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Labor Relations and the Lawyer

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Calendar

January 6.—Denver Bar Association regular monthly meeting, 12:15 p.m., Chamber of Commerce dining room, E. Blythe Stason, Dean of the University of Michigan Law School, Speaker.

February 3.—Denver Bar Association regular monthly meeting, 12:15 p.m., Chamber of Commerce dining room, Hon. J. W. Delehant, United States District Judge, District of Nebraska, Speaker.

Labor Relations and the Lawyer†

By JEAN S. BREITENSTEIN *

Since it was announced that I would speak upon the assigned topic, I I have received numerous suggestions as to what I should or should not discuss. These have covered the full range from an elementary outline to guide those who have had little experience in the labor field to the idea that I should present an analysis of some of the highly technical problems that currently confront those who actively engage in counseling large corporations in labor matters.

The present interest in the soft coal strike has led me to believe that perhaps a more timely presentation might result from an analysis of some of the causes of present day labor strife and a discussion of some of the proposed remedies. In arriving at such conclusion I may have been presumptuous. I fully realize that the subjects are controversial and that many of you may disagree with me.

First as to the causes. Attention has oft been directed by able writers to the fact that the United States has existed and progressed under two contradictory philosophies—on the one hand that of political democracy and on the other that of a capitalistic economy. For many years—until about 1930—capitalism was in the ascendancy. However, our political democracy demanded the imposition of gradually increasing controls designed to curb the growing power of big business. These controls took the form of such laws as the Interstate Commerce Act, the Sherman Anti-trust Act, the act creating the Federal Reserve System, and the Securities Act.

†An address before the Denver Bar Association, Dec. 9, 1946.
*Of the Denver bar.

The stock market crash of 1929 and the depression which followed brought to an end the ascendancy of capital. From then organized labor has assumed powers which have increased with each succeeding year. Labor has accomplished this through the operation of our system of political democracy. In rapid succession Congress passed such laws as the Norris-La Guardia Act, the Wagner Act and the Fair Labor Standards Act. The U. S. Supreme Court, by way of any assist, held in the Hutcheson case that labor unions were immune from prosecution under the anti-trust laws, in the Thornhill case that peaceful picketing was a constitutionally protected right, and in the Darby case that the field of interstate commerce encompassed many matters previously thought to be the sole concern of the states.

With capital deprived of the weapon of injunction and labor provided with the protective armoring of collective bargaining, the balance of power inevitably shifted to organized labor. A friendly national administration did nothing to discourage the unions in their demands. A change in personnel of our highest court resulted in decisions removing certain hazards—such as the fear of anti-trust prosecutions.

The natural result was to create in organized labor a group power, the like of which had never before confronted the U. S. The expanding unions pyramided in a manner that far exceeded the holding company activities of certain capitalists in the 1920's. No longer was there a situation of local unions dealing with local employers. Industry wide organizations, including in their membership all employees of the industry contracted with the entire industry upon the basis of one master contract. When this point was reached, the unions were in a position to monopolize and to restrain trade in a manner and to an extent never conceived by the creators of the great business trusts.

There has resulted, in part at least from the causes outlined, a situation wherein a union dominated by one man can entirely disrupt the economy of the nation. What are we going to do about it? A great variety of remedies has been suggested. Let us briefly examine a few of them.

Some people urge the outlawing of all strikes. Such action would seem to require the simultaneous outlawing of all lockouts. This proposal runs directly contrary to the philosophies under which our country has operated for over 150 years. The right to strike is a right precious to labor just as the right to lockout is a right precious to the employer. However, the right to strike and the right to lockout are relative, not absolute, rights. The interests of the public transcend either the interests of labor or the interests of capital.

If strikes and lockouts are to be outlawed then some method must be devised for the settlement of controversies between employers and employees which are incapable of voluntary agreement. This involves some sort of compulsory arbitration—that is, some federal agency must be created to perform the functions which during the late war were performed by the War Labor Board and its various agencies. It is difficult to believe that any who

adhere to our tradition of a political democracy and a free competitive system can ever agree to compulsory arbitration of such matters as hours, wages and working conditions. Unless freedom of contract is to be entirely discarded, these fundamental issues must be left to voluntary agreement. Both labor and management must resist any attempt to delegate to a governmental agency the power of decision in these matters. If in a period free from a national emergency such as the late war, a federal bureau can write the ticket as to wages, hours and working conditions, then we have come to the end of the road for both free enterprise and organized labor. Instead we have a collectivist state—call it socialistic, fascistic or what you will.

