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means direct or obscure, will, in the final reckoning, lose that which it seeks to secure.

Rather than rest after establishing standards whereby to judge dissident minorities, let the reader use these concluding lines, written by Henry Thoreau, as a springboard into the deeper social issues exposed by the reaction of authority to the conduct of minorities:[93]

> If a man does not keep pace with his companions, perhaps it is because he hears a different drummer. Let him step to the music which he hears, however measured or far away.

THOMAS T. ROSS

FEATHERBEDDING AND THE TAFT-HARTLEY ACT: WHY THE INEFFECTIVENESS OF LAW FORCE?

Utterance of the word "featherbedding" is likely to raise blood pressures, increase heartbeats, and warp rationality with anger. The violent reaction to this word is easily explainable if featherbedding is in fact an inherently evil practice. Organized labor resents use of this emotionally charged concept because it effectuates a wholesale condemnation of work practices. The sound of featherbedding leaves distasteful thoughts of inefficiency, unnecessarily high wage costs, and shrinking profits ringing in the ears of management. Many who react adversely to the concept are often unaware of the specific work practices encompassed, or cognizant of specific work practices, but lacking knowledge of the motives underlying these practices. Before irrevocably concluding that featherbedding is an a priori evil, an examination of specific practices and an analysis of the social, economic, and psychological factors surrounding the behavior should be undertaken.[1]

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93. THOREAU, WALDEN ch. 18, 358-59 (1906).

1. LEITER, FEATHERBEDDING AND JOB SECURITY 34 (1964).

Although featherbedding cannot always be justified, the most persuasive reason for labor's use of the tactic is that it often cushions the adverse impacts of technological change and insures a certain degree of economic security. Unless an alternative method for providing economic security, which is also less costly in both an economic and social context, can be formulated, featherbedding should not be totally condemned. At the heart of the controversy surrounding featherbedding is section 8(b)(6) of the Taft-Hartley Act.[2] Whatever may have been the original intent of Congress in enacting this proscription of featherbedding, subsequent construction and application by the National Labor Relations Board and the federal courts have rendered the statute ineffective. The reasons underlying the failure of law force to curb featherbedding practices will be given special emphasis in the following analysis. Because state power to control industrial relations has largely been preempted by federal legislation,[3] state regulation of featherbedding will not be discussed. Various proposals for the elimination or mitigation of featherbedding practices will also be explored. Perhaps the following analysis will clear up an emotionally fogged area and aid the reader in understanding why law force has not been used effectively to curb featherbedding practices.

FEATHERBEDDING DEFINED

In a broad sense, featherbedding may be equated with resistance to technological change. This resistance assumes many forms and can only be adequately defined by listing specific practices. The different types of featherbedding include:

(1) requiring excessive numbers of workers to perform a given task,

(2) opposition to laborsaving machinery or other new production techniques,

(3) performing repetitive or unnecessary work operations,

(4) assigning unreasonably low production quotas to each worker, and

(5) all other attempts to restrict productivity.

Other examples of work-restrictive practices that fall within these five categories include a demand for a three-day work week, refusals to work on prefabricated materials, strict seniority plans governing promotions and pay increases, use of a union shop to control the

2. 61 Stat. 136 (1947); 29 U.S.C. §158(b)(6) (1964).

3. See Delony, *State Power To Regulate Labor-Management Relations*, SYMPOSIUM ON THE LMRDA of 1959, at 666 (Slovenko ed. 1961); Cox & Seidman, *Federalism and Labor Relations*, 64 HARV. L. REV. 211 (1950).

supply of competent personnel, and exclusive assignment of work to a single craft.[4] These latter examples cannot always be equated with the more common featherbedding practices. Perhaps a better definition of featherbedding is this: Work practices that not only restrict productivity, but also have no reasonable relationship to health, safety, or job security. If work restrictive practices are enforced to protect the worker's health or safety, the decreased productivity can be justified because of the more than offsetting savings in human costs. When the sole reason for imposing limitations on productivity is job security, justification must be assessed by balancing economic and social costs of decreased or static production against any adverse effects of technological displacement.

CAUSES OF FEATHERBEDDING

Work restrictions are often defended on the ground that the slow pace or extra production processes are necessary to insure a quality product.[5] More often than not, the preservation-of-quality argument is used to bolster labor's interest in economic security. In the first instance, management should determine the quality level that can be successfully marketed.[6] In the final analysis, the consumer will either accept or reject management-determined quality. Organized labor cannot claim to represent the public interest in regard to quality control because the purpose of a labor organization is not to safeguard the public interest, but rather to promote the economic security of its members.[7] Management is indirectly motivated to produce in accordance with public interest and will attempt to maintain production at the highest level consistent with a predetermined goal of quality.

Opposition to increased production levels is frequently justified on the ground that increased activity will endanger health and safety of the workers. This opposition may consist of decreasing actual time on the job or, while maintaining actual working time, decreasing the units of production or the number of machine operations supervised. The continuous exhaustion that gradually builds up day by day is a frequent and subtle threat to health and safety. Shortened hours, longer vacations, coffee breaks, and lunch periods are devices used

4. See Aaron, *Governmental Restraints on Featherbedding*, 5 STAN. L. REV. 680 (1953); Van de Water, *Influences of the Common Law on Make-Work Practices in Industry*, 6 LAB. L.J. 87 (1955).

5. *E.g.*, Austin v. Painters' Dist. Council, 339 Mich. 462, 64 N.W.2d 550 (1954).

6. See Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 223 (1964) (concurring opinion); Note, *The Scope of Collective Bargaining*, 74 YALE L.J. 1472, 1477 (1965).

