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COLLECTIVE BARGAINING—IS IT WORKING?

Labor-management relations have experienced a transition from an informal relationship to statutory regulation by the several acts of Congress between 1914 and 1959. Such formalization has resulted in part from the desire to protect a substantial public interest. The primary statutes which govern labor and management are the Sherman Antitrust Act,¹ the Clayton Act,² the Norris-LaGuardia Act,³ the Wagner Act,⁴ the Taft-Hartley Act⁵ and the Landrum-Griffin Act.⁶ Perhaps the most important of these statutes is the Wagner Act, which forces employers to meet with the representatives of their employees and to bargain collectively. This act "legitimized" collective bargaining and effectively curbed "free-wheeling" activities of employers which were often detrimental to their employees.

In 1971 one might have cause to wonder if the pendulum has not swung too far in one direction. Industry-wide labor strikes have become commonplace, with doubtful effects on the nation's economic health. Such events prompt inquiry into the present performance of the collective bargaining process as now constituted. A meaningful analysis requires a basic understanding of the collective bargaining process in the United States, the laws which gave birth to the process and those which seek to sustain it. The purposes of collective bargaining, the forces which forged its forms and methods and the problems presently confronting collective bargaining will be presented. Union monopolies, government intervention, and consequent imbalances in bargaining positions which affect collective bargaining will also be considered.

A THUMBNAIL LEGISLATIVE HISTORY OF COLLECTIVE BARGAINING

1890: The Sherman Antitrust Act

The Sherman Antitrust Act⁷ was formulated by Congress under the power granted to it by the Commerce Clause of the Constitution.⁸ "The purpose

¹ 15 U.S.C. § 1 *et seq.* (1964).

² 15 U.S.C. § 12 *et seq.* (1964).

³ 29 U.S.C. §§ 101-15 (1964).

⁴ National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (1964).

⁵ Labor-Management Relations Act, 29 U.S.C. § 141 *et seq.* (1964).

⁶ Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 153, 158-60, 164, 186, 187, 401 *et seq.* (1964).

⁷ 15 U.S.C. § 1 *et seq.* (1964).

⁸ The commerce clause of the Constitution provides:

"Congress shall have power to regulate Commerce with foreign Nations, and among the several States. . . ." U.S. Const. art. I, § 8.

By virtue of this power, in conjunction with the necessary and proper clause, Con-

of the antitrust laws is to prevent a select few in a particular field from achieving such monopolistic power as to stifle competition."⁹ It was intended to promote open markets and free competition in order to protect the public from unfair pricing and mercenary tactics through corporate conspiracy to the exclusion of other interests. Injury accrues to the public whether price fixing agreements are reasonable or not. While initially thought applicable to labor organizations,¹⁰ today the Sherman Antitrust Act does not deal with unions directly.¹¹ It is included herein to show government willingness to curtail management bargaining power.

Although the government passed the Sherman Act to prevent corporations from becoming so powerful that they could exert unfettered control within a given industry, this type of legislation has not been passed with regard to unions. There has been nothing to constrain unions from attaining the powerful positions which legislation prevents management from achieving.¹²

1914: *The Clayton Act*

The Clayton Act¹³ was drafted to provide broader and more effective relief, both substantively and procedurally, to persons injured by violations of the Sherman Act. Section 17 of the Clayton Act specifically exempted labor organizations from the antitrust applications of the Sherman Act.¹⁴ The rationale in exempting unions was that "[t]he labor of a human being

gress has authority to reach into local areas and regulate intrastate activity having an appreciable effect on interstate commerce.

"It is the effect upon the interstate commerce or its regulation, regardless of the particular form which the competition may take, which is the test of federal power. *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 120 (1942).

⁹ *Denison Mattress Factory v. Spring-Air Co.*, 308 F.2d 403, 413 (5th Cir. 1962).

¹⁰ The antitrust laws declared illegal every contract, combination, or conspiracy, in whatever form, which directly or necessarily operates in restraint of commerce. *Loewe v. Lawlor*, 208 U.S. 274, 276 (1908). Thus in effect, working men who in concert set a price for their services were considered to act in restraint of trade. *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n*, 274 U.S. 37 (1927).

¹¹ The development of the common and statutory law has been such that working men who act in concert to set a price on their services are excluded from the ambit of antitrust legislation.

In *United States v. Hutcheson*, 312 U.S. 219 (1941), Justice Frankfurter combined the Sherman Act, the Norris-La Guardia Act, and § 20 of the Clayton Act and concluded that labor unions were exempt from antitrust laws.

¹² It would not be accurate to say that all labor groups possess extreme economic power and have the ability to influence the market through their monopolistic control of labor. Labor groups range in economic power from little power in the service industries and migrant worker areas to great power in the heavy industries of the nation. Some unions are exploited while others are the exploiters. See Comment, *Labor Immunities and The Public Interest*, 44 TUL. L. REV. 297 (1970).

¹³ 15 U.S.C. § 12 *et seq.* (1964).

¹⁴ *Id.* § 17.

is not a commodity or article of commerce."¹⁵ Therefore a group which formed for collective bargaining purposes was not considered as acting in restraint of trade or in a conspiracy since a man's labor is not a commodity to which the Commerce Clause and the Sherman Act can be applied. In the Clayton Act Congress expressed a policy toward unions opposite to the policy expressed toward management by the Sherman Act. At the time unions were viewed as a socially beneficial combination. An employee, standing alone, was helpless in dealing with management. In order to be effective in "a lawful economic struggle . . . between employer and employees as to the share or division between them of the joint product of labor and capital . . ." ¹⁶ it was recognized as essential that this combination must necessarily extend beyond one shop.

