involved in the particular dispute; but they could not speak for a hundred million Americans, any more than could a panel composed of your letter-carrier, your minister, and your family doctor. The best they could do was seek to work out some compromise and persuade two of the other six members of the Board (three “labor” and three “management”) to vote for it.

Many criticisms were directed toward the public members of the War Labor Board panels. Sometimes it was asserted that their dominant philosophy was that of peace at any price. Often, the “public” members were accused of being too sympathetic to the demands of organized labor. Sometimes, they were accused in union publications of being too “management minded.” It was asserted from time to time that particular disputes were settled on the basis of political deals, rather than on the basis of an intelligent, high-minded, and fully-informed appraisal of what the public interest demanded in a particular conflict.

The War Labor Board experience strongly argues that no small group of men can be selected who possess, singly or collectively, the wisdom that would be needed to divine what settlement of a particular labor dispute would best serve the public interest. Can you think of any three men endowed with the prescience to foresee what terms of settlement of the steel strike of 1959 would have been best for all the people directly or indirectly affected?

The most that "public members" can do is to serve as a catalytic to compromise. Just as in chemical reactions the catalytic agent sometimes forms intermediate compounds that decompose, too often the intermediate compromises hammered out in fear of an imminent strike have little permanency. They provide only a stop-gap solution. More is needed.

## II. THE ANTITRUST LAWS ARE INADEQUATE TO MEET THE PUBLIC NEED

A second proposal, and one which has wide popular appeal, is to make the antitrust laws applicable to labor unions. However, only the most optimistic can find much comfort in this suggestion. The chief difficulty may be briefly summarized thus: While the proposal is based on premises that are logically valid, no one has as yet been ingenious enough to devise a practical method of applying antitrust sanctions to the monopolistic practices of labor unions. In short, the theory is good, but its practical application involves difficulties not yet solved. The reasons for these two conclusions may be separately stated.

First, the proposals are based on premises that are logically valid. Many of the larger labor unions do in fact possess monopolistic power. Through their control of the labor supply, they are able to, and in too numerous instances have in fact engaged in restrictive practices tending to fix prices artificially high, to restrict production, to prevent entry by newcomers into certain fields of trade and commerce, and to restrain competition. These are the classic hall-marks of monopoly power. For more than a half century, business concerns exercising such powers have been subject to severe criminal and civil penalties. There is no logical reason why similar legal restraints should not be imposed, in the public interest, on labor unions engaged in restraint of trade or other monopolistic practices. On the contrary, elementary ideals of fair play strongly urge that the same rules of law should apply to managers of labor as apply to managers of corporate enterprise.

Second, despite the logical validity of the proposal that antitrust laws should be made applicable to labor unions (as, indeed, they had been for many years until the decision of the United States Supreme Court in *Apex Hosiery Co. v. Leader*<sup>1</sup>), there are practical difficulties in applying them.

<sup>1</sup> 310 U.S. 469 (1940).

First, and probably foremost, is the circumstance that the remedies utilized to compel businesses to avoid monopolistic practices are inappropriate to the case of the union monopoly. The anti-trust laws authorize the courts to enter certain types of order only. Such orders are well adapted to correct the harm caused when business management violates the antitrust laws. But they would not work well, if applied to the situation that results when unions violate antitrust principles.

For example, if the bigness of a corporation is utilized as a means of accomplishing improper objectives, the courts can order a divestiture — can order a big company carved up into smaller ones, which then (for such is the nature of business) compete vigorously with each other, each striving to earn the most money for its owners. But it would scarcely be practicable to split up a big union, like the United Steel Workers or the United Auto Workers. For one thing, the court would not know along what lines it should be split up — whether it should be along geographical lines, or whether there should be a separate union for each type of industry, or whether perhaps the size of the unions should be patterned to fit the size of the companies in the industry.

More important, one wonders what good would be accomplished by splitting up a union. Allied unions do not compete with each other. Would not a dozen small U.A.W. unions voluntarily adopt programs of joint action and mutual assistance so effective that their combined monopolistic powers would continue unabated? One fears that the chief result of divestiture would be to increase the number of full-time, paid union officers, and increase other administrative expenses, with the result that each worker would have to pay more union dues without receiving any corresponding benefit.