7. *But see* Ross, *Labor Organizations and the Labor Movement in Advanced Industrial Society*, 50 VA. L. REV. 1359, 1366 (1964).

to protect health and safety and also to maintain a prolonged, rather than short term, rate of efficiency. None of these devices directly increases production, and all constitute paid time in which no work is performed. Nevertheless, it is generally recognized that a certain amount of time spent on the job should be devoted to rest periods because this will break the monotony of work, indirectly stimulate efficiency, and promote employee health and safety.

At times management may place an exceptionally efficient worker among other employees in an attempt to encourage the group to maintain the production pace of the most efficient worker. This tactic has been opposed on two grounds: (1) the speedup undermines the durability of a group that cannot maintain an increased pace without injury to health; and (2) this same device can be used to secure additional productivity without any corresponding wage increases.[8] Labor has often counterattacked the speedup by establishing maximum production quotas for each worker.[9]

Management has a vital interest in determining productivity rates, but labor may also have interests both in sharing gains accruing from increased productivity and promoting health and welfare. If protection against a speedup is not the reason for union-enforced production quotas, and no other economic interest of labor is involved, management should remain free to control the rate and methods of production.[10] However, when both management and labor have vital interests at stake, a joint determination of productivity rates should be made.[11]

A reduction of employees within a bargaining unit resulting from a decision to subcontract or automate is bound to weaken the union's position in future bargaining sessions. Assuming that there is strength in numbers, any change in production processes that may curtail employment will be opposed by labor representatives. Loss of employees within a bargaining unit will also mean a reduction in total union dues. Lacking adequate funds to provide its members with strike pay, a union may not be able to withstand a long work stoppage. The inability to engage in a prolonged strike minimizes union bargaining power.

The effects of technological change cannot be precisely measured, but certain general aspects can be approximately pinpointed. Most of the controversy surrounding the effects of technology and automation stems from a failure to examine both the short and long-run con-

8. LEITER, *op. cit. supra* note 1, at 24.

9. *E.g.*, Printz Leather Co., 94 N.L.R.B. 1312 (1951).

10. Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 223 (1964) (concurring opinion); see Note, note 6 *supra*.

11. *Ibid.*

sequences.[12] However, one economist has concluded: "Our choice does not rest between automation and full employment but between prompt automation with the possibility of moderate unemployment and delayed automation with the certainty of grave perennial unemployment, until our progress has caught up with that of our competitors."[13]

In the short run, technological change will probably cause some unemployment. Workers displaced by machines or other changes in the methods of production will be forced to find new jobs. If the technologically displaced worker's skills have become obsolete, he may remain chronically unemployed.[14] Even if the displaced worker can find another job, the position available may entail a decrease in wages and a total loss of seniority, pension funds, sick leave, and other fringe benefits. The favorable features of technological change in the short run include relief from arduous tasks and higher quality goods. Product prices probably will not be lowered by an innovating firm in the short run. No drop in prices can be expected because the industry adopting the technological change may occupy a quasi-monopolistic position until its competitors are able to adopt the new production technique.

In the long run, technological change will probably yield increased leisure time and lower priced goods. With an increase in leisure time and lower prices, demand in the services and entertainment industries may be stimulated.[15] Whether the benefits derived from technological change will outweigh any adverse effects to society depends upon the seriousness of the short-run problem of technological displacement. If technologically displaced workers become chronically unemployed, two further results are likely: (1) consumer demand will be decreased because a segment of the population has lost its purchasing power; and (2) the demand for new skills to meet changing production methods will outstrip the available supply of labor. Assuming that a significant number of workers do remain chronically unemployed, rapid changes in production techniques may result in recession, rather than expansion, of the economy. Even if the economic costs of technological displacement do not erase the benefits derived from the improved production techniques, the displaced workers might be saddled with a disproportionate share of the adverse effects.

12. Dankert, *Technological Change and Unemployment*, 10 LAB. L.J. 393 (1959).

13. EINZIG, THE ECONOMIC CONSEQUENCES OF AUTOMATION 85 (1957).

14. See BUCKINGHAM, AUTOMATION: ITS IMPACT ON BUSINESS AND PEOPLE 112, 127 (1961); Horowitz, *Automation and Full Employment: A Public Point of View*, 14 N.Y.U. CONF. LAB. 329, 332 (1961); Kahn, *Automation and Employment*, 10 LAB. L.J. 796, 801 (1959).

15. See Kahn, *Automation and Employment*, 10 LAB. L.J. 796 (1959).

The average worker is interested in maintaining employment, and any long-run economic arguments focusing attention on the ultimate gains to society from technological change cannot erase his fear of economic insecurity. If work restrictive practices were utilized solely for the sake of decreasing production, then these practices would warrant total condemnation. However, when the introduction of new production methods is opposed because of an actual threat to job security, wholesale condemnation is difficult to justify. In order to determine whether any restriction of output is reasonable, it will be necessary to ascertain the cost of the particular restriction to society and to balance that cost against the cost of technological displacement to both the workers affected and to society in general. Balancing involves one other question: Should the technologically displaced worker bear the total cost of unemployment?

SECTION 8 (B) (6) OF THE TAFT-HARTLEY ACT: A LEGISLATIVE EXERCISE IN FUTILITY

If restraining featherbedding is an object of law, the law has been a glaring failure. Perhaps this failure of legal restraints can be explained by a pair of conflicting values. Increased productivity is a highly prized goal of society. Economic security, however, is an equally prized goal of most citizens. When the reason for restricting production is to provide economic security, society is faced with an acute dilemma. Should the goal of economic security be sacrificed for the goal of increasing productivity; should static or decreased production be the price to pay for economic stability; or is it possible to pursue both goals? A literal reading of the laws directly aimed at featherbedding practices[16] should lead one to conclude that certain work restrictions cannot be tolerated, even if the price of restraint results in the infliction of economic hardships on a portion of the population. The interpretation and application of section 8 (b) (6) of the Taft-Hartley Act[17] and other legal restraints,[18] however, is indicative of futile efforts to prohibit featherbedding.