It may be argued that so far as the so-called natural monopolies are concerned, i. e., industries in which the charges to the consumers are within the control of some public body, it is essential that the power to strike or lockout be entirely eliminated. The difficulty is that many industries are just as essential to the public welfare as are those in which the ultimate charges are completely regulated. The current coal strike is a good example.

The answer would seem to lie in the creation of an agency of mediation or conciliation, to which notices of strikes or lockouts must be given, with appropriate provisions for that agency to forbid strikes or lockouts until after a suitable cooling off period during which an impartial investigation should be made, with adequate provision for publicizing all pertinent facts. Consideration might further be given to authorizing such board to apply for an injunction against the threatened strike or lockout in the event the board should make an appropriate finding that the public interest would be damaged. However, unless our political ideals and philosophies are to be discarded, this power should not extend to the compulsory arbitration of matters affecting wages, hours and working conditions. This must be left to agreement between the employer and the employees.

Another popular suggestion is that industry wide or area wide strikes should be prohibited by law. This idea carries with it as a necessary premise the idea that collective bargaining contracts should not be on a basis of either an entire industry or an entire area. Such a suggestion runs contrary to a well developed trend that has existed for many years. Both unions and employers have in recent years joined with other unions and other employers in an effort to combat the common opposition. Such organization among the unions is well known to you all. Perhaps the organizations of employers, because not as well publicized, are not as well known. Here in Denver we have the Mountain States Employers Council, an organization of the employers in the Rocky Mountain area, which has as its purpose unified action by industry in dealing with labor. These organized groups of employers are to a great extent for the benefit of the small employer who individually does not have the influence or the financial strength to combat strong and well heeled labor organizations. The big employers can take care of themselves

to a great extent. But their positions are immeasurably weakened when the unions are able to obtain concessions from the little fellows who are too weak to fight and then contend that these concessions should be adopted by the entire industry. So there is an advantage both to the small and the large employer in coordinating their activities through organized effort.

Obviously if the right to take concerted action is denied to the unions it must be denied to the employers. Certainly it is arguable as to whether or not any ultimate good to the public will result from any prohibition of industry wide or area wide collective bargaining, strikes or lockouts.

Instead it would seem that the remedy lies in another direction. The principles of the Sherman Act should be made applicable to combinations of labor unions and of labor unions and employers. The decision of the U. S. Supreme Court in the Hutcheson case was based entirely upon the construction and application of the Sherman Act, the Clayton Act and the Norris-La Guardia Act. Labor unions have no constitutionally guaranteed right to monopolize or restrain trade. The existing immunity of labor unions to prosecutions for combining to create monopolies or to restrain trade should be removed by Congressional legislation. When this is done, then the problem of industry or area wide strikes or lockouts will disappear.

Another popular idea is that the closed or union shop should be prohibited by law. Even a cursory analysis of this proposal discloses that it is no remedy. Contractual recognition of a closed shop, a union shop, a maintenance of membership shop or an open shop means little. They affect only that tenuous subject of union security. A strike can occur and often in the past has occurred just as readily in an industry having an open shop contract as in one having a closed shop contract. And strangely enough there are employers who take the position that if their business is going to be organized by a union it is preferable to have a closed or union shop. Certain union negotiations are made easier. The charge of union discrimination may be easily denied. And perhaps in some cases the recruiting of new employees is facilitated. However, most employers take the position that under American political philosophy an employee should be free to join or refrain from joining a union as he may see fit—in other words that union membership must not be a condition of employment. Certainly this principle may not be denied without at the same time denying the validity of some of our fundamental concepts of individual rights.