The effect of this disparity of policy was to subject businessmen engaged in price fixing to the antitrust laws, while laborers engaged in comparable activity remained free to fix the price of their labor.¹⁷

1932: *The Norris-LaGuardia Act*

The Norris-LaGuardia Act¹⁸ was passed in order to curtail and regulate the jurisdiction of courts, as well as to further the rights of laboring men to organize and bargain collectively. This congressional action was taken because the purpose of the Clayton Act had become frustrated by protracted judicial construction¹⁹ which lead to abuses in the application of injunctions against unions.

By 1932 it was apparent that despite the provisions of the Clayton Act exempting unions from antitrust regulation, many federal courts persisted in issuing injunctions on grounds that union activities constituted conspiracies to violate the Sherman Act.²⁰

The Norris-La Guardia Act removed the fetters upon trade union activities, which according to judicial construction § 20 of the Clayton Act had left untouched, by still further narrowing the circumstances under which the federal courts could grant injunctions in labor disputes.²¹

The overall policy of Congress was to encourage the use of non-judicial processes of negotiation, mediation and arbitration for the adjustment of labor disputes. One ostensible reason for this choice of congressional policy

¹⁵ *Id.*

¹⁶ *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209 (1921).

¹⁷ J. Williams, *Labor and the Antitrust Laws*, in *LABOR LAW DEVELOPMENTS* 5, 6-7 (Southwestern Legal Foundation ed. 1966).

¹⁸ 29 U.S.C. §§ 101-15 (1964).

¹⁹ *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921).

²⁰ See *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n*, 274 U.S. 37 (1927); *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184 (1921); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921).

²¹ *United States v. Hutcheson*, 312 U.S. 219, 231 (1941).

was the significant cost factor in judicially litigated disputes. By analogy it is generally recognized that the cost involved in antitrust enforcement is a substantial burden on the federal budget. The Justice Department Antitrust Division budget has recently been computed to be in the range of four million dollars annually, funding a staff of over one hundred attorneys involved in the litigation and enforcement of present and past decrees.²² Furthermore, antitrust enforcement consumes a considerable amount of the courts' time, adding to already crowded calendars.²³ To include settlement of labor disputes in this cluttered environment would undoubtedly multiply cost and court congestion still further. Thus by "unfettering" unions from antitrust restraints while encouraging negotiation, mediation and arbitration to settle labor disputes, the Act had a pronounced effect on strengthening the union bargaining position.

1935: *The Wagner Act*

The Wagner Act²⁴ was primarily designed to promote industrial peace and stability "by encouraging the practice and procedure of collective bargaining."²⁵ Section 3 of the Act²⁶ created the five-man National Labor Relations Board (NLRB) to act as the body to oversee and implement the Act. Members are appointed by the President for five-year terms with the consent of the Senate.²⁷ "[W]here the Board has acted properly within its designated sphere, the court is required to grant enforcement of the Board's order."²⁸

Through the process of collective bargaining Congress hoped to stimulate a free flow of interstate commerce, while at the same time substituting "a rule of law for the arbitrary and capricious power of the boss."²⁹ The Act specified certain rights of employees relative to collective bargaining, however no mention was made of employers' rights. Thus the Act declared congressional policy to be the protection of "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."³⁰

²² A. NEALE, *THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA* 374 (1966). The tremendous cost and burden of antitrust enforcement has led the attorney general to recommend "negotiation [of consent settlements] . . . whenever the Division deems it feasible for efficient enforcement." *Id.* at 374 n.1, *citing* 1955 ATT'Y GEN. NAT. COMM. REP'T ch. VIII, at 360.

²³ A. NEALE, *supra* note 22, at 375.

²⁴ National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (1964).

²⁵ *Brotherhood of R.R. Trainmen v. Toledo, P. & W. R.R.*, 321 U.S. 50 (1944).

²⁶ 29 U.S.C. § 153 (1964).

²⁷ *Id.* § 151(a).

²⁸ *NLRB v. Warren Co.*, 350 U.S. 107, 112 (1956).

²⁹ A. COX, *Procedure and Creativity*, in *LABOR ARBITRATION—PERSPECTIVES AND PROBLEMS* 253-54 (BNA ed. 1964).

³⁰ 29 U.S.C. § 151 (1964).

The Act noted the inequality of bargaining power of employees who did not possess freedom of association necessary to allow them to organize and contrasted this to the solidly organized position of the employers. It was determined that such inequality unduly burdened and affected the flow of commerce and aggravated the total business situation in the economy. This imbalance further aggravated the economy by depressing wage rates and the purchasing power of wage earners and preventing the stabilization of competitive wage rates between industries. The consequences of the Depression were a catalytic source of inspiration for the Wagner Act. Growing out of the catastrophe of the thirties was an ever constant realization that "laissez faire" was not the best of all possible worlds. It had become evident that the optimism in individual ability to maintain social and economic stability should be supplanted by group and state initiative.³¹ The Wagner Act was a realization of this evolving desire, and introduced limited governmental involvement in the corporate realm to vindicate the rights of the worker.³² Thus "the Wagner Act further intended that despite the functioning of the NLRB the purposes of collective bargaining could best be accomplished through minimal government intervention."³³ In theory the process of collective bargaining was to be self-effectuating and the government was to step out of the picture once the two parties had been brought together under the Act.

1947: The Taft-Hartley Act

The Taft-Hartley Act³⁴ was passed as a response to management's pleas for help after a 12-year period during which unions had thrived under the Wagner Act in the prosperity of the sellers' market then existing. The 12-year period had witnessed a four-fold increase in union membership from 4 million in 1935 to over 14 million in 1947. In such vital areas of national importance as trucking, mining, construction and the railroads over four-fifths of the laborers worked under collective bargaining agreements.³⁵ Strikes had become commonplace and union power, vested in the hands of a few, equaled or exceeded that of the largest corporations.

While unions had multiplied in size and strength, management freedoms under collective bargaining had been limited by the National War Labor Board which altered labor relations from a union struggle for recognition to a situation where wages were the mere starting point for further negotiations on a variety of topics. What had previously been areas of exclusive manage-

³¹ See N. CHAMBERLAIN, *COLLECTIVE BARGAINING* 301 (1951).