After World War II, the American public had just completed a long period of concentrating on defense production at the expense of consumer goods. When the war ended, defense production was curtailed and an expansion of both consumer goods and services became possible. A rash of strikes or other concerted production restrictions by labor organizations was a threat to any immediately ex-

16. *E.g.*, 60 Stat. 420, 18 U.S.C. §1951 (1951) (anti-racketeering act); 61 Stat. 136 (1947), 29 U.S.C. §158 (b) (6) (1964) (Taft-Hartley Act); 60 Stat. 89 (1946), 47 U.S.C. §506 (1962) (Lea Act).

17. 61 Stat. 136 (1947), 29 U.S.C. §158 (b) (6) (1964).

18. See statutes cited note 16 *supra*.

panding supply of consumer goods. Public opinion reflected an antagonistic view toward any labor activity that would restrict immediate consumption. Within this post-war context, provisions for curbing union power were enacted in the Taft-Hartley amendments[19] to the National Labor Relations Act.

The Senate conferees originally thought there was no pressing need for general legislation on the subject of featherbedding. The conference committee finally adopted the present version of section 8 (b) (6) because "the matter of exacting money for services not to be performed borders definitely on extortion" and an exaction of payment under such circumstances should be an unfair labor practice.[20] Section 8 (b) (6) is the only provision of the Taft-Hartley Act that purports to condemn featherbedding objectives. This anti-featherbedding law reads as follows:[21]

> It shall be an unfair labor practice for a labor organization or its agents to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed.

Although the exact scope of the section was never expressly delineated, one point of the Senate debate was clear. Call-in pay, rest periods, vacations, higher wages without a proportionate increase in work loads, sick leave, severance pay, pensions, and other generally recognized fringe benefits were not prohibited.[22] In exempting fringe benefits and rest periods, Congress placed special emphasis on the words "in the nature of an exaction." Fringes and rest periods are parts of the basic wage structure and not "exactions" even though no work is performed while the employee is being paid. Call-in pay is not an exaction because the employee subject to call is merely receiving consideration for time periods that cannot be called his own.[23]

Senator Taft felt that it would not be wise to give a board or court the power to determine whether an excessive number of employees, standbys, was in fact demanded.[24] Several additional statements made by Senator Taft, however, indicate that section 8 (b) (6) would prohibit a demand for unneeeded employees.[25] When the Con-

19. 61 Stat. 136 (1947), 29 U.S.C. §158 (1964).
20. 93 CONG. REC. 6601 (1947).
21. 61 Stat. 136 (1947), 29 U.S.C. §158 (b) (6) (1964).
22. 93 CONG. REC. 6603 (1947).
23. *Id.* at 7001.
24. *Id.* at 6598.
25. "It is intended to make it an unfair labor practice for a man to say 'You must have 10 musicians, and if you insist that there is room for only 6, you must pay for the other 4 anyway.' That is in the nature of an exaction from the

gressional debate on section 8 (b) (6) terminated, the question regarding what kinds of standby pay arrangements were prohibited remained unanswered with one possible exception. A standby arrangement whereby the employer was required to hire additional employees who neither proffered nor performed services was definitely prohibited by section 8 (b) (6).[26]

The final version of section 8 (b) (6) was a rejection of the broad prohibitions contained in the original House bill. Under the bill labor organizations or their agents would be guilty of an unfair labor practice if they required an employer: (1) to employ excessive numbers of workers; (2) to pay for more workers than are required to perform a given task; (3) to pay several times for one service; or (4) to pay for the privilege of using any machine or to impose any restrictions on its use.[27] In rejecting these broad prohibitions, Congress may have intended only to forbid demands for payment that amount to extortion. On the other hand, one might logically argue that payments demanded for useless or unwanted services were banned. Nothing in the final Congressional debate indicated that restrictions on the introduction of new production techniques were prohibited. In repudiating an all-inclusive ban of featherbedding, Congress apparently was cognizant of the fact that almost every featherbedding practice has some relationship either to working conditions or job security. If an employer desires four men to do a job, this may be the least expensive method of operation; however, an unreasonable production load may be imposed upon the workers involved. Hiring an additional man might result in better working conditions without unduly burdening the employer with wage costs. Management may wish to use new equipment in the production process; a labor organization may attempt to impose restrictions on the introduction of technological change in order to protect the job security of its members. In these examples, labor's productivity restrictions should not be totally condemned without analysis of *both* labor and management's economic interests. The difficulty lies in assigning relative values to the conflicting interests of labor and management. This difficult task is a major factor underlying every administrative and judicial interpretation of section 8 (b) (6).

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employer for services which he does not want, does not need, and is not even willing to accept." *Id.* at 6603. In further debate Taft pointed out that "The use of the words 'in the nature of an exaction' makes it clear that what is prohibited is extortion by labor organizations in lieu of providing services which an employer does not want." *Id.* at 7001-02.

26. See 93 CONG. REC. 6598, 7002, 7683 (1947).

27. H.R. 3020, 80th Cong., 1st Sess. (1947).

Administrative and Judicial Interpretation

Very few cases have arisen in which a section 8 (b) (6) violation has been alleged. A broad interpretation of 8 (b) (6) could have been used to carve out and prohibit large areas of collective bargaining demands; however, the law has been construed very narrowly, and no unfair labor practices under this statute have been sustained. The National Labor Relations Board has held that a strike to compel an employer to rehire discharged workers is not a section 8 (b) (6) violation.[28] The Board reasoned that a strike to secure reinstatement of discharged employees is not an attempt to secure an exaction for work not performed or not to be performed. The effect of the Board's decision is an implicit recognition of a union's interest in protecting the existing employment of its members.