While it would seem that a prohibition of a closed shop is no solution of the basic problem of labor relations, it is at the same time apparent that the right to a closed shop is one which should be so circumscribed as to conform to American ideals. It might well be provided by appropriate legislation that there may be neither a closed shop nor a maintenance of membership clause in a labor contract unless four conditions are satisfied, viz:

1. The union must have as members at least 75 percent of those employees sought to be covered by the agreement;

2. The agreement must be ratified by at least 60 percent of all such employees by secret ballot;

3. Any person employed or seeking empolyment must be admitted to union membership on terms available to at least a majority of the existing membership; and

4. No person may be deprived of union membership except on written charges and after a fair hearing.

So much for the closed shop. Let us now turn to another subject of ever present importance—the right of collective bargaining and what should be done about the Wagner Act. At this stage it is a waste of words to argue about the right of collective bargaining. Its general acceptance must be recognized. The question is thus narrowed to a consideration of what should be done about the Wagner Act and here again the issue is largely confined to a discussion of what should be done to equalize the responsibility and power on both sides of the collective bargaining table. In this probably lies the best chance for sound and constructive federal labor legislation.

The Wagner Act took a one sided view of the problem. Rights were created in favor of labor. Employers were prohibited against engaging in certain practices which were declared to be unfair. No corresponding rights were recognized in industry and unions were made liable for no unfair practices. In other words, one side was restricted in its activities while the other was left free to do what it chose. The result should have been apparent at the time of the enactment of the legislation. But on top of the legislation itself there has been the administration of the law by the National Labor Board which has been declared by board members to have been slanted in favor of labor.

All this adds up to the conclusion that the Wagner Act must be amended so as to provide some fair and suitable basis for the operation of the recognized right of collective bargaining.

The most important aspect of this problem concerns the mutual responsibility of the labor unions and the employers and the mutual enforceability of labor contracts. If such mutuality does not exist, then what good are the collectively bargained contracts. And let it be noted here that the problem is not one sided. Much has been said about the lack of responsibility of unions. Consider the other side of the picture. What is a labor union to do if the employer fails to comply with a contract which does not contain a provision for arbitration. And what is the labor union to do if the contract provides for arbitration and the employer refuses to arbitrate. In many instances it may be that the only effective remedy of the union is to strike and this in itself may be a violation of the contract. And when you have a contract breached by each party where do you stand.

The point is that it is just as much in the interest of labor as it is in the

interest of capital to have mutual responsibility under mutually enforceable contracts. Several obvious remedies immediately became apparent. A labor union should be a legal entity capable of suing and being sued. Unions should be required to file annually public statements showing their assets, liabilities and officers. But of paramount importance there should be some method of compulsory arbitration provided either by contract or by appropriate legislation for the settlement of disputes arising under labor contracts. Such an arbitration should not include the power to either add to or subtract from the labor contract, but should include the power to construe and apply the contract and enforce decisions by appropriate methods.

Mutual contract responsibility is not the only subject for consideration when amendments to the Wagner Act are considered. Secondary boycotts and jurisdictional strikes should be eliminated. And of primary importance is the establishment of a code of what constitutes unfair labor practices on the part of labor unions. The existing law defines unfair labor practices on the part of employers. Specifically the Wagner Act might well be amended to provide that it would be an unfair labor practice for a group of employees or a union to engage in any of the following:

1. A strike, work stoppage or slow down during the cooling off period preceding a strike or in violation of a collective bargaining contract;
2. Seizure of or damage to property during any labor dispute;
3. Use of such threats of violence as mass picketing, blocking access to a place of business or interfering with the use of a public highway;
4. Withdrawal of essential maintenance employees in any labor dispute where the result may be to jeopardize the safety of persons or property;
5. A secondary boycott;
6. A strike or other coercive action to influence employees in their choice of bargaining representatives;
7. A strike or other coercive action to compel recognition as bargaining agent by an employer prior to certification as such bargaining agent.

Perhaps other undesirable practices mgiht be added. The list given is at least explanatory of the type of activity which might well be forbidden to labor unions.

Other amendments to the Wagner Act worthy of consideration relate to a redefinitoin of the term employee so as to exclude supervisory employees and to the safeguarding of the employer's right to free speech. This last should not be necessary but the position taken by the NLRB and the courts indicate the desirability of positive legislation. Also if the investigating, prosecuting and judicial functions of the board are not adequately separated by the recently enacted administrative practice act, provision might well be made for their complete independence.

If the revisions suggested are made in the Wagner Act, it would seem that some sort of a labor court should be created to enforce labor con-

tracts but not to write labor contracts and determine controversies involving unfair practices on the part of either employers or employees. For such a court to be of any value it must be so set up that impartiality, integrity and high class personnel are assured.