³² The major architect of the Act viewed workers as "caught in the labyrinth of modern industrialism and dwarfed by the size of corporate enterprise. . . ." 79 CONG. REC. 7565 (1935) (remarks of Senator Wagner).

³³ AMERICAN ASSEMBLY, *CHALLENGES TO COLLECTIVE BARGAINING* 56 (1967).

³⁴ 29 U.S.C. § 141 *et seq.* (1964).

³⁵ A. COX, *LAW AND THE NATIONAL LABOR POLICY* 12-13 (1960).

ment prerogative were thrown into the arena of permissible collective bargaining topics. The need to restrict the unions' activities, by giving management equal strength to negotiate, prompted the passage of the Taft-Hartley Act.

The purposes of the Act were to delineate both union and management rights, to provide peaceful procedures to protect such rights, to set out the individual's relationship to his labor organization and to define and structure proper practices between unions and management in light of the general welfare.

There is little doubt that such government intervention was needed, however it was passed clearly in the face of the ideals of the Wagner Act which had envisioned a minimal amount of government intervention. The Wagner Act had intended that the parties should resolve their own differences while working within the guidelines of the Act. Failure of the bargaining parties to resolve their problems is tolerated for a limited time and then public pressure forces governmental intervention. The purpose in discussing the Taft-Hartley Act is to indicate that government has responded to changed conditions and has initiated legislation required to facilitate collective bargaining.

Together with the Wagner Act, Taft-Hartley expresses federal labor policy as the "promotion of collective bargaining; to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife."³⁶ However the inequities which collective bargaining sought to correct have again arisen with the ever present variables of social change.³⁷ The imbalance now has shifted in favor of labor. The question which remains unanswered is whether or not government will again seek to restore the equilibrium in union-management relations which presently is lacking in collective bargaining.

An attempt to pass legislation that would have curbed unions' economic power was made in 1946. At that time, under the Truman administration, Congress approved and sent a bill³⁸ to the Chief Executive that was designed to subject unions to controls similar to those of the Sherman Act for corporations. President Truman vetoed the measure and an attempted override by Congress failed by five votes.

UNION POWER TODAY: THE NEW PROBLEM

The public policy underlying this impressive array of legislation was to allow union development while preventing management from forming power-

³⁶ *Teamsters Local 24 v. Oliver*, 358 U.S. 283, 295 (1959).

³⁷ To gain a perspective of the diverse views as to the present effectiveness of collective bargaining in a changing social setting see B. KIRSH, *AUTOMATION AND COLLECTIVE BARGAINING* (1964).

³⁸ H.R. 4908, 79th Cong., 2d Sess. (1946).

ful monopolies. This policy has, in fact, been implemented and the legislation has in most respects succeeded, perhaps too well.

Today, we have passed through this formative stage of union development and the purposes behind the past legislation have become moot for the larger unions. In the words of Robert Kennedy, speaking about the size of the Teamsters Union, it is a "union so powerful, that it is certainly the mightiest single organization in the United States next to the government itself."³⁹

International labor unions are powerful both in dollars and also in the influence they have over individuals and communities. "Unions have incomes of over \$1.4 billion a year in dues and investment income. They receive over \$80 million a month dues money."⁴⁰ This money is used in politics to support candidates favorable to union goals and is invested in banks, factories and insurance companies. "Jobs are controlled through hiring halls and through compulsory membership, in order to keep a job a person must pay his dues to the union."⁴¹ Unions are permitted to compel members of a union to pay dues as a permissible method of enforcing "union security"⁴² against the members.⁴³ This growth of union power must be acknowledged by government if the balance which was their original purpose is to be restored.

By virtue of their exemption from the restrictions of antitrust regulation, unions are free to impede competition unless they join with non-labor groups.⁴⁴ The application of this broad federal labor policy to unions prohibits only a certain means to an end: combining with non-labor groups. It does not prohibit the end result itself, restraint of trade. The test is not

³⁹ Comment, *supra* note 12, at 299 n.15.

⁴⁰ Panel discussion between Senator Strom Thurmond of South Carolina and Congressman David Martin of Nebraska on the "What's The Issue?" radio program of the U.S. Chamber of Commerce, August 5, 1962. "Union Monopoly Power" was the subject of discussion. [Hereinafter referred to as "Union Monopoly Power"].

⁴¹ *Id.*

⁴² "Union security" is the term for the collective means used to obtain union recognition and to maintain continued union existence and viability. Within the framework of the union-management relationship, union security may include: (1) Management's recognition of the unions as the sole bargaining agent for its employees; (2) Maintenance of union membership by setting a deadline for a new employee to join the union; (3) Mandatory payment of dues by the union member or a deduction from his salary. This firmly implants the union in the company while setting out the member's responsibilities and allegiance to his elected representatives. J. BARBASH, *THE PRACTICE OF UNIONISM* 156 (1956).

⁴³ See *Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954); *A. Nabakowski Co., 148 N.L.R.B. 876* (1964). In both of these cases it was decided that the only form of discrimination which labor organizations could exert against their members was requiring the payment of dues. If dues were unpaid it was grounds for dismissal by the employer at the request of the union.

⁴⁴ *United States v. Hutcheson*, 312 U.S. 219, 233 (1941).

whether a union limited or restrained trade but whether a union "combined with management" and therefore, since management is present, violated the Sherman Act. This concept of a union combining with management was used in *United Mine Workers v. Pennington*.⁴⁵

In *Pennington*, a suit was initiated by the trustee of UMW's welfare and retirement fund against the owners of a coal company. The suit was founded on a claim for royalty payments under a national agreement.⁴⁶ The coal company filed a cross-complaint alleging violations of the conspiracy provisions of the antitrust laws.

