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TRENDS IN LABOR ARBITRATION†

by

*Nathan P. Feinsinger**

THIS paper was originally planned as a discussion of the arbitration of "grievances." In the light of certain developments in the steel dispute, however, forecasting a significantly broader role for arbitration and other forms of third party participation in the solution of labor-management problems, a correspondingly broader approach to the subject has been taken.

I hope I am not being merely pollyannish when I venture the opinion that, despite its immediate hardship to all concerned, the steel dispute of 1959 may, in the long run, prove to have been a constructive experience for the nation as a whole. The steel dispute is widely regarded as evidencing a failure of the process of collective bargaining as an instrumentality of national labor policy. I do not share this view. An automobile may have perfectly good brakes but an accident may occur, particularly on slippery roads, if the driver does not apply them properly. So, in the steel case, the difficulty as I see it, is the failure of the parties to make proper use of a quite adequate facility. If that be so, the remedy is not to seek a substitute but to stimulate labor and management to use the collective bargaining process more effectively in their own self interest and, more vitally, in the public interest. The steel dispute has dramatized this need. Ways and means are being seriously studied and discussed by the government, by the press, by the experts, and by labor and management, including, at this moment, the steel industry and the steelworkers' union. The results cannot help but be constructive.

One cannot forecast all the results of this ferment. One result is fairly certain, however. There is sure to be an increase in the use of "neutrals" in the capacity of mediators, fact finders, or arbitrators, either by private agreement or through government appointment, to handle a broad range of labor-management problems. This development will not dilute the collective bargaining process but will, if properly used, enrich that process and make it serve more effectively as a means to the twin goals of our national labor policy, namely, industrial justice and industrial peace.

If third party participation in the collective bargaining process

† From an address delivered at the Southwestern Legal Foundation Institute on Labor Law (1959), during the steel dispute of 1959.

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is to be most effective, whether by private individuals, by the courts (in applying the *Lincoln Mills*¹ doctrine, for example), or through other governmental agencies, the nature and purposes of that process must be fully understood. Under the National Labor Relations Act,² as amended, collective bargaining is defined as "the performance of the mutual obligation of the employer and the representative of the employees to meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached. . . ."³ This language may suffice as a legal definition but does not adequately describe the institution of collective bargaining or explain the objectives of Congress in imposing the duty to bargain. Collective bargaining is a procedure designed to reconcile the conflicting interests of labor and management and to promote cooperation in their day-to-day relationships in the interest of industrial justice and industrial peace. It is designed, on the one hand, as an alternative to unilateral determination of wages and other conditions of employment by management or labor, and, on the other hand, as an alternative to determination by some agency of government.

In expressing its preference for collective bargaining rather than unilateral determination, Congress sought to remove the inequities which had resulted from the inequality of bargaining power between the individual employee and his employer. Through collective action, workers were to be given a voice, through their unions, in determining the conditions of their employment, which meant, inevitably, a corresponding limitation on what is commonly described as "management prerogative." Through increased economic strength resulting from collective action, workers were expected to raise their wage levels. Through the spread of organization, unions were expected to stabilize competitive wages and working conditions within and between industries.

In expressing its preference for voluntary collective bargaining rather than governmental determination, Congress expected the parties to assume the responsibilities which go with self-government. More particularly, while strikes and lockouts were not banned, Congress hoped that labor and management would utilize collective bargaining as an instrumentality of industrial peace. This hope was based

¹ *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

² Labor Management Relations Act (Taft-Hartley Act), 61 Stat. 136 (1947), 29 U.S.C.A. § 141 (1959).

³ 29 U.S.C.A. § 158.

on the experience of various impartial investigatory commissions, best summarized, perhaps, in a report which stated:

The chief advantage which comes from the practice of periodically determining the conditions of labor by collective bargaining directly between employers and employees is, that thereby each side obtains a better understanding of the actual state of the industry, of the conditions which confront the other side, and of the motives which influence it. Most strikes and lockouts would not occur if each party understood exactly the position of the other. Where representatives of employers and employees can meet personally together and discuss all the considerations on which the wage scale and the conditions of labor would be based, a satisfactory agreement can, in the great majority of instances, be reached.⁴

The assumption that collective bargaining would minimize industrial strife was expressed in the preamble to the National Labor Relations (Wagner) Act of 1935⁵ and repeated in its amendments thereto by the Labor-Management Relations (Taft-Hartley) Act of 1947.⁶ Congress declared its purpose to be that of "encouraging the practice and procedure of collective bargaining"⁷ because such practices were "fundamental to the friendly adjustment of industrial disputes"⁸ which would otherwise adversely affect interstate commerce.