Enforcement of Contract Rights; Bargaining Proposals. Several cases involving strikes to enforce contract rights have generated charges of section 8 (b) (6) violations. A local Teamsters union and trucking concern entered into a contract that obligated the employer to hire a union man whenever a job opening was available.[29] A temporary job did become available, but the employer hired a nonunion man. The union struck and demanded an amount equal to the wages earned by the nonunion employee for the benefit of an unemployed member who would have secured employment but for the employer's contract violation. The employer claimed that this was an attempt to exact wages for services that were not performed. The NLRB held that the union's demands were not prohibited by section 8 (b) (6).[30] The Board reasoned that the union was merely attempting to enforce a valid claim for damages resulting from the the employer's contract breach, and that this could not be considered an exaction. In another case involving a breach of contract,[31] the union called a strike when the employer reduced travel expenses from five dollars a day to three dollars for employees who were working on a construction project twenty-five miles from home base. Once again the employer claimed this was an attempt to secure an exaction for services not performed. The Board's general counsel held that the strike was called over a dispute concerning the amount employees should be paid for their services and not a strike to exact pay for

28. Kallaher & Mee, Inc., 87 N.L.R.B. 410 (1949).

29. 61 Stat. 136 (1947), 29 U.S.C.§158 (a) (3) banned the closed shop but was not applied retroactively.

30. International Bhd. of Teamsters, Local 294 (Conway's Express), 87 N.L.R.B. 972 (1949), *enforced*, 195 F.2d 906 (2d Cir. 1952).

31. Administrative Decision of NLRB Gen. Counsel, Case No. F-276, CCH LAB. L. REP. ¶55236 (1958).

services not performed.[32] Payments for room, board, and travel are facets of the basic wage structure, which is the bargained-for equivalent in an exchange for services performed.[33] Concerted activity to secure a higher basic wage structure has long been recognized as a fundamental right of organized labor.[34]

Various other bargaining tactics and demands remain outside the scope of section 8 (b) (6). An offer to drop a libel suit against the employer is a legal bargaining inducement and is not an exaction for services not performed or to be performed.[35] Organized labor's demands for the establishment of an employer-financed welfare fund are not prohibited by section 8 (b) (6).[36] The successor of a bankrupt company may be requested by the union bargaining representative to pay any wages owed by the bankrupt for services performed.[37]

Standby Pay. The application of section 8 (b) (6) to standby pay arrangements has created a major controversy. Different meanings may be attributed to the concept of a standby worker. An employee who receives wages for doing no work at all is probably the most flagrant example of the standby. At the other extreme is a worker who spends about five or ten per cent of his job time performing tasks that yield little or no economic benefit to his employer. An example of this latter concept of standby pay is the makework practice known as "bogus" typesetting in the publishing industry. Essentially, "bogus" typesetting is the procedure whereby local advertisements are reset from an original printing by a cast plate. "Bogus" is duplication of work that has already been performed; the recopied advertisement is never intended for actual use. Newspaper publishers claim the practice is both costly and wasteful. The International Typographical Union defends "bogus" on the ground that it stabilizes employment by creating work during slack periods and prevents employers from establishing joint composing rooms to set advertisements, which would mean job losses for many printers. The publishers attempted to eliminate this makework tactic in collective bargaining sessions, but were always confronted with an increased

32. *Ibid.*

33. Administrative Decision of NLRB Gen. Counsel, Case No. 224, CCH LAB. L. REP. ¶11,361 (1952).

34. 61 Stat. 140 (1947), 29 U.S.C. §157 (1964); 49 Stat. 452 (1935), 29 U.S.C. §159 (a) (1964).

35. Administrative Decision of NLRB Gen. Counsel, Case No. SR-2100, CCH LAB. L. REP. ¶11583 (1962).

36. Administrative Decision of NLRB Gen. Counsel, Case No. K-337, CCH LAB. L. REP. ¶53711 (1956).

37. Administrative Decision of NLRB Gen. Counsel, Case No. SR-1683, 1961 CCH NLRB ¶10801.

wage demand as the price to pay for a contractual prohibition of "bogus."[38]

Less than two years after the enactment of section 8 (b) (6) of the Taft-Hartley Act, several members of the American Publishers Association filed unfair labor practice charges with the NLRB against the International Typographical Union. One of the charges filed was an alleged featherbedding violation by the union in its demand for continuation of bogus typesetting. The Board held that this reproduction practice demand was not an 8 (b) (6) violation.[39] The fact that the reproduction practice encompassed only five per cent of the employees' total work time was emphasized by the Board in finding that "it does not follow that such payment constitutes an 'exaction' . . . it would not be 'in the nature of an exaction' to compel employers to give employees paid rest or vacation periods."[40] Even though the "bogus" practice was not a service to the employer, payments for this nonproductive time were considered an integral part of the employees' basic wage structure. The Board analogized this type of payment to a "guaranteed weekly or annual wage arrangement, which is generally recognized as a legal demand, although it may and often does in any given factual situation, involve payment for nonproductive time."[41] On appeal the Board's order was affirmed by the Court of Appeals for the Seventh Circuit on the grounds that a demand for "bogus" typesetting was merely incidental to actual services performed for the employer's benefit.[42]

In *American Newspaper Publishers Ass'n v. NLRB*, [43] the United States Supreme Court affirmed the Seventh Circuit, reasoning that "Section 8 (b) (6) leaves to collective bargaining the determination of what, if any, including bona fide 'made work,' shall be included as compensable services and what rate of compensation shall be paid for it."[44] Payments for work that is relatively useless to the employer are not prohibited. Justices Clark and Douglas dissented on the grounds that work that was entirely useless and unwanted was not a "service" within the meaning of section 8 (b) (6).[45]

The majority of the Supreme Court in the *American Newspaper Publishers* case felt that disputes involving the value of work per-

38. See Aaron, *Governmental Restraints on Featherbedding*, 5 STAN. L. REV., 680, 705 (1953).

39. International Typographical Union (American Newspaper Publishers Ass'n), 86 N.L.R.B. 951 (1949).

40. *Id.* at 959.