In essence, the cross-complaint set forth allegations arising from a 1950 wage agreement. The UMW had agreed to abandon opposition to working hours in an attempt to allow the larger operators to increase production. Through a process of rapid mechanization and union financing, wages would gradually increase with increasing production and royalty payments to the union pension fund would be correspondingly raised. The terms of the agreement were imposed on all operators, regardless of their financial status.⁴⁷

Subsequently, in an effort to increase wages, further steps were taken to exclude non-union operators from the coal industry. The combined efforts of the union and large coal companies brought forth the Walsh-Healey Act.⁴⁸ Minimum wage standards were required for employees of TVA contracted coal companies. In effect, small companies were now faced with the union imposed burden of meeting minimum wage rates or losing the TVA market for their coal output. Further pressure was exerted on the TVA to gradually purchase coal solely from union companies. The final phase of the program culminated in a "destructive and collusive price-cutting campaign" in which four of the larger coal companies sought control of the TVA market. The union had its greatest investment and most advantageous position of control in two of these four companies.⁴⁹ In *Pennington*, the aspect of union self-interest was held to violate the Sherman Act because it was an attempt to control the prices and production of coal through a multi-employer bargaining agreement. The union had agreed to work with management to freeze out the smaller mines. The union was held to have strayed from its exempted area of "self-interests" and to have combined with a non-labor group in restraint of trade. To prevent such situations from arising where a bargaining relationship is impaired because of

⁴⁵ 381 U.S. 657 (1965); Comment, *supra* note 12, at 298.

⁴⁶ National Bituminous Coal Wage Agreement of 1950, *as amended*, Sept. 29, 1952, executed by the Philips Brothers Coal Company and the United Mine Workers of America on Oct. 1, 1953, and re-executed on Sept. 8, 1955 and Oct. 22, 1956. 381 U.S. at 659.

⁴⁷ 381 U.S. at 659-60.

⁴⁸ 41 U.S.C. § 35 *et seq.* (1958).

⁴⁹ 381 U.S. at 660-61.

an imbalance between the parties, the government should attempt "to allocate to unions power enough to gain for their members a fair share of their labor's product, but less power than would enable them to press upon the society economic side effects disproportionate to their contributions to the social order."⁵⁰ Specifically, the adverse side effects are wage-push spirals which lead to inflation. The strengthening of unions in key industries has created a conflict in public policy between the anti-monopoly intent of the Sherman Act and the exemption of unions by the Clayton Act.

The Need for Competition

The need to insure competition is paramount to the development of better products and services. It also maintains realistic consumer prices. "The Sherman Act and later legislation recognized that competition is the basic law of commerce and that to stifle such competition or control an undue amount of economic power should be forbidden."⁵¹ The balance between labor and management effects the maintenance of competitive prices and profit levels by assuring that natural market conditions will adjust these variables and that they will not be manipulated by an overly powerful party in restraint of trade.

If a company were unbridled by the Sherman Act it could conceivably achieve a monopoly and by controlling the supply affect the demand, thereby driving the price of its product upward. Yet the provisions of the Clayton Act permit the unions to occupy precisely this position with respect to the labor supply.

Competition protects against such market control by the existence of another producer of the product that would be willing to price the commodity lower in hopes of capturing the market for itself. The Sherman Act also fosters competition in its anti-conspiracy in restraint of trade provisions. The balanced union-management relationship would function against the union in the same way competition and the Sherman Act affect corporations. Balanced power between the union and management would prevent unions from withholding labor, or from demanding exorbitant prices for labor's use.⁵² Without the type of mandatory restraint provided by the Sherman Act, unions have proven no more willing to impose self-restraint than has management.

Multi-Employer Contracts

The inequality of applying the Sherman Act only to management is best illustrated by multi-employer contracts.⁵³ There is a great similarity between

⁵⁰ Comment, *supra* note 12, at 311.

⁵¹ "Union Monopoly Power", *supra* note 40 (remarks of Congressman Martin).

⁵² The regulation of the supply of labor as discussed herein refers to the highly organized industries such as steel, coal, auto, shipping and trucking.

⁵³ In multi-employer contracts the union acting on a national scale presents a single

management's collusively fixed price agreement and a multi-employer union contract where only one price is set for the labor. Despite the implications of a restraint of trade by creating a fixed price level, the multi-employer contracts are favored by unions and management. Management prefers this arrangement since they are assured no other company is paying a lower wage. Unions prefer it since they do not have to fear competition. The result of these arrangements is that employer collusion although restricted by the Sherman Act is encouraged by present-day multi-bargaining contracts. In *Pennington*, a union was prohibited from acting directly to fix prices by working with a non-labor group. In multi-employer contracts the same objective is reached indirectly. The goals of the Sherman Act were consumer protection and dispersion of private economic power. These goals are frustrated by the monopoly power exerted by labor in their "self-interest" areas through multi-employer agreements.

Wage-Price Spirals

The public suffers whether the fixing of prices is from management collusion or from price setting by unions through multi-employer agreements. When a balanced union-management relationship is lacking, price fixing results for much the same reason as when there is no competition between manufacturers.⁵⁴ The effect of such activity is a wage-price spiral. "A wage-price spiral" or "wage-push inflation" occurs where substantial union power over wages exists.⁵⁵ Such a wage-price spiral can totally distort the financial picture for anyone living on a fixed or substantially fixed income such as welfare recipients, retirees or employees in a non-union company. "When organized labor gets wage increases in excess of productivity gains, causing prices to rise, organized labor increases its real purchasing power while unorganized groups suffer declines in theirs. In the latter group prices rise but incomes are unchanged."⁵⁶

When one union succeeds in getting an advantageous wage package, other unions are stimulated to seek a similar package for their membership. In the highly mechanized mass production industries the increased wages may be absorbed and not passed on to the consumers. If the rising cost of labor cannot readily be absorbed in such mechanized industries the firm may choose to accelerate its level of mechanization instead of acquiescing to higher wage de-

set of wage rates to all the employers in a given industry. Since all the employers are charged the same wage costs they need not fear competition and there is no disadvantage to settling with the union. The public suffers since the increase in wages is passed directly on to the consumer.