Similarly, injunctive relief is well adapted to antitrust violations by businesses; but it would not be appropriate in cases where unions violate the antitrust principles. For example, if a group of companies agree to fix prices, or to divide territories, this can readily be stopped by means of an injunction forbidding them from continuing this practice, on pain of fines and jail sentences. But how would the injunction be framed where unions were defendants? One of the most potent monopolistic weapons of the big union is the practice of throttling a small business by a picket line, to compel the employer to accept unreasonable and unduly burdensome demands. Could the union be enjoined from picketing?

In an earlier day, when the federal courts construed the anti-trust laws as applying to labor union activities, they did undertake by injunction to limit the picketing activities of unions. But the results of these attempts were unsatisfactory; and a growing public resentment led finally to the enactment of the Norris-La Guardia Act,<sup>2</sup> which so drastically limited the powers of the federal courts to issue injunctions in labor disputes as to make this device practically a dead letter. Further, more recent decisions and legislation have recognized certain rights on the part of unions to picket, subject to stated limitations. How, then, could injunctions be used to enforce the antitrust laws against labor unions?

This brings us to the second basic practical difficulty encountered in any attempt to make the antitrust laws applicable to labor unions. Many of the most effective monopolistic practices of the unions are now protected by law. The antitrust laws could not be made really effective as against unions, unless far-reaching amendments were made in many other laws. An outstanding example is the device of compulsory membership. This means that once a union wins a bargaining election in a plant, it can bargain an agreement which requires that *all* employees in the plant, and *all* who thereafter come to work there, must become dues-paying members of the union in order to hold their jobs. Thus the union's monopolistic powers over the labor supply in that plant become self-perpetuating. This violates the theory of the antitrust laws. But the legality of compulsory membership provisions has been recognized for many years, and is now specifically protected by statute.<sup>3</sup>

Similarly, the Taft-Hartley law specifically recognizes and protects the principle of "majority rule."<sup>4</sup> This sounds like a democratic principle. But in practice it is something less than that. If, for example, there are 500 employees in a plant and 300 of them vote in a union election (a not unusual percentage) and 151 vote in favor of union representation, the result is that thereafter the

<sup>2</sup> 47 Stat. 70 (1932), 29 U.S.C. (1958) §§101-115.

<sup>3</sup> Section 8 (a) (3), 61 Stat. 140 (1947), 29 U.S.C. (1958) §158 (a) (3), provides that it shall not be an unfair labor practice to execute a "union shop" contract, requiring union membership as a condition of employment. Elimination of earlier provisions, requiring an affirmative vote of the employees affected as a condition precedent to the execution of such an agreement, has in operation served to encourage the execution of such contracts, notwithstanding the provisions of §14(b), 61 Stat. 151 (1947), 29 U.S.C. (1958) §164(b), that federal law shall not be construed as authorizing the execution of "union shop" contracts in states where such agreements are prohibited by state law.

<sup>4</sup> 61 Stat. 143 (1947), 29 U.S.C. (1958) §159 (a).

union which was favored by only 151 employees becomes the *exclusive* representative of all 500, with sole power to decide (by collective bargaining) the conditions under which they shall work, and the ways in which their grievances will be handled.

It would be impossible for the courts to prohibit, as violative of the antitrust laws, practices which are specifically made legal by other laws.

In short, while it can readily be agreed that the principle of the antitrust laws should be made applicable to labor unions, the practical difficulties of applying the existing antitrust laws to monopolistic labor union practices are so great as to compel the conclusion that new legislation is needed.

### III. "LABOR COURTS" ARE NO SUBSTITUTE FOR COLLECTIVE BARGAINING

The third principal suggestion proposes to give effect to the public interest in the settlement of labor disputes by submitting them to a "labor court." Since the American courts have done so well in settling all other kinds of disputes, it is said, they could presumably do equally well in the area of labor disputes. Imbued only with a desire to obtain equal justice for all, it is argued, the courts could determine the rights and obligations of the parties impartially and fairly.

This suggestion is specious. The so-called "labor court" would not be a court at all, but only a dignified name for a group of arbitrators. Courts sit only to determine legal controversies, which can be solved by application and adaption of statutes and common-law rules. But there are no statutes or common-law rules that tell us whether a group of employees deserve a wage increase (and if so, how much and how soon) or whether management should have a right to cut out "featherbedding" practices under which some employees are paid for not working. There are no legal rights and wrongs in these areas. Such questions must be settled by negotiation and bargaining — or by arbitration. The term "labor court," in short, would be merely a euphemistic description of a process of compulsory arbitration. Will compulsory arbitration answer the problem? Surely not.