41. *Id.* at 961.

42. American Newspaper Publishers Ass'n v. NLRB, 193 F.2d 782 (7th Cir. 1951).

43. 345 U.S. 100 (1953).

44. *Id.* at 111.

45. 345 U.S. 100, 111, 112 (1953) (dissenting opinion).

formed, including makework that yielded no benefit to the employer, should be resolved in the collective bargaining process.[46] The fact that the nonproductive practice constituted only a small portion of total work time may have been the controlling consideration in the Court's position. Under different circumstances where, for example, a union demands repetitious work tasks that would consume fifty per cent of the employees' total work time, a different result might be reached. As the percentage of nonproductive time on the job increases, the analogy drawn to payments made for rest periods and vacations becomes dubious. If, however, payments for a substantial proportion of nonproductive time are equated with a guaranteed weekly or annual wage arrangement, no violation of section 8 (b) (6) would be found.[47]

If a demand for supplemental unemployment benefits is legal, then, in an economic sense, payment for nonproductive work is only distinguishable where the nonproductive employee could be used at another job in a productive capacity. In order for a board or court to make a fair determination of the economic interests involved when demands for nonproductive work are made, not only must the cost of the work in wages be ascertained, but also values and costs must be assigned to employee job security and the effects of misallocated resources upon our economy. Estimates that featherbedding practices in all industries cost approximately one billion dollars annually[48] should be carefully scrutinized. Management can easily determine the amount of wages paid or production time lost because of featherbedding practices, and from an entrepreneurial standpoint this is a logical method of assessing makework costs. These cost estimates do not, however, reflect labor's interest in working conditions and job security nor society's interest in maximum utilization of resources. If both wage payments for featherbedding and the cost, if any, to society of misallocated resources exceed the worth of working conditions and job security, featherbedding would not be justified. With such complex value determinations at stake, it is doubtful that agreement could be reached even by a computerized labor board or court. The Supreme Court's interpretation of section 8 (b) (6) permits employers and employees jointly to place a value on makework and avoids the necessity of using law force solely to protect the economic interests of employers.

46. 345 U.S. 100, 111.

47. International Typographical Union (American Newspaper Publishers Ass'n), 86 N.L.R.B. 951, at 961 (1949).

48. Time, Aug. 3, 1959, p. 70. The cost of setting "bogus" for the New York Times has been estimated at $150,000 a year. International Typographical Union (American Newspaper Publishers Ass'n), 86 N.L.R.B. 951, at 1027 n.79 (1949).

Before the enactment of the Taft-Hartley Act, the American Federation of Musicians adopted a rule whereby no traveling band would be allowed to perform unless a local band was also hired for the same engagement.[49] Many theatrical employers were coerced into paying for two bands, even though only one, the traveling band, actually performed services. The local band was usually paid whether they appeared and offered to perform or no appearance was made at all. Employers vehemently protested this tactic and charged the local unions with economic blackmail. Local musicians defended their standby arrangement on the ground that they were merely trying to secure employment, and in order to obtain this objective, some limitation on out-of-town competition had to be imposed.

After section 8 (b) (6) of the Taft-Hartley Act became effective, the American Federation of Musicians continued to enforce the standby payment rule. The local unions did, however, change one tactic in enforcing their work rules. Local bands offered to play at the performance for which the out-of-town band was engaged. The services offered by the local band consisted of playing overtures and chasers at both the intermission and conclusion of the main performance. Confronted with these bargaining tactics, a local theater manager filed unfair labor practices with the NLRB.[50] The theater manager believed that a proffer of services, which he did not need, was an attempt to secure an exaction prohibited by the Act. The Board found that the musicians' bargaining tactics were not prohibited by section 8 (b) (6), reasoning that the statute did not prevent a union from seeking actual employment for its members even when "the employer does not want, does not need, and is not willing to accept such services."[51] The majority of the Board implicitly recognized that a union device to promote job security is justified regardless whether it is used to *secure* or to *maintain* employment. Board Member Reynolds dissented on the ground that attempts to secure payment for unwanted or unneeded work were protected only when the "service" was performed by a regular employee as an incident to his ordinary work tasks.[52] The dissenting board member felt that section 8 (b) (6) applied because the work proffered did not protect the job security of those presently enjoying employee status.

On appeal from the Board's order dismissing the theater manager's complaint, the Sixth Circuit Court of Appeals held that the Board's decision was erroneous.[53] The circuit court based its de-

49. Aaron, *op. cit. supra* note 38, at 706, 707.

50. American Fed'n of Musicians (Gamble Enterprises), 92 N.L.R.B. 1528 (1951).

51. *Id.* at 1533.

52. *Id.* at 1536.

53. Gamble Enterprises, Inc. v. NLRB, 196 F2d 61 (6th Cir. 1952).

cision on a statement made by Senator Taft during the Congressional debate preceding the enactment of section 8 (b) (6). The statement relied upon was: "It is intended to make it an unfair labor practice for a man to say, 'You must have ten musicians, and if you insist that there is room for only 6, you must pay for the other 4 anyway.' That is in the nature of an exaction . . . ."[54] This isolated comment by Senator Taft indicates that the demands of the local musicians were prohibited. Taft made several other comments, however, that were inconsistent with the explanatory statement relied upon by the court. At one point in the Congressional debate, Senator Taft said that the only type of featherbedding prohibited was a demand to secure payment for employees who do no work at all.[55] Taft also stressed the practical difficulties that would be encountered if a board or court were empowered to determine how many men were needed to perform a service for the employer.[56] Senator Ball stated that payments demanded in a case where *no* work is either proffered or performed would clearly be prohibited.[57] The legislative history does not reveal any clear intent to prohibit demands for work that is valueless from an employer's standpoint.