⁵⁴ Reference here is to the auto, coal, steel, transportation, shipping and related industries. In industries such as oil, wages and costs are less important bargaining factors because of the high degree of automation.

⁵⁵ P. BOARMAN, *UNION MANAGEMENT AND ANTITRUST RESTRAINTS* 109 (1963).

⁵⁶ *Id.* at 104; see Comment, *supra* note 12, at 315-16.

mands.⁵⁷ The resultant reduction of the labor force required is readily apparent, particularly in the semi-skilled industries.

The problems arise when workers in the less progressive industries see the raise their fellow union members have received. "These workers seek to restore the wage differentials which previously existed but such wage increases for less productive workers cannot be absorbed by producers without increases in prices."⁵⁸ This activity starts the cycle over again. The increase in wages is reflected in raised prices. People who are receiving the increased wages maintain a neutral position while those on a fixed income, as stated above, diminish their ability to meet the increased market prices. "Wage rates set by strategically situated, powerful unions set the level toward which other rates climb; these centers of power become the fulcrum from which leverage is extended to raise rates all along the line."⁵⁹

The effect of a wage push spiral brought about by an imbalance of power in a collective bargaining relationship may have an effect on the marketability of American goods in the international marketplace. Increased wages which force the prices of these goods up may cause a reduced demand in the international market due to the availability of lower priced goods of similar quality from other sources. This may well lead to unemployment in the industries manufacturing such goods which have increased prices due to the wage increases granted overly powerful unions.

"There seems to be no reason to doubt that the upward pressures [for wages and benefits] exerted by unions and transmitted to prices through the law of costs may well proceed at a rate greater than the rate of increase in productivity for the economy as a whole, with a resulting general rise in prices."⁶⁰ Were this problem to be dealt with through monetary or fiscal policies it would not be attacking the source. Such efforts would merely be attempts to create a counter-push by squeezing businessmen so that they in turn squeeze labor. "An obvious alternative is to diminish the degree of economic power in the hands of unions."⁶¹

Wage-price problems created by labor-management bargaining are not easily resolved. Before any solutions are undertaken, a study into the causes and effects of union-management relations and results of previously bargained agreements should be analyzed. The effect of union "micro-eco-

⁵⁷ See Comment, *supra* note 12, at 311 n.85.

⁵⁸ P. BOARMAN, *supra* note 55, at 109.

⁵⁹ Schlesinger, *Market Structure, Union Power and Inflation*, SOUTHERN ECONOMICS JOURNAL, Jan. 1958, reprinted in W. GALENSON & S. LIPSET, LABOR AND TRADE UNIONISM 163 (1960).

⁶⁰ E. CHAMBERLAIN, LABOR UNIONS AND PUBLIC POLICY 29 (1958).

⁶¹ *Id.*

⁶² Micro-economics is that part of economics which deals with particular firms' prices, outputs, incomes and expenditure. Emphasis is on individual areas of activity

nomic"⁶² influences in the total "macro-economy",⁶³ if carefully analyzed, would profit both parties and the public. It is doubtful whether negotiators have a real grasp of the intricacies of micro and macro-economics sufficient to temper their demands at the bargaining table.⁶⁴

Problems with the NLRB

The Wagner Act established the NLRB to balance union and management bargaining power at a time when management enjoyed a decided edge. The functioning of the NLRB was to provide not only an enlightened body to decide actual disputes but also to provide guidelines for the future.

One of the primary problems with the NLRB is the changes in policy which have followed changes in its members after presidential appointments. Even if the Board exercised its rule-making functions the changes of administrations would leave unions and management in the dark as to the applicability of prior decisions of the Board. The intervention of the NLRB into labor-management relations was originally a well-founded incursion. Now the Board is often merely an extension of the political party in office and ends up being a tool to express that party's views on labor-management relations.

The need for labor-management legislation was founded on much more basic and important issues than the changing views of political parties. Such legislation was sponsored to heal economic ills and to assure positions of equal bargaining power for the parties who play such a large part in determining the economic well being of the nation.

The Time to Act

Analysis of the specific problems existing in the basic collective bargaining area leaves one convinced that conditions have radically changed since the government first became involved in the field. No longer is it possible to realistically cast unions in the role of the struggling weakling.

Since the government's purpose, expressed in the Sherman Antitrust Act, was to maintain free competition and prevent powerful monopolies from developing, some consideration ought now be given to union monopolies which have control over the nation's labor. The ALF-CIO is a single union which is divided into many smaller units. There are thousands of independent policy-making employers but rarely is there a single management group which speaks for all the smaller management units in the same way the AFL-CIO

such as a single firm or household as opposed to all the firms in an industry or households in the nation. K. BOULDING, *ECONOMIC ANALYSIS* 1 (1966).

⁶³ Macro-economics is that part of economics which deals with general economics and studies the overall averages as aggregates of the economic system. Emphasis is on the study of economic systems as a whole especially with reference to their general levels of output and income and the interrelations among sectors of the economy. *Id.*

⁶⁴ See Comment, *supra* note 12, at 316 n.103.

speaks for labor. "Labor monopoly vastly outreaches employer monopoly."⁶⁵

As previously stated, one purpose of the Clayton Act was to permit union organization during the early days of union activity. Today the unions, in most cases, no longer require this permissive approach and the policy behind the "labor not a commodity" argument does not have the same conviction as it may have had in 1914. Rather than attempt to apply the Sherman Act to present-day unions it would be better to draft new legislation. Such legislation should be drafted especially to deal with modern unions and could better cope with the present labor-management relationship than the Sherman Act.