The whole idea of being compelled to submit to the *ad hoc* discretionary judgment of an arbitrator (or even three or four arbitrators) on such basic issues as wages or management prerogative is anathema to the managers of unions as well as to the managers of business. Neither unions nor companies would be willing to sub-

mit to compulsory arbitration. This by itself may be unimportant, for the rights of the public override those of both contesting parties. But it does appear a bit naive to talk seriously of passing a law which would be unanimously opposed by both unions and companies, and presumably by the rest of the public as well. Further, there are substantial doubts as to the constitutionality of a law that would provide for compulsory arbitration.

More important still, the idea of compulsory arbitration is at odds with fundamental concepts of our democratic society. Should any man, or any group of men, be vested with plenipotentiary power to tell a group of employees that they must continue to work without any wage increase although they would rather not work at all than continue without an increase, or to tell a company that it must give up its right to determine the products it will manufacture, or perhaps to impose a retirement plan that is unwanted by either employees or employer? Instinctively, most Americans would say "No." Substitution of arbitrary discretion for the give and take of collective bargaining is not in keeping with American traditions, which have long recognized and respected the collective bargaining process. Yet this is what any process of compulsory arbitration would involve. America is not ready for it — not yet, at least.

#### IV. SUGGESTIONS POINTING TO A SURER SOLUTION

There are two time-tested principles, consistent with democratic American traditions, that have been quite overlooked in all the debates as to how in the public interest we can avoid the disruptions of the national economy that too often accompany major industrial disputes.

##### A. *The Public Should Be Told the Facts*

The first of these principles recognizes that, as John Galsworthy said long ago, "Public opinion's always in advance of the Law." When all the facts of the case are made fully known to the public, there emerges with amazing speed a crystallized public opinion that truly represents all facets of our great populace. As it emerges, it often is indeed in "advance of the Law," as the poet said. But, because it is the true public opinion, and recognized as such by Congress, it possesses amazing power to modernize the law. Amendments can be enacted speedily when public demand for a change is felt.



An outstanding instance of the genius of the American people, once all the facts are placed before them, to arrive at a common judgment as to what changes in the law are required (and speedily to obtain enactment of such changes) is afforded by the Labor Reform Law of 1959.<sup>5</sup> In the early months of 1959, it was commonly conceded by practically all who professed special knowledge in the matter that none of the pending labor reform bills could be passed at the 1959 Session of Congress. The union lobbies were exerting such powerful opposition, it was said, that not even a mild bill could be passed. However, in the course of a few weeks, as the reports of the McClellan Committee reached their startling conclusions, and were carried by newspaper and radio throughout the Nation, the public, aroused by the frank and shocking disclosure of the facts, demanded action and got it. The enactment of the far-sweeping provisions of the 1959 law was made possible only because of the force of an aroused public opinion, and the public was aroused only because all the facts involved had been made public knowledge.

Is it not fair to assume that if all the facts involved in a dispute between, say, the United Steelworkers and the major steel companies were made known to the public there would be formulated a public opinion as to what settlement terms were right and just and fair for the Nation as a whole? Is it not fair to assume that the companies and the union would be just as heedful of the true public opinion, so expressed, as was the Congress?

On these assumptions it is urged that the first step toward a surer solution of the problem is to adopt an effective method of letting the public know all the facts involved in a labor dispute of sufficient stature to imperil the national well-being.

### B. *Modern Governmental Techniques Should Be Brought To Bear*

The second time-tested principle that should be reexamined in the present exigency is that which recognizes the special ability of administrative agencies to serve certain governmental purposes more efficiently than do the traditional judicial and legislative organs. Nearly seventy-five years ago, the Interstate Commerce Commission was created to work out solutions to baffling problems connected with regulation of the railroads—problems that our forefathers found as difficult and pressing as today we find the

<sup>5</sup> 73 Stat. 519 (1959), U.S. CODE CONG. and AD. NEWS 2953 (Sept. 14, 1959).

