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Labor Law Revision: Some Preliminary Observations

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SESSION THREE

LABOR LAW REVISION: SOME PRELIMINARY OBSERVATIONS*

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COLLECTIVE BARGAINING has arrived. I was fairly sure of it a couple of years ago when I saw John Dunlop's now famous grouping of collective bargaining with such other successful and distinctive American institutions as the family farm, our system of higher education, and our constitutional government of checks and balances.[1] But I knew positively that collective bargaining had really arrived—and that it was here to stay—when it was adopted by that most "American" of all institutions, organized baseball. Just nine days before the opening of this year's exhibition season, the Major League Baseball Players' Association, an unaffiliated labor union, concluded around-the-clock negotiations with the club owners and reached a settlement on pensions and other benefits, thus averting a general strike.[2] That truly would have been a national emergency! Imagine a prolonged strike of big league ball players and its effect on the American way of life. The 1966 machinists' strike of five major airlines pales by comparison.

The baseball players were only following a path that had been marked for them by their colleagues in professional football. It had become a common path, now well traveled by school teachers, engineers, garbage collectors, bank employees and even policemen, to mention just a few of the newcomers to the ranks of organized labor. Collective bargaining has never been so popular, notwithstanding the public's impatience with strikes—dock strikes, airline strikes, teachers' strikes, and all the rest. The institution of collective bargaining, which developed many decades ago on the railroads, now determines wages and conditions of employment for millions of workers in almost every type of occupation and in every industry, public[3] as well as private.

Generally, the institution works, and works well. But occasionally it fal-

* These remarks represent Professor Morris' preliminary comments, which are especially pertinent to the topic discussed at the symposium. The remainder of his article, containing a detailed analysis of proposed procedural reform in labor law, applicable to both the Labor-Management Relations Act and the Railway Labor Act, will appear as a leading article in the next issue of the *Journal*. *See* Editor's Note, p. 436 *infra*.

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[1] Raskin and Dunlop, *Two Views of Collective Bargaining* in CHALLENGES TO COLLECTIVE BARGAINING 172 (ed. L. Ulman 1967).

[2] N. Y. Times, Feb. 26, 1969, at 50, col. 1.

[3] *See* Morris, *Public Policy and the Law Relating to Collective Bargaining in the Public Service*, 22 Sw. L. J. 585 (1968).

ters, and sometimes it breaks down entirely, with consequent damage to the public welfare and the nation's economy. Usually, this damage is only temporary, and a strike-bound industry of one year becomes a booming industry of the next. This is not to minimize the impact of strikes on the non-participating public, the market position or the inflationary spiral, for a finely tuned economy cannot help but suffer from unnecessary or prolonged work stoppages. But it would be folly to assume, at this point in time, that legislation can be devised to make the American economy absolutely strike-proof. Aside from the fact that such laws would have to provide for rigid governmental controls and probably police-state enforcement, it is questionable whether, in the long run, we would want an economy wholly devoid of strikes even if it were attainable. The collective action of a strike, either potential or in being, might be so vital to the collective bargaining process, and so compatible with the constitutional guarantees of free speech and assembly that the strike as an institution should perhaps be considered inextricably woven into the fabric of the American economy.[4] Nevertheless, efforts can and should be made to reduce the incidence of strikes, especially where vital public services are affected.

Perhaps the day will come when a total substitute for the strike can be found. For such a substitute to be suitable, at least according to existing values in our economic society, it must preserve the bilateral participation which is characteristic of present day collective bargaining. It should also provide a method for adjusting wages and conditions appropriate to the unique requirements of particular groups of employees and employers. Moreover, it should achieve this without damaging the public interest and without seriously interfering with the relative freedom which still distinguishes this country's system of economic enterprise. Not one of the current legislative proposals, nor any other plan of which I am aware, meets all of these conditions.[5]

Rather than tilt at windmills in an effort to devise a substitute for strikes, I shall concentrate instead upon another broad set of problems: The procedural inadequacies in the existing federal regulation of labor-management relations. Though mindful of the air transport emphasis featured in this symposium, I shall deliberately resist the temptation to treat airline labor relations as sui generis. Airline labor problems will, of course, be included in this paper, but problems in this single industry can neither be viewed nor solved in isolation. I share that opinion which holds that a substantial factor common to many of the trouble spots in airline labor relations is the procedural insufficiency of the Railway Labor Act. However, I do not recommend repealing that Act nor removing the airlines from its coverage. Rather, I recommend the development of a new procedural approach to enforcement of the substantive provisions of the Act,

[4] *Id.* at 591.

[5] *E.g., Holland—S. 140*, 91st Cong., 1st Sess. (1969); *Griffin—E. 103*, 91st Cong., 1st Sess. (1969); *Javits-Kuchel—S. 1456*, 90th Cong., 1st Sess. (1967); *Smathers—S. 176*, 90th Cong., 1st Sess. (1967); *Pickle—H.R. 5683*, 90th Cong., 1st Sess. (1967).

but only as one part of a general revision in the administration and enforcement of all of the basic federal labor statutes.

Before discussing such a far-reaching proposal, I want to comment briefly on another area which I agree is also in need of legislative revision —the matter of handling so-called "emergency disputes." I know that some of my symposium colleagues will give this important subject a higher priority, but time and my own choice of a primary topic will limit my remarks on this subject.