Once the government steps into the area of private law making and passes legislation to permit more equitable dealings between parties in the private sector it is also its duty to carefully observe these areas in order to take further measures necessary to assure that an equitable balance continues. The willingness of government to promote collective bargaining legislation should also include the willingness to refrain from intervention when it sacrifices the best interests of the parties. The role of government should not be intervention to regulate substantive issues, but to regulate procedural issues. In other words the government should provide the tools whereby the parties are brought together but should not determine for one, or both, of the parties how they should be utilized. The key to successful collective bargaining is a workable agreement arrived at by the parties themselves. To achieve this result further government action is necessary. The time to act is now.

The public is already beginning to favor government intervention in traditionally free collective bargaining relationships. This attitude has developed due to hostility toward pressures exerted by unions in attaining bargaining demands.⁶⁶ The public desires better protection against the disruption of industries which cause severe and immediate effects to their interests (for example, the airplane, disposal and teacher strikes). Unless the parties can resolve this problem the government will eventually submit to public pressure and intervene.

If the government were to intervene, broad changes to restore equality in union-management relationships would be required. Changes as broad as the Wagner or Taft-Hartley Acts may be necessary. Unless a new policy were established any remedy would only be temporary and such a truncated effort would probably serve to hamper the relationship of union-management bargaining. The present "emergency injunction" powers under the NLRA are examples of temporary intervention by government that has a questionable effect on aiding the union-management relationship. Such injunctions

⁶⁵ P. BOARMAN, *supra* note 55, at 114.

⁶⁶ Clousson, *The Changing Visage of Collective Bargaining—Can Public Intervention be Restrained?*, 56 ILL. B.J. 818 (1968).

can forestall a crisis but may have no real effect on restoring equality to the bargaining relationship.

What steps might now be taken to achieve the goals the government has sought to accomplish?

ALTERNATIVES

Matching the Parties

The bargaining scope of a union might be required to correspond to that of the individual corporation or plant within the industries with which they previously bargained. This approach would serve to more evenly match the power of labor and management at the bargaining table, thus avoiding the inherent dangers of multi-employer bargaining.

While quantitative analysis of a labor organization is often utilized, this is merely an indicator of several factors which may signal the danger of potential abuse. The only meaningful approach is qualitative analysis of these factors. The question to be answered is whether particular labor organizations have either created monopolies, or are capable of creating monopolies, by their ability to do three things:

(1) to compel their members to submit to commands and to take away jobs or fine them if they do not obey; (2) to force up the price that the consumer must pay; and (3) to curtail the product or service and therefore stop job opportunities.⁶⁷

The primary purpose in limiting the size and power of a union is not to destroy its bargaining position, but to reduce the problems of national, regional, or industry-wide bargaining where one union bargains with all companies and has the power to strike every factory or business in that industry or region. "Industry-wide bargaining power used by a single union—like in the steel, auto, coal, shipping or trucking industries—means a monopoly over the workers. This causes monopoly wage price setting, inflation or the alternate, national emergency strikes."⁶⁸ The adverse consequences of such power will not only effect the economy as a whole, but ultimately the consumer.

The need for such fragmentation is apparent when one considers that the power of management and labor is not equal. Management of one company has no meaningful control or authority over the direction management of another company must follow. It cannot shut down an entire industry, however "the union's monopoly power is complete, it can control the work of each employee in all plants in an industry regardless of who owns them or where they are located."⁶⁹

A recent example of such union power over an industry is the September, 1970 strike against General Motors by the United Auto Workers. "Con-

⁶⁷ "Union Monopoly Power", *supra* note 40 (remarks of Senator Thurmond).

⁶⁸ *Id.* (remarks of Congressman Martin).

⁶⁹ *Id.*

tracts with common expiration dates with the 'Big Three' auto producers were won by Walter Reuther in the middle 1950's."⁷⁰ In this instance the "Big Three" had given their proposals to the U.A.W., which had them rejected by the council of representatives composed of workers from each of the employers. Thereafter the union named General Motors as its strike target. The U.A.W. could have struck all three producers. "Originally a joint attack against General Motors and Chrysler had been planned."⁷¹

The advantage of smaller units and local level settlement is that a local union which deals with a company is in the best position to know what it takes to solve their differences. When workers in the locality settle disputes the "local" public interests are more clearly defined as opposed to disputes where the decisions are made by a union officer hundreds or thousands of miles away in a national or international union's main office.

If strikes took place they would tend to be of a local nature since bargaining would be confined to one area or one company and therefore an entire industry, region or the United States would not be tied up. The public could buy products or travel as they chose even if one of the companies was struck or closed down. The pressure would not come from the union as much as from the company's knowledge that its competitors were still producing and making a profit while it was being struck. This knowledge might bring about a speedy settlement. In an industry-wide regional or national strike all the companies are being struck and a resulting status quo exists among them. In this situation the companies are hurt as a whole, but none is hurt any more or less than its competitor. The public is the victim in these strikes because it is prevented from obtaining the goods or services from an alternate source. Local bargaining units would obviate this problem and restore the element of competition to the settlement of such disputes.

Limiting the Topics

A second approach would be to limit the topics which could be considered in the collective bargaining. Caution would have to be used in eliminating topics so as not to hamstring the union or management parties in light of Taft-Hartley's permissible bargaining areas under Section 8(d).⁷²

One way topics could be limited or done away with entirely would be to overrule *United Steelworkers v. Warrior & Gulf Navigation Company*.⁷³ This case adversely affected the ability of employers to conduct their businesses in an efficient manner, free from union intervention. The case subjected previous "management prerogatives" to a process of review by arbitration. This was accomplished by giving the standard arbitration clause

⁷⁰ Wall Street Journal, Sept. 2, 1970, at 3.

⁷¹ *Id.* at 2.

⁷² 29 U.S.C. § 158(d) (1964).