Shortly before the Wagner Act, Congress had expressed the view, embodied in the Norris-LaGuardia Act of 1932,⁹ that the courts were not a proper forum to resolve labor disputes, whether by injunction or otherwise. This view was modified by the Taft-Hartley Act, notably section 301, which authorizes suits in the federal courts for violation of contracts between employer and unions. For our purposes, the most significant development since in that area is the *Lincoln Mills* decision of 1957,¹⁰ construing section 301 as authorizing suits for specific performance of agreements to arbitrate.

Since 1935, collective bargaining has become the way of industrial life in a large segment of our economy. The hope and expectations of Congress have been partly realized. Workers now exercise a voice in their employment conditions. Wage levels have been increased. Strikes over union recognition have been minimized. Strikes over the multitude of grievances which arose in the day-to-day administration of collective bargaining agreements have been largely eliminated by

⁴ Industrial Commission Report to Congress (1902).

⁵ 49 Stat. 449 (1935), 29 U.S.C.A. § 151 (1946).

⁶ 61 Stat. 136 (1947), 29 U.S.C.A. § 141 (1959).

⁷ 29 U.S.C.A. § 151.

⁸ *Ibid.*

⁹ 47 Stat. 70 (1932), 29 U.S.C.A. § 101 (1952).

¹⁰ *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

the voluntary adoption of internal procedures culminating in "final and binding" arbitration. But certain basic problems remain in the same or altered form and new ones have been added which have perplexed the parties and the public and have created fresh interest in arbitration in some other "third dimension" as a means of solution. What are these problems? To what extent can they be solved by the parties directly? To what extent by the aid of third parties? To what extent by legislation only, and what kind?

(1) The stabilization of wage rates within and between industries has been impeded by the virtual halt to the spread of unionization. Competition from non-union plants concerns organized employers and union alike. Understandably, organized employers have sought cooperation from unions in seeking to reduce labor costs by increased efficiency and economies in various forms. Also understandably, the unions in these cases, though recognizing the employer's problem, have been reluctant to extend cooperation to the extent of relinquishing benefits already achieved in the form of wage rates or other conditions of employment; or agreeing to unilateral action in such matters as subcontracting, shift schedules, work loads, crew size, transfers, and the like; or accepting improvements less than those obtained by other unions. In the steel case, management has asserted that a similar problem exists stemming not from competition within the industry but from foreign competition in steel and from competition with other materials produced in this country.

(2) Even aside from the pressure of competition, management is becoming increasingly insistent on recapturing the "right to manage" which it feels has been impaired by the process of collective bargaining, resulting (in its opinion) in inefficient and uneconomical practices which hamper production. This attitude may have received some stimulation from the decision of the United States Supreme Court in the *American National Insurance*¹¹ case, holding that it is not a violation of the duty to bargain collectively for an employer to insist that the union agree to unilateral control over some matters, such as promotions, discipline, and work schedules, which are clearly "mandatory" subjects of collective bargaining. The unions have resisted this trend on the ground that management is attempting "to turn the clock back" or to "break the union." In this area, perhaps more than in any other, old fears and antagonisms are being resurrected.

(3) Parallel to management's concern with what it regards as re-

¹¹ NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952).

strictive, inefficient, or uneconomic practices is the union's fear that regardless of management's motive, the effect of its decisions is to diminish job opportunities and impair job security. For these reasons, it is opposed, for example, to subcontracting and to transferring work out of the bargaining unit to "white collar" personnel within the plant, two of today's most perplexing problems.

(4) On the question of wage levels, the emphasis has shifted materially since 1935. At that time, Congress was concerned with raising wage levels in order to increase the purchasing power of wage earners and thus prevent depressions. In many quarters today, it is asserted that the real problem is that of "excessive" wage settlements adding to the danger of inflation. Unions continue to adhere to the mass purchasing power theory and point to "administered prices" as the villain in the piece. I am not a good enough economist to choose between these positions. The important fact is that thus far Congress has left the question of proper wage levels to be determined by collective bargaining and the question of wage-price-profit relationships to unilateral determination by management. Under the existing interpretation of the duty to bargain, labor has no legally enforceable right to bargain about prices or profits and no right to a "look at the books" except when the employer pleads inability to pay. Whether or not this limitation is sound public policy, labor regards it as unfair to be asked to limit its wage demands in order to stabilize prices with no assurance that its concessions would have that effect and no right to bargain about a proper wage-price-profit relationship. Thus far, management has held firmly to the view that prices and profits are no concern of the unions at the bargaining table. With labor and management thus holding opposite views, the question arises as to whether collective bargaining is a suitable procedure for determining proper wage levels and, if not, what other procedure should be followed.