I acknowledge that there is a need for more flexible statutory machinery to aid in the settlement of emergency disputes. Ben Aaron has accurately observed that "[c]oncocting panaceas for emergency disputes is a popular indoor sport in this country, and . . . one does not have to be an expert to play."[6] I shall be neither an expert nor a player, for I am not ready to add any new devices to the arsenal of weapons already proposed by numerous commentators. I personally favor the arsenal-of-weapons approach, but there are some things I would not include in the President's arsenal, specifically: Compulsory arbitration, seizure or the non-stoppage strike.[7] These devices are not compatible with traditional concepts of collective bargaining, and I am not prepared to suggest abandonment of the basic element of collective bargaining in either the airline industry or in any other industry. Of course, there may be some strikes where hardship on the public would be so great that settlement must be imposed by outside intervention rather than by allowing economic combat to run its normal course. But such disputes are not common, and when they do occur it may be less damaging to our economic institutions to have them adjusted on an ad hoc basis by congressional action, as was the case in the Locomotive Firemen's dispute which was submitted to arbitration by special Act of Congress.[8] In most emergency disputes, however, mediation, fact-finding, limited intervention by the President and *temporary* injunctive relief through the courts—used singly or in combination—should suffice.

Contrary to the views of some prophets of doom, there is evidence that mature and responsible collective bargaining is more often the rule than the exception, and that when left to their own devices, unions and employers generally do settle their disputes without inflicting any lasting damage upon the economy. It is noteworthy that Taft-Hartley emergency procedures were invoked only six times in the last five years, and that resort to Railway Labor Act emergency procedures has dropped to a third of the previous frequency.[9] Nevertheless, as Mr. Nixon recently noted,[10] the President should have additional options in dealing with national emergency disputes. Whatever options Congress chooses to give him, they should be available for use in any national emergency dispute regard-

[6] Aaron, *Emergency Dispute Settlements*, in SOUTHWESTERN LEGAL FOUNDATION, LABOR LAW DEVELOPMENTS—1967, 185, 199 (1967).

[7] For a description of these devices, *see* H. WELLINGTON, LABOR AND THE LEGAL PROCESS 270-97 (1968).

[8] Act of August 28, 1964, 77 Stat. 132, 45 U.S.C. 157 (1964). Noted in 17 LAB. L.J. 671 (1966). *Cf.* Locomotive Engineers v. Baltimore & O.R.R., 372 U.S. 284 (1963).

[9] 56 SEC. LABOR ANN. REP. 23 (1969).

[10] 70 Lab. Rel. 197 (1969).

less of whether the immediate participants are operating under the Railway Labor Act or the Taft-Hartley Act. For these purposes there is no relevant distinction between a maritime strike and an airline strike. The same arsenal of weapons should be available to the President for use under either statute.

EDITOR'S NOTE

Because of the scope, length and depth of Professor Morris' paper, and the space limitations of this issue, the remaining and major portion of the paper will be published as a leading article in the next issue of the Journal. *In that article, Professor Morris explores the common core of substantive rights and duties which the Railway Labor Act and the Labor-Management Relations Act provide. He concludes that the basic legal pattern which governs the collective bargaining relationship of employers, unions and employees in the United States is firmly set and not likely to be changed in the foreseeable future, save for minor loophole-closing adjustments. He finds, however, that the existing procedural machinery available for administering and enforcing the substantive labor law is a maze of conflicting and overlapping jurisdictions, quite inadequate to cope with present day realities in the industrial community. Regarding the Railway Labor Act, he stresses the absence of centralized and uniform decision making, the conflicting jurisdiction of the several tribunals which operate under the Act, inadequacies in representation procedures employed by the National Mediation Board and the need for a "general counsel," particularly to provide assistance to individual employees in implementing the doctrine of fair representation. Focusing upon the procedural deficiencies of the Labor-Management Relations Act, Professor Morris discusses the periodic tendency of the National Labor Relations Board to swing back and forth in many key decisions in response to changes in political administrations. He explores the reasons why widespread voluntary compliance with the Act has not been achieved and why NLRB remedies are so often ineffective. He also describes the serious conflict in jurisdiction which exists between the Labor Board and arbitrators and courts concerning the interpretation and enforcement of collective bargaining contracts. Professor Morris feels this conflict is particularly serious in the law of fair representation.*

According to the author, the foregoing and other procedural objections point to a tentative conclusion—at least working hypothesis—that Congress should establish a constitutional labor court to assume jurisdiction over enforcement and interpretation of the substantive rights and duties of the Railway Labor Act and the Labor-Management Relations Act. He suggests the retention of the NLRB for representation cases, but with an expanded jurisdiction to cover also determination of representation under the Railway Labor Act. He includes in the plan an Office of General Counsel, or its equivalent, for the presentation of both NLRA and RLA complaint cases, although he would not preclude interested parties from bringing direct actions. The National Mediation Board and the Fed-

eral Mediation and Conciliation Service, merged into a single agency, would continue to exercise the mediation functions authorized by the respective statutes. The plan does not propose to disturb the relationship of the courts to the arbitration process.

Professor Morris believes that the time is ripe for major procedural reform in American labor law, and the Board of Editors shares his hope that the proposed plan will stimulate serious efforts to effect changes that will transcend the narrow self-interest which has too often characterized labor legislation in the past.