The validity of the musicians' standby rule was finally settled by the United States Supreme Court in *Gamble Enterprises, Inc. v. NLRB*.[58] The Supreme Court reversed the Sixth Circuit's decision and upheld the Board's ruling that the union had not violated section 8 (b) (6). The Court reasoned that where bona fide services were proffered in good faith, no violation would be found. In such a case, the employer would be free either to accept or reject the union's offer of additional employment.[59] Mr. Justice Burton qualified the Court's holding by stressing that, under the statute, form could not be equated with substance.[60] He noted that the local musicians had proffered valuable services; it may be assumed that if the union had demanded payment for doing nothing, a section 8 (b) (6) violation would have been found. The disturbing thing about the Court's opinion is that the majority found *valuable* services had been proffered. The theater manager would certainly doubt that the "services" were in fact valuable. The majority apparently is not concerned whether "service" is to be defined as something that yields economic value to the employer or whether it is defined as any work offered for securing valuable employment from the laborer's point of view.

54. 93 CONG. REC. 6603 (1947).
55. *Id.* at 6598.
56. *Ibid.*
57. *Id.* at 7683.
58. 345 U.S. 117 (1953), *reversing* 196 F.2d 61 (6th Cir. 1952).
59. 345 U.S. 117, 123-24 (1953).
60. *Ibid.*

Mr. Justice Jackson's dissenting opinion was based on the theory that the musician's union was trying to secure unlawful standby payments by merely making an offer of token services.[61] The dissent has merit only if the law were designed to leave employers free to promote their economic interests while prohibiting employees from pursuing their economic goals, which happen to conflict with the interests of the employer in most cases. Even assuming that Congress did intend to curb union power to promote job security in 1947, that does not necessarily mean the legislative intent was a wise policy. The majority of the Court recognized that an attempt to assess and balance the economic interests of labor, management, and society would be a futile exercise in speculation. Where conflicting goals are involved, the majority sanctions the collective bargaining procedure, which will enable the parties to settle their own dispute, unhampered by law force.

The effect of the Supreme Court's decision in *Gamble* remains unclear. Demands for standbys who receive pay for doing nothing at all would certainly be prohibited by section 8 (b) (6). How much bona fide work a standby would have to offer to avoid a featherbedding violation is uncertain. For example, assume that a manufacturer uses twenty-five employees as quality control inspectors and the union demands an additional twenty-five inspectors. In fact, there is only room on the inspection line for twenty-five employees. If more inspectors are hired, they will not be able to perform any service except in an emergency situation where one of the regular inspectors becomes ill or for some other reason cannot perform his usual duties. If the test for an 8 (b) (6) violation is merely whether any service is offered, regardless of its value to the employer, then no unfair labor practice would be found. On the other hand, if the test is whether a bona fide service is proffered, then the union's demand might be within section 8 (b) (6).

Several opinions by the NLRB's general counsel indicate that section 8 (b) (6) would not prohibit demands for pay where token services are performed. A movie projectionists' union did not violate the Act by requiring use of two persons in projection booths even though one employee could easily perform the tasks of running pictures.[62] The application of the statute to standby pay demands was vividly illustrated when the Board's general counsel made the following observations:[63]

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61. 345 U.S. 117, 124 (1953) (dissenting opinion).

62. Administrative Decision of NLRB Gen. Counsel, Case No. F-1089, CCH LAB. L. REP. ¶56,406 (1959).

63. Opinion of NLRB General Counsel, NLRB. Release R-4, Sept. 23, 1947, 3 CCH LAB. L. REP. ¶4920.10 (1965).

> The gist of this section is that the payment is made for services "which are not performed or not to be performed." Thus when the Teamsters halted trucks at the mouth of the Holland Tunnel and required the driver to put a member of the Teamsters Union on the seat in order to qualify to deliver the load in New York City, and to pay him a full day's wages for taking the ride, I don't doubt that the owner of the truck called it "featherbedding," but I have great doubt that it could ever be brought within the terms of this section of the statute. On the other hand if the driver accepted the option which often was tendered him of paying money but waiving the privilege of having his "helper" ride with him, we have a situation where there were no services performed or to be performed.

Resistance to Technological Change. Striking or bargaining to resist technological change can definitely limit the productive capacity of our economy. On the other hand, this same resistance can guarantee a form of economic stability for the worker. A permanent resistance to all forms of technological innovation would soon result in a stagnant or declining economy. Resistance to laborsaving devices and techniques on a permanent basis cannot be justified because the cost of resistance in terms of lost production exceeds the economic interest of the workers involved in job security. In order to reconcile the competing interests of productivity gains and economic security, the best solution may be to control the rate of technological change.[64] In 1897 a federal court held that a strike to prevent the introduction of laborsaving devices was illegal and could be enjoined.[65] As the values of our society have changed, the right of labor to concertedly resist technological changes entailing job losses has been recognized by the courts.[66]

A firm that is permanently restricted from changing its methods of production may soon find that it cannot effectively compete and as a result will have to terminate operations. Recognizing the futility of imposing permanent restrictions on the use of laborsaving devices, many unions have utilized other techniques that would allow changes in production methods and also provide job security for the employees involved. One of these techniques is the establishment of an

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64. See Kahn, *Automation and Employment*, 10 LAB. L.J. 796 (1959); Van de Water, *Industrial Productivity and the Law: A Study of Work Restrictions*, 43 VA. L. REV. 155, 186 (1957).