To what extent can these problems, or any of them, be solved by the parties directly, *i.e.*, by direct negotiation without third party intervention, in a mutually satisfactory manner and without a strike? The answer is, in all of them, and completely. (Whether a particular settlement is in the public interest may present a different question.) The obvious support for this broad assertion is the fact that many employers and unions, large and small, in all industries and areas, *do* settle such problems directly. For example, speaking of the controversial issue of "work rules" involved in the current steel dispute, the board chairman and president of Detroit Steel, upon settlement

with the union, reportedly stated that "the company always had been able to work out any problems that came up in this respect through conferences between its industrial relations officials and union representatives, and . . . any future problems would be handled the same way."¹² It is true that this company does not have a "Clause 2-B" in its contract, but it would be naive to assume that the same problems do not arise when the company desires to change existing practices. In the auto industry, in which the search for improved efficiency is ceaseless, no problem of this kind, as far as I am aware, has ever presented a serious strike issue.

Why is it that in some companies in an industry or in some industries, and not in others, such problems cannot be settled, apparently, without a strike? The answer, I believe, lies in the frame of mind with which the representatives approach the bargaining table. By one approach, the parties recognize the problem, undertake to analyze it in terms of existing fact, prior experiences, and reasonable anticipation, and seek a sensible solution, based on mutual confidence that the spirit as well as the letter of the settlement will be observed. By another approach, one side or the other, or perhaps both, refuse to recognize the problem, or, admitting the existence of the problem, attribute to it such symbolism as "management prerogative" or "union busting," thus frustrating a realistic solution. As a result of this approach, when agreement is reached, it is likely to be treated as a victory or defeat in principle, rather than a fair settlement, thus depriving the settlement of its real value, and perhaps laying the foundation for future strife.

The problem of establishing a proper wage level is sometimes distinguished from other bargaining problems, and the efficacy of private bargaining in this area is sometimes questioned on the theory that the public has a more direct interest in terms of possible inflationary consequences, and on the assumption that "excessive" wage increases necessarily result in increased prices. The distinction is not realistic. To begin with, the wage rate is only one element of labor costs. So-called "fringe benefits" are also a significant element. In addition, any restriction on management's freedom of operation, even a simple seniority clause (however justifiable in terms of employee satisfaction or security) may increase labor costs. The important question is not what management pays but what it receives in return. Just as a union may reduce its wage demand in exchange for a union shop to strengthen its bargaining position in the long run, so manage-

¹² Wall Street Journal, Oct. 28, 1959, p. 3 (Midwest ed.).

ment may increase its wage offer in exchange for assurances of increased operating efficiency and economy. This is the theory on which the automobile industry has agreed to an "annual improvement factor" in the wage package in consideration of the union's agreement to cooperate in "technological progress, better tools, methods, processes and equipment." This is also the justification advanced by the steel industry's negotiating committee for linking the size of its wage offer to its demand for changes in the work rules. Thus, to brand a wage increase size either as "inadequate" or "inflationary" solely on the basis of its size is an oversimplification.

Assuming it were possible to separate the wage rate from other cost and benefit factors, it would still be difficult to characterize a particular wage increase as inadequate, inflationary, or "just right." There is no universally accepted criterion of a "just right" wage increase. Contribution to "increased productivity" comes the closest, but, as the steel negotiations indicate, there is disagreement, for example, on the relevant measure of productivity. Again, as the steel case illustrates, the cost of a strike, the loss of wages and profits to the immediate parties and related employers and workers, and the loss of tax revenue to the government, are factors in the wage equation which cannot be overlooked. It is no answer to say that a union should not be permitted to "hold a gun at the public's back" or to "lift itself up by its own bootstraps" through a prolonged strike any more than the employer through a prolonged "no." The right to say "no" or to strike has thus far not been limited to cases where no hardship to the public results.

Thus far, I have discussed some of the difficult problems which confront the parties in collective bargaining and have indicated my belief that none of them is insoluble by direct negotiation, provided the parties deal in realities and not in shibboleths. When collective bargaining fails to produce a solution, what then? Is a strike the inevitable next step? In resolving grievance disputes, labor and management have found a substitute for strikes in voluntary arbitration. In this country, arbitration is generally distinguished from other forms of third party intervention by the "final and binding" character of the solution proposed by the arbitrator. I am inclined to feel that this aspect of arbitration process, while important, has been over-emphasized. A final and binding decision is not worth much to the parties unless it falls within the area of acceptability to both parties to a dispute. The extent to which this result may be accomplished depends in part on the kind of arbitration the parties desire. They

may prefer what is sometimes called a "judicial" process, which often tends to obscure the real problem. At the other extreme, they may prefer a mediation process, with the arbitrator empowered to rule if mediation should fail. In between are all sorts of variations. Recently, for example, after I had declined a request to arbitrate a grievance dispute which would have taken several days, the parties asked if I would meet with them to discuss their chances if they were to arbitrate before someone else. I agreed. After an hour or so of amiable conversation with the parties, sitting in comfortable chairs in the company lawyer's office, I made my best guess and gave my reasons. Ten minutes later, the case had been settled and the settlement embodied in a one paragraph letter to the union. As I was leaving, someone said, "Hey, you know what you have done? You've arbitrated this case." Indignantly, I denied the charge. As someone is reputed to have said, "The Iliad was not written by Homer, but by another man of the same name."