problems of regulating labor-management relations. The Interstate Commerce Commission was empowered to exercise a combination of legislative, judicial and executive powers that enabled it to proceed in an experimental fashion, trying several proposed solutions on a tentative basis until it hit upon one that worked satisfactorily. So well did this approach work as a means of hammering out practical solutions to the problems of railroad regulation, that the Interstate Commerce Commission Act became a pattern for many subsequent congressional enactments. In 1914, there was created a Federal Trade Commission charged with the duty of preventing unfair and deceptive methods in competition. In later years, a large number of federal administrative tribunals have been created for the purpose of policing the minutiae of conduct in some designated field affected by the public interest. Thus, the Securities and Exchange Commission supervises the issuance and sale of stocks and bonds, to protect the public from deceptive practices in the stock market. The Civil Aeronautics Board determines what routes airplanes may fly, what companies shall operate such routes, what planes may be used, and how much fare may be charged. The Federal Communications Commission exercises a similar supervisory control over radio and television. The Federal Power Commission is guardian of the public interest in the production and distribution of natural gas. The list could be extended. Several score additional examples could be cited where Congress found it appropriate and necessary to create an administrative agency as a means of providing continuous governmental supervision over an area of activity where, in the public interest, regulation was necessary.

Nearly a quarter of a century ago, Congress made a start in this direction by creating a National Labor Relations Board. However, its powers were, on the whole, circumscribed somewhat narrowly. It was given power to determine, within prescribed limits, how large or small a group of employees constituted an appropriate "unit" for collective bargaining purposes, and to determine whether a majority of the employees in such "unit" desired to be represented by a union. It was given power to prevent the commission of specified unfair labor practices by employers and (twelve years later) by unions. Its work, within the rather narrow sphere of authority delegated to it, has won the respect of labor, management, and the public. Its expertness in dealing with the problems entrusted to it has been recognized by the United States Supreme Court which in *Phelps Dodge Corp. v. National Labor*

*Relations Board* expressed its deference to the judgment of the NLRB by explaining that in the field of labor relations "factors outside our domain of experience may come into play."<sup>6</sup>

But the Board has never been given a sphere of authority nearly as broad in the field of labor relations as the authority delegated to other agencies in their respective areas of regulation. Is it not time to consider whether the NLRB (or some independent agency) be given broader powers in this area?

### C. *Implementing the Program*

The two suggestions above made can readily be combined in a single course of action.

An administrative agency could be created and vested with powers to ascertain the facts involved in critical labor disputes and the duty of disseminating such facts to the public. The same agency could be given powers to exercise certain sanctions designed to curb abuses of power by either of the contending parties and (by making sure the desires and wishes of the individual employees were recognized and protected) to promote the public interest in the fair settlement of labor disputes affecting the national interest.

#### 1. *Making the Facts Known*

The steel strike of 1959-1960 furnishes a timely and excellent example of the inability of the public — and, indeed, the employees directly involved — to learn the facts bearing on the central issues in dispute.

It is well known that one of the principal issues in the steel strike concerned the "work rules." But what are the facts of the case? One obtained the general impression from advertisements published by the companies that they wished to restrain uneconomic "featherbedding" practices. The advertisements published by the union warned of the loss of thousands of jobs if the companies won their point. But neither side, so far as the writer has discovered, published a sufficient statement of the underlying factual circumstances to permit the public to form a judgment on the issues.

It may be assumed that most citizens are unsympathetic with unnecessary "make work" practices whereby employees are paid for not working or for performing useless tasks. It is fair to assume also that public sympathy runs high for men about to lose jobs

<sup>6</sup> 313 U.S. 177 at 195 (1941).

which have long been recognized as legitimate jobs. But, on the basis of the fragmentary information available, the public had no means of knowing which side was in the right.

If an accurate, complete, and impartial statement of all the relevant facts had been made known, the public would have formed its own conclusion as to how the dispute should have been resolved; and there can be little doubt that the force of public opinion would have powerfully influenced the negotiating teams, just as it influenced the Congress which, a few months earlier, was considering a labor reform bill.

Consider, too, the plight of the employee. Had he been asked to vote on whether he wished to accept the companies' offer, he probably would not have known whether he was one of those who would lose their jobs under the companies' proposal. How could he intelligently decide how to vote? It would seem that at the very least the employee whose future is vitally involved in the outcome of the dispute should be enabled to learn exactly what is involved.

Presidential fact-finding commissions, given a few days to study the situation, at a time when emotional feelings are running high, cannot possibly do an adequate job. What is needed is a staff of expert fact-finders who would work with both parties day in and day out over a longer period of time, and who by careful study of the pre-negotiation demands would be able to focus clearly upon the facts lying at the heart of the dispute before they became confused in the heat of debate. If empowered to interrogate representatives of both parties, and to take testimony, and demand the production of evidence bearing upon the facts involved in the dispute, such an agency could lay before the workers, and the general public as well, a clear and authoritative picture of what was really involved in the dispute. In the bright light of such fact-finding processes, the employees affected could make an intelligent choice, and the general public could adequately express its opinion as to how the dispute ought to be resolved in the public interest.