⁷³ 363 U.S. 574 (1960).

broad and all-inclusive construction and coverage. Previously courts only compelled arbitration of disputes which the parties had "expressly" committed to the arbitration process. They would not imply that a topic was arbitrable. This entire approach was reversed after *Warrior & Gulf*.⁷⁴ This case arose because the collective bargaining contract contained a general clause excluding from arbitration all matters strictly functions of management. Thereafter management began contracting out work formerly done by the union employees. The union disputed management's right under the collective bargaining contract to engage in this labor practice. When the employer refused to submit this grievance to arbitration, suit was brought in the United States district court to compel arbitration. Upon finding that management's conduct fell within the broad exception clause contained in the collective bargaining agreement, the court concluded that the grievance was not subject to arbitration.⁷⁵

In its reversal the Supreme Court held that since the collective bargaining agreement failed to expressly exclude the employee's grievance from an arbitration settlement, arbitration was compellable.

The new approach after *Warrior & Gulf* was that apart from matters the parties "specifically exclude" all parts of the contract could be subjected to collective bargaining. The old contracts were opened up to arbitration. Management had to go back to the bargaining table and renegotiate so as to remove areas from the sphere of the newly imposed arbitration. By overruling the *Warrior & Gulf* trilogy there would be arbitration only on those subjects actually contemplated and agreed upon by the parties.

Third Party Intervention

Finally the process of collective bargaining itself might be altered to accommodate a third party who would enforce compulsory arbitration on behalf of the public's substantial interests. This alternative has merit only so long as the interests of the public are not permitted to totally dominate the collective bargaining relationship. An arbitrator must have the ability to weigh the demands of the parties against the public interest and not interfere with the negotiations of the parties unless a severe hardship on the public's interest is obvious. The goal of collective bargaining is to have the parties involved settle their own disagreements. Third party intervention should be permitted only with caution in order to allow the greatest amount of flexibility and freedom when the two bargaining parties can interact.

Third party intervention could be initiated at some point prior to the need for arbitration. Possibly the "cooling off" period for strikes which threaten the national health or security under the Taft-Hartley Act would be an

⁷⁴ See Clousson, *supra* note 66, at 819.

⁷⁵ *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 168 F. Supp. 702 (S.D. Ala 1958).

opportune time for such intervention to take place. The implementation of such an alternative would probably require new legislation.

NLRB Member Selection

If a remedy were sought to the problem of Board members reflecting the views of the President who appointed them at least three different approaches could be followed. First, the power of appointing Board members could be retained by the President while restricting the number of appointments he could make during each term of office. In conjunction with this approach the terms of the members might be staggered in such a way that a majority could never be achieved by any one President's appointments. Since the President may serve two consecutive terms in office it might be necessary to increase the number of Board members so that he could appoint replacements but could not succeed in appointing a majority. If for example the number of Board members were increased to nine and their five-year terms were staggered so that a new term began every two years, a President serving two terms could make only four appointments. Under the present system a two-term President can appoint a totally new Board over an eight-year term in office.

A second approach to curb this practice might be to develop a "labor court" patterned after the Court of Claims and the Customs Court. This specialized court would have judges with life tenure, subject to good behavior. The Court of Claims and the Customs Court are among the inferior courts established by Congress under Article III of the Constitution. These two courts are illustrative of courts which are devoted to a single, specialized area of the law. These courts have no jurisdiction outside their respective subject areas.

The Customs Court is especially interesting because of the manner in which its nine judges are divided into three separate divisions. Each division is assigned certain paragraphs of the tariff and revenue acts and this determines to which division protest cases are assigned.⁷⁶ Such a division of labor permits the panel of three judges⁷⁷ to become specialists within an already specialized court in order to more capably deal with the issues presented. This feature would be especially desirable in labor relations.

The third approach to solving the Board's problems would be to permit representatives of both management and unions to select the members of the Board in the same manner in which mediators are now selected. Each side selects one member and then a third member would be selected by their chosen representatives or the two parties would have to agree on a third

⁷⁶ 3 WEST'S FEDERAL PRACTICE MANUAL § 4226 (2d ed. 1970).

⁷⁷ Protests are normally heard by an entire division of three judges in New York City, the headquarters of the court. Single judge hearings are also conducted at Ports of Entry and then reviewed by an entire division in New York. *Id.*

selection. The process of selection utilizing this approach would involve a monumental effort by unions and management. Success is possible, however, and could result in a Board which was more attuned to the problems of the parties and more willing to give the direction which the Board was authorized to provide.

The successful use of such an approach would favorably affect the public's third party interests. A better balanced relationship between representatives of union and management will permit a reduction in wage-price spirals, the products of unbalanced relationships, and protect the public from being forced to assume the burden of a higher wage or an increased product price.

Voluntary Arbitration

One solution which has already met with limited success is self-imposed voluntary arbitration. In the absence of a complete legislative remedy concerning existing problems between unions and management it is in accord with the Wagner Act to allow the parties to resolve their disputes. Self-imposed arbitration permits this goal.⁷⁸ The impending threat of further government action may encourage more widespread use of this approach. Such increased use of self-imposed arbitration might act as the necessary catalyst to motivate unions and management toward "results oriented" bargaining in order to obviate the need to arbitrate.

Approval of arbitration as a means of solving disputes has been recognized by the Supreme Court of the United States.⁷⁹ The parties to collective bargaining agreements usually prefer this method over submission of a dispute to the NLRB or to the courts, the usual bodies which provide the intervention which the public seeks. A total of 94 percent of all labor agreements presently contain arbitration clauses.⁸⁰ Unions and management also prefer arbitration over the NLRB and courts because the arbitrator is familiar with the history of the particular union-management relationship and gives greater effect to the expectations of the parties than either NLRB or courts.⁸¹

A drawback to arbitration as well as allowing a matter to go to the NLRB, or the courts, is that the parties may have previously taken extreme positions on various issues and then refused to relinquish any ground hoping that the arbitrator or court will choose a middle ground between both extremes. This strategy generally leads to agreements in which neither side is satisfied.⁸²

⁷⁸ See Casey & O'Neill, *A Comparison of the Law Governing Labor Relations in the United States and the United Kingdom*, 44 TUL. L. REV. 67, 90-92 (1969).