Can voluntary arbitration, or some variation thereof, be adapted to the settlement of disputes in the *making of a contract* as contrasted with disputes arising as to the *interpretation or application* of an *existing* contract? There is, of course, some experience in this area. However, management generally, labor less so, is reluctant to agree to arbitrate contract terms, one argument being that the risk is too great. The validity of this objection depends, of course, on the issue involved and the terms of the submission. There is not much difference in risk, for example, and perhaps less in asking an arbitrator to decide what the contract should provide on the issue of subcontracting (assuming he is fully informed of the management's problems, as well as the union's) and asking him to decide in the absence of a clear prohibition or reservation in this agreement, whether the management may subcontract if the union objects, or the limitations, if any, on the right.

In the steel case, the difficulty in resolving the work rules issue has not been management's reluctance to submit the matter to arbitration, but the terms of the proposed submission. The industry's proposal read as follows:

What, if any, changes should be made in the local working conditions provisions to enable the companies to take reasonable steps to improve efficiency and eliminate waste, with due regard for the welfare of the employes?

The union's objections to this form of submission are that the question is loaded and that it is bound to cause loss of existing bene-

fits with no possibility of offsetting gain. Suppose, however, that the submission were revised to read as follows:

1. In any plant covered by the main agreements, are there presently existing local working conditions or practices protected by Section 2-B, and not otherwise, which substantially interfere with the efficient and economical operation of that plant? Management shall have the burden of proof on this issue.
2. In each instance so found, if any, is there, nevertheless, a reasonable justification for the condition or practice? The union shall have the burden of proof on this issue.
3. In each instance, if any, in which the arbitrators shall find no reasonable justification for the condition or practice in its present form, the arbitrators shall determine the appropriate form of relief to management, including elimination or modification of such condition or practice.
4. In each instance, if any, in which relief is granted to management, the arbitrators shall determine what, if any, hardship will result, by loss of job security, by wage loss, or otherwise, to the employee or employees affected, and shall provide adequate relief for such hardship, in the form of monetary damages or otherwise.

Aside from final and binding arbitration, other forms of non-governmental third party assistance in the avoidance or settlement of strikes over contract terms are beginning to emerge. For example, in recent years Allis-Chalmers and International Harvester and the UAW have successfully avoided or shortened such strikes by the use of private mediators acting independently or in collaboration with the Federal Mediation and Conciliation Service. In dealing with problems of automation in the meat-packing industry, Armour & Company and the UPWA provided for a joint committee, with an impartial chairman, to formulate means of training employes for new or changed jobs. In the steel industry, Kaiser Steel Corporation and the steel workers established a three-man committee of neutral experts (1) to study the work rules problem and make recommendations for the next contract negotiation and (2) to work out "a language formula to insure a proper sharing of the fruits of the company's progress among stockholders, employees and the public." The steel industry negotiating committee took a more cautious yet significant step in the same direction by proposing a Human Relations Research Committee chaired by two neutrals, one selected by each side, to study and recommend solutions of specific problems and "such overall problems as the parties may from time to time refer to such committee."

In my opinion, the trend toward voluntary resort to the use of

private neutral third parties to resolve contract-making problems in basic industries is the most significant development of our time and holds the greatest promise for future industrial peace. The voluntary character of this step and the flexibility which it provides the parties in their choice of procedures—mediation, fact finding, recommendations, or final and binding decision—are its outstanding virtues. Intervention by the government at this time, beyond encouraging and assisting the parties to any particular dispute to establish such a procedure, would be a serious mistake. For one thing, it would tend to halt this significant development, because one side or the other might be tempted to use the new government device, whatever it might be, if it saw advantages for its position. For another, the various proposals for government intervention¹³ ranging from compulsory fact-finding to compulsory intervention, and all carrying an implied threat of government regulation of wages, prices, and profits, would impair the essential voluntary character of collective bargaining without any assurance of greater industrial justice or peace in the long run.

Conclusion

Collective bargaining has not failed. The fact is, however, that its potentialities as an instrument of industrial justice and peace have not been fully utilized. Considering the heavy responsibilities which Congress has imposed upon labor and management which in other countries are assumed by the government itself, labor and management have done a good job. But not good enough. The most constructive step which they can take to improve their performance is to make wider use of voluntary arbitration, with less emphasis on its "final and binding" character, and more emphasis on its utility for solving problems.

¹³ See the *Wall Street Journal*, Oct. 21, 1959, p. 1 (Midwest ed.).

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