65. Hopkins v. Oxley Stave Co., 83 Fed. 912 (8th Cir. 1897).

66. Order of R.R. Telegraphers v. Chicago & N.W. Ry., 362 U.S. 330 (1960); United States v. Carrozzo, 37 F. Supp. 191 (N.D. Ill. 1941).

automation fund.[67] The principal features of an automation fund are that management is permitted to introduce laborsaving machinery in exchange for using the benefits derived from increased productivity to provide different types of economic security for employees. Savings in production costs are placed in the fund, which is used to provide supplemental unemployment benefits, retraining expenses, and severance pay.[68] It is doubtful that the NLRB or the courts would find that a demand for an automation fund was a violation of section 8 (b) (6). The price management may have to pay in order to effect a change in working conditions and productivity is labor's demand for an automation fund, which will provide a form of security against technological displacement. The price demanded is not an exaction, but merely a *quid pro quo* in the bargaining process.[69] Employers may overcome or avoid union attempts to restrict productivity by obtaining a management functions clause in the collective bargaining agreement.[70] To insure that the employer may unilaterally make changes in the production processes, the clause should spell out specific functions.[71] Absent a management functions clause, an employer may make unilateral changes in the methods of plant operation only when such changes would have no appreciable impact on present working conditions and no concerted demand for joint determination of the issues surrounding the desired plant changes is made.[72]

Another common example of work practices that restrict output is a union-enforced production quota rule. Bricklayers may enforce a rule that only 1,000 bricks may be laid per eight-hour working day. Roofers and carpenters have commonly limited the number of shingles that may be installed per day. Painters will often limit their production to fixed square feet of surface area per day, limit the size of brushes that may be used, or prohibit the use of rollers. In the first instance, management has the recognized right to set production quotas. A union may demand, however, that the production loads be reduced when issues of health, safety, or job security are at stake. Health, safety, and job security are mandatory subjects of bargaining and must be resolved jointly by labor and management.[73]

67. See KENNEDY, AUTOMATION FUNDS AND DISPLACED WORKERS 207 (1962).

68. *Ibid.*

69. GOLDBLATT, MEN AND MACHINES 40 (1963).

70. See Shell Oil Co., 149 N.L.R.B. 283 (1964); Kennecott Copper Corp., 148 N.L.R.B. 1653 (1964).

71. See United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960) (decision to subcontract).

72. *Accord*, Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964); NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952); Fafnir Bearing Co., 151 N.L.R.B. No. 40, 58 L.R.R.M. 1397 (1965).

73. See cases cited note 72 *supra*; Renton News Record, 136 N.L.R.B. 1294

Ineffective Regulation is Evident. A review of the administrative and judicial interpretations of section 8(b)(6) conclusively demonstrates that the law has not been used to prohibit any of the most commonly criticized featherbedding practices. Employers will continue to condemn featherbedding; labor organizations will continue to use the device to promote job security, safety, and health; and legal scholars and economists will remain divided in their opinions.[74] As the trend toward automation and other rapid advances in technology accelerates, the debate over featherbedding will intensify. Our economy is already experiencing a shift in the proportionate makeup of the labor force. The percentage of factory workers is declining, and the percentage of white-collar office workers is on the rise.[75] Automation may pose a threat to the job security of many office employees; if this segment of the labor force becomes organized, resistance to technological change in the form of featherbedding will magnify the current dispute in industrial relations.[76] In order to eliminate wasteful featherbedding practices, both legislation and bargaining techniques must be revised.

PROPOSALS

The significance of a claim that technological change poses a threat to job security cannot be comprehended unless all the ramifications of the statement are explored. If a worker becomes displaced, he not only loses a chance to earn a livelihood, but may also lose other valuable fringe benefits, such as pension funds, seniority rights, health and accident insurance, sick leave, and paid vacations. The plight of the technologically displaced worker is intensified if he is unable to find new employment. Even if other jobs are available, the displaced worker may lack the necessary skills demanded or the funds required to relocate his family. In balancing society's interests in job security and maximum utilization of resources, permanent resistance to technological change will have to be curbed. Permanent resistance not only protects the job security of those presently enjoying employee status but also creates more artificial employment for prospective employees. One who presently has no job cannot validly be brought within the bargainable issue of job security.

(1962); Note, *Mandatory Subjects of Bargaining—Operational Changes*, 17 U. FLA. L. REV. 109, 119 (1964).

74. *Compare* EINZIG, THE ECONOMIC CONSEQUENCES OF AUTOMATION (1957), *with* Berg & Kuhn, *The Assumptions of Featherbedding*, 13 LAB. L.J. 277 (1962) *and* Dankert, *Technological Change and Unemployment*, 10 LAB. L.J. 393 (1959).

75. Kahn, *Automation and Employment*, 10 LAB. L.J. 796 (1959); Ross, *Labor Organizations and the Labor Movement in Advanced Industrial Society*, 50 VA. L. REV. 1359 (1964).

76. See EINZIG, THE ECONOMIC CONSEQUENCES OF AUTOMATION 205 (1957).

Redrafting Section 8 (b) (6)

Section 8 (b) (6) should be amended to read as follows:

> It shall be an unfair labor practice for a labor organization or its agents to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services that are not performed or not to be performed.
>
> (A) Services shall not be construed to encompass: (1) useless and unwanted work tasks; nor (2) any other work that is substantially nonproductive. *Provided* that nothing in this section shall apply to any union demand that is directly related to promoting the health, safety, or job security of a person who presently enjoys employee status, or any provision of an existing collective bargaining agreement.