Turning now from the Wagner Act and what can be done to render it really workable, consideration must be given to the subject of how can labor be prevented from taking over the functions of management. Some argue that labor should take over management but I believe we all recognize that when and if that happens we have come to the end of our established system of free competitive enterprise. On this question the answer would seem to lie not in legislation but in a firm stand by management against contractual encroachments by labor upon the functions and responsibilities of management. If the rules can be clarified so that the government is no longer an active participant on the union side of the table but merely an umpire, employers will have a better chance in maintaining their prerogatives. The representatives of industry may not abdicate their duty and responsibility to manage the enterprise in which they are engaged. To this end they must resist the incorporation into labor contracts of clauses designed to weaken management. I have reference to such matters as mutual consent clauses, joint committees, unlimited arbitration and seniority provisions which eliminate qualifications and competence. If management supinely yields to labor on these matters then it does not deserve to manage.

Thus far we have considered the mechanics or procedures of labor relations. One subject of a somewhat different nature should be mentioned. I refer to the Fair Labor Standards Act. There would seem to be room for much improvement here. Of great current interest is the June 1946 decision of the U. S. Supreme Court in the Mt. Clemens Pottery Company case wherein the portal to portal doctrine was enlarged to the time clock doctrine with employers held subject to overtime payments for time spent in walking to the working place and in getting out tools and putting on the equipment needed for particular tasks. Wage suits aggregating millions of dollars have resulted from this decision. Without going into detail it would seem that much thought should be given to amending the Fair Labor Standards Act so as to eliminate (1) uncertainty as to coverage, (2) uncertainty as to exemptions, (3) uncertainty in meaning of "regular rate," (4) uncertainty in meaning of "work week" and "time worked." These matters are of a highly technical nature and no good purpose would be served in outlining them in detail. Suffice it to say that the need for improvement is a real and pressing need.

The remedies which have been discussed relate in large measure to legislative matters. Herein lies a danger. We cannot expect a cure-all to come from Congress. No law is any better than its administration. In the final analysis capital and labor must work out their differences by voluntary agree-

ment and not under the compulsion of governmental edict. This requires a mutual understanding and a mutual recognition of the problems of each. All this must be done within the framework of our political democracy and of our capitalistic economy.

To the extent that we as lawyers can assist in such a solution we owe a definite duty to our profession and to the public. If no solution is found, then we must reconcile ourselves to some form of collectivist state. And if the country turns to collectivism what will become of labor unions, employers, lawyers and bar associations?

Our Returning Lawyer Veterans

J. HARTLEY MURRAY, major, Judge Advocate General Department, served from March 1942 to October 1946 in the United States and in Europe. He was a member of the staff of Mr. Justice Jackson, U. S. Chief Prosecutor at the Nuremberg trials. He has returned to practice as a member of the firm of Murray, Baker & Wendelken, Mining Exchange Bldg., Colorado Springs.

Denver Bar Holds Tax Institute

The Denver Bar Association held a very successful tax institute on December 12th and 13th. The afternoon sessions of both days were devoted to a comprehensive analysis of the proper method of and problems encountered in the filling out of individual income tax returns. Thomas Girault, Chief Field Deputy, from the Denver office of the Collector of Internal Revenue, and John H. Daly and Byron C. Godfrey, special instructors, conducted the sessions, and the thanks of the Denver lawyers goes to them for their most excellent presentation of the subject.

In the Thursday evening session, Donald G. Kirk, Assistant Trust Officer of the Colorado National Bank, gave a very excellent discussion of income tax problems in an estate or trust, and Louis A. Hellerstein, Denver lawyer, made an excellent presentation of the problems encountered in the buying and selling of a business. On Friday evening, T. Raber Taylor, J. Churchill Owen and Richard Tull, discussed tax problems of incorporation.

The Tax Committee of the Denver Bar Association which arranged the program are: T. Raber Taylor, chairman, and Albert J. Gould, Stephen H. Hart, Louise A. Hellerstein, Harry Alexius King, William R. Newcomb and Richard Tull.

Denver District Judges Assigned

Judge Joseph J. Walsh will be the presiding judge of the civil division of the Denver District Court in 1947. Judges Henry S. Lindsley and Joseph E. Cook are assigned to the criminal division at West Side Court. Judge Robert W. Steele, who has been sitting in the criminal division will return to Judge Lindsley's division of the civil division.