⁷⁹ See *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960).

⁸⁰ Bond, *The Concurrence Conundrum: The Overlapping Jurisdiction of Arbitration and the NLRB*, 42 S. CAL. L. REV. 4, 17 (1969).

⁸¹ *Id.*

⁸² See Rains, *Dispute Settlement in the Public Sector*, 19 BUFF. L. REV. 279 (1969-70).

Bargaining parties may also depend on the ability of the government to "make things right" in their favor. Such dependence results in forestalling the dependent party from fully executing his responsibility at the bargaining table. A union may well refuse to bargain on a topic, wait for management to file an unfair labor practice complaint and be assured of getting into another forum "where they might possibly get a better deal than if they had bargained with management."⁸³

Voluntary arbitration can be a useful tool to assist collective bargaining when selectively used by the bargaining parties. If subjects are predetermined to be arbitrable the parties may circumvent the need for government intervention. Self-imposed arbitration provides localism and flexibility in the relationship between the union and management. By submitting to their own form of arbitration the parties succeed in keeping the dispute within the union-management family relationship.

Voluntary arbitration does provide solutions to some problems between the parties. However, it does not solve the disparity of bargaining power which may exist between unions and management. The subjects of voluntary arbitration are only as broad or narrow as the parties were able to bargain for. If one party is weaker its interests will not be given full attention in arbitration.

The NLRB is authorized under the Wagner Act to consider only the contract and not the parties' prior relationships. When an arbitration clause is included in a collectively bargained agreement the parties are assured of more flexible attention from the arbitrator to their respective problems.

Widespread use of voluntary arbitration would constitute a self-restraint of unions because of the availability of these other forums. The likelihood of such self-imposed restraints is slight. It is doubtful if the unions are any more ready to curb their appetites for greater benefits and wages than the corporations were for greater profits in the early and middle 1900's. In the absence of self-restraint by the unions to curb their tremendous power there are no checks on their monopolistic manipulation of labor.

The Most Reasonable Offer

A solution to the problem of parties taking extreme positions and one that would force the parties to bargain in good faith is for the arbitrator or court to accept the most reasonable final offer of one of the parties.⁸⁴ This would place the onus on each party to arrive at and seek a reasonable list of demands. The goal would be reasonableness with the most reasonable

⁸³ *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960).

⁸⁴ Rains, *supra* note 82, at 284-85.

demand being accepted by the fact finder. The parties would be forced to make their priorities clear and would thereby give the fact finder, arbitrator or court, more information upon which to base a decision. Factors to consider in order to determine reasonableness would be: the amount or type of demand considering industry patterns and past experiences of the fact finder; increased or absence of increased productivity to match wage demands; the individual and internal problems of the parties that either support or fail to support their basis for a demand.

When the parties know that their ultimate offer is going to be weighed against the opposition's on the basis of reasonableness their conduct at the bargaining table will be affected. The most desirable and most likely impact of such a solution will be for each party to retract from unrealistic positions in advance of confronting its opposition and the arbitrator. The parties would not be afforded the luxury of maintaining an obtuse position far removed from a reasonable position. The bargaining would revolve around a more compatible common ground than around the previously polarized positions of union and management.⁸⁵

CONCLUSION

Although various solutions to economic problems have been proposed, it is not suggested that they should all be applied either with equal force or at the same time. Some may be harmoniously implemented while others must be applied individually to prevent undesirable side effects.

The thrust of these alternatives has been balancing the power between unions and management. In summary, three distinct approaches have been considered.

I. *Balancing Bargaining Power*

- A. Matching the parties by localized bargaining where economic power is balanced;
- B. Limiting the topics which are bargainable;
- C. Self-imposed voluntary arbitration;
- D. Most reasonable final offer.

II. *Enforcing the Public's Interest*

- A. Third party intervention;
- B. New legislation.

III. *Revision/Replacement of the NLRB*

- A. Staggering terms of members to control presidential appointments;

⁸⁵ *Id.* at 285.

- B. Increasing the size of the Board;
- C. A labor court similar to Court of Claims or Customs Court;
- D. Board selection by union and management.

In considering area I, it is possible to take the suggestions individually and harmonize them to produce a notably improved bargaining relationship. However, it might not be necessary to utilize all the approaches in area I in order to achieve the desired balance between the parties. The need for arbitration, be it self-imposed or compulsory, might never arise once the parties were matched in economic power and had clearly defined the topics to be opened to collective bargaining. For this reason only one item should be attempted at a time in order to minimize unnecessary government action.

Area II is the broadest, and for that reason is most likely to involve economic side effects. A congressional enactment aimed directly at unions which exert monopolistic pressures would be a deep incursion into existing union-management relationships. This could lead to a multiplicity of new problems for the bargaining parties and the third party public interests. Nonetheless such a course should be considered at this time. Such an approach would conceivably incorporate some of the methods suggested in the third area dealing with Board revision or replacement.

The proposed solutions offered in area III are intended to be used together to achieve the desired result. If the National Labor Relation Act were amended to create a labor court to enforce its provisions, the redirection of parties to this forum would not be difficult. Curbing presidential appointment powers could also be accomplished without burdening the system.

Suggestions in area III could supplement area I if necessary. It would be unrealistic to conclude that the suggestions in area I would obviate the need for a system of review.

In order for unions and management to collectively bargain successfully a balance of powers and interests must be maintained. The federal government has the primary responsibility to maintain this balance. A failure to act now will result in continued abuses as a result of the excessive demands of the more powerful of the two parties, the unions.

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