The revised definition of "services" in the proposed draft will eliminate some useless or unwanted work demands, which formerly had the effect of creating artificial employment. The productive contributions of the unemployed and the artificially employed are both zero. "But this disguised unemployment actually has a worse effect on economic growth than normal unemployment since it is a rigid and continual [*sic*] state."[77] The proviso of the new draft will exempt any union demands that might protect the health, safety, or job security of members in the bargaining unit. Any possibility of retroactive application, or restraints on freedom of contract when both labor and management consent to a proposal, is negated by the proviso. The proposed redraft of section 8 (b) (6) will not eliminate all featherbedding practices, but will prohibit wasteful practices that do not directly affect the economic security of a *present* employee.

Providing Alternatives to Featherbedding Within the Framework of Collective Bargaining

If fear of economic insecurity is the major cause of featherbedding, makework practices can be eliminated only by reducing or destroying this fear. Increasing labor mobility will be a step in the right direction. This could be accomplished in a collective bargaining agreement by including: (1) transferable seniority rights; (2) vested interests in pension funds; (3) retraining expenses or a company sponsored retraining program for those who lack the required skills to man

77. Note, *Drafting Problems and the Regulation of Featherbedding—An Imagined Dilemma*, 73 YALE L.J. 812, 848 (1964).

new equipment; (4) severance pay; (5) supplemental unemployment benefits; (6) moving expenses; and (7) aid in job placement. In order to finance these proposals, an automation fund in which labor would be given a share of productivity gains could be established.

Providing the financial ability to seek new employment and relocate is not a cure-all. Psychological factors cannot be erased with dollars. In order to eliminate labor's fear of technological changes, other collective bargaining proposals may have to be adopted. The intangible values of a permanent joint labor-management committee to study and resolve any problems arising in connection with changes in technology should not be underestimated.[78] Advance notice of any changes in the methods of production should also be given to the bargaining representative.[79]

Once the financial and psychological problems stemming from changes in technology have been overcome, management should be given free reign to revise production methods. This might be accomplished by trading makework rules for a management functions clause coupled with adequate protection of job security. Society would benefit from a compromise between unbridled discretion to increase productivity and promotion of job security.

One important disadvantage of collective bargaining is that it may often result in shouldering management with burdensome costs. Management benefits from technological change, but society also benefits. The cost of the benefits derived cannot justifiably be borne solely by the industry that initiates the innovations.[80] Retraining programs and job placement functions may not be financially feasible for many small industries; society, represented by government, should bear a portion of this expense.

Governmental Assistance

In assessing the value of any government-sponsored program, it is essential to ascertain the costs of the program in terms of both dollars and possible losses of freedom. The administrative costs of governmental programs have been notoriously high in the past and are not likely to decrease in the foreseeable future. If retraining, unemployment benefits, and social security are adopted as exclusive remedies for providing economic security for the technologically displaced

78. See LEITER, FEATHERBEDDING AND JOB SECURITY 180-90 (1964); WALKER, TOWARD THE AUTOMATIC FACTORY 214 (1957).

79. *Ibid.*

80. Horowitz, *Automation and Full Employment: A Public Point of View*, 14 N.Y.U. CONF. LAB. 329 (1961). *But see* Coburn, *A Union View of Automation*, 14 N.Y.U. CONF. LAB. 313 (1961).

worker, both management and labor have lost a portion of their freedom to bargain collectively. When the parties responsible for the resolution of featherbedding and productivity disputes do not come up with a workable solution, government-imposed solutions are highly probable.[81]

The costs of education have traditionally been a government responsibility, and many existing facilities could be converted into job placement and training centers without too much expense. Retraining and job placement functions should, therefore, be performed by government agencies. Other programs designed to accommodate productivity gains to job security should be established by private negotiation.

CONCLUSION

Featherbedding is a term that connotes reprehensible conduct. If all attempts by organized labor to enforce work restrictive rules are called featherbedding, an unjust condemnation is effected. Most of the controversy surrounding featherbedding practices stems from a failure to recognize the major causes of makework tactics. A realization that featherbedding is not used for the sole objectives of restricting productivity and making life easy for the laboring class should result in a reevaluation of previous notions about featherbedding tactics.

Law force has been ineffective in controlling featherbedding practices because a literal interpretation of section 8 (b) (6) of the Taft-Hartley Act cannot be reconciled with society's present values. An expanding economy, which entails higher quality goods and increased leisure time, is a major goal of society. Job security, which often includes seniority plans, pensions, paid vacations, sick leave, and accident and health insurance, is also a highly prized value. If law force were applied to prohibit *all* featherbedding, a means to promote job security, health, and safety would be eliminated. The proposed redraft of section 8 (b) (6) will, hopefully, strike a proper balance between the conflicting policies of maximum utilization of resources and economic stability.

Abolishing the most evil of featherbedding practices through legislation is not a complete answer to the problem. Alternatives to featherbedding must be established within the framework of collective

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81. See, *e.g.*, 77 Stat. 132 (1963), 45 U.S.C.A. §157 (Supp. 1966) (compulsory arbitration statute governing railroad featherbedding); Morgan, *The Adequacy of Collective Bargaining in Resolving the Problem of Job Security and Technological Change*, 16 LAB. L.J. 87 (1965).

bargaining. Governmental assistance in the fields of retraining and job placement will also be necessary for an adequate solution.

One noted author has aptly described the changing character of collective bargaining in the following words:[82]

> Problems which confront labor and management are often easy to see. . . . [T]he difficulty is that solutions often require such a delicate balancing of conflicting interests — and interests within interests — that even a computer would have difficulty handling all the variables.

Reconciling management's interest in operational efficiency and labor's interests in job security will necessitate a delicate balancing process. Different industries, confronted with different problems, will adopt different solutions. A brief outline of collective bargaining proposals has been set forth with the hope that labor and management will strike a proper balance between their competing interests and that this balance will effectively promote the interests of society.

ALLAN P. CLARK

82. Fleming, *New Challenges for Collective Bargaining*, 1964 WIS. L. REV. 426, 433.