## 2. *Protecting the Public Interest*

The powers of the agency should not be restricted to fact-finding and publicizing. On the basis of the facts found, the agency could be empowered by Congress to take appropriate action along a number of lines designed to safeguard the collective bargaining process and curb monopolistic abuses.

(a) *Bargaining Units.* One of the most significant unsettled issues in the field of labor relations concerns the question how big the bargaining unit should be. We have all seen how industry-wide bargaining can and often does produce crises that threaten the national economic well-being. We have seen how (in the automobile industry, for example) bargaining on a company-wide basis enables the union to adopt a "divide and conquer" strategy, taking advantage of the fierce inter-company competition to "knock off" the adversaries one at a time. It requires but little imagination to conjecture what havoc could be wrought by a law requiring each employer to bargain separately with its own employees. A group of thirty or forty small tool and die shops in a single metropolitan area would be helpless to defend themselves against the economic force of a single union representing all employees of all companies (even though separate bargaining teams were set up on the basis of company units) unless the employers were permitted to join forces for bargaining.

These few instances are enough to suggest that there is no single pat answer as to how large a bargaining unit should be. In some cases it should be larger; in others, smaller.

By authorizing a federal administrative agency to determine, on a case-by-case basis, what bargaining unit would be appropriate to protect the public interest by avoiding situations where unions could exercise their economic power in a monopolistic fashion, it might be possible to take long steps toward applying to the collective bargaining process the principle of the antitrust laws, and at the same time promote democracy in collective bargaining.

(b) *Strike Votes.* The right of employees to strike has long been protected by law. Should they not equally have a right not to strike? Unfortunately, they do not now in fact have a right to refrain from striking. If they are told by union officials that they must strike, they have no real alternative but to follow their leader's orders. Perhaps it would, as unions argue, hamstring the effectiveness of union bargaining strategy to adopt a law requiring that there must always be a government-conducted strike vote before a strike can be called. On the other hand, it must be conceded that there are some cases where it would be most beneficial to the employees concerned, and to the general public as well, to let the employees decide for themselves (in light of accurate, complete and unbiased statements of the facts involved in the dispute) whether or not they wished to go on strike.

It is therefore suggested that the federal administrative agency here proposed should have power, in those instances where it deems such action appropriate in the public interest, to order that no strike could be called unless a majority of all the employees in the bargaining unit voted in favor of such action at a secret election conducted by the government agency after the employees had been fully informed of the issues involved and were apprised of all the facts bearing on such issue.

If they voted against striking, collective bargaining would go on, and the union would be in the same position that employers now are. Employers cannot lock out — this is normally prohibited by law. Similarly, the union, if its own members voted against strike action, would have to bargain the issue out on the merits as employers are now compelled to do. Neither side would be able to say: "We won't play ball any more unless you will play our way."

(c) *Miscellaneous Administrative Sanctions.* If such an agency were created it could be endowed with powers in appropriate cases to administer various administrative sanctions (not unlike those now exercised by the Interstate Commerce Commission, the Civil Aeronautics Board, and the Federal Communications Commission) designed to compel good faith bargaining between evenly-matched parties. It might, for example, be authorized to prohibit "union shop" agreements in certain industries. It might be empowered, subject to stated criteria, to limit and modify the rule that the union is the *exclusive* representative of all employees, members and non-members alike. It might require in appropriate cases that the union would be permitted to bargain only for those employees who were union members, where this appeared to be the only way of curbing union monopolies that threatened the public interest. Again, it might be empowered, where a bargaining deadlock in a basic industry threatened the public interest, to determine that the provisions of any such new agreement as might be negotiated could not be applied retroactively. This would be, indeed, an effective inducement to the parties to settle their disagreements speedily.

All these are but illustrative examples of the way in which an administrative tribunal, with appropriately described but clearly limited powers, could help avoid crippling strikes without impairing the overall effectiveness of the collective bargaining process which still appears to be our best hope for industrial peace. The creation of such an agency would contemplate committing the

collective bargaining process to evenly-matched teams who would carry on their bargaining under conditions that would permit employees, stockholders, and the general public to know the facts that should be weighed in striking a bargain that would be fair to all interested parties, the public included.