

Book Review

Labor and the Wartime State, Atleson, James B.
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reviewed by Clyde Summers†

The American collective bargaining system became established and took its present shape in the 1940s. The turmoil of change growing out of the depression years and legislation which encouraged unionization and collective bargaining—the Norris- La Guardia Act, Section 7 of the NLRA, and the Wagner Act—was quieted by mobilization and wartime measures. Unions took the “no-strike” pledge and strikes which impeded the war effort were considered unpatriotic or denounced as “treasonous.” Collective bargaining disputes were resolved by the War Labor Board (“WLB”), which prescribed terms of settlement, including how collective agreements should be administered. Union membership grew by fifty percent during the war and some unions grew geometrically. The Auto Workers and Steel Workers more than doubled, and the Electric Workers quadrupled.

Professor Atleson, in this impressive and thoroughly researched study, has traced the shaping of collective bargaining during the war with particular focus on the role of the federal government acting through the WLB. The study is a detached analysis of specific problems and the WLB’s response to those problems. In addition, it sets those problems in the context of the political and social climate of the times. It not only delineates the articulate policies of management and unions, but also examines their underlying motivations and their institutional imperatives.

Professor Atleson describes how wartime regulation shaped our collective bargaining system in four major respects. First, the WLB regularly recommended or ordered parties coming before it to include in their collective agreement provisions for a grievance procedure with binding arbitration of disputes arising under the contract as the final step.

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The WLB would not order arbitration of interest disputes, that is, the terms of the agreement, but only the interpretation and application of the agreement. The primary purpose was to avoid strikes on day to day problems. By the end of the war more than ninety percent of all collective agreements had such provisions, and that remains the pattern today. The Supreme Court has imbedded arbitration in labor law with the Steelworkers Trilogy.¹

Second, the WLB ordered inclusion of a no-strike clause prohibiting strikes during the contract term. This was animated by the wartime “no strike” policy, but was commonly considered as reinforcing arbitration. As Professor Atleson points out, the clause was generally broader than the arbitration clause so that the union could not strike, even though the dispute did not involve interpretation or application of the agreement and was therefore not arbitrable. This is still the pattern in collective agreements, and the Supreme Court has extended the no-strike obligation beyond its explicit terms. Applying its gratuitous aphorism that arbitration is the *quid pro quo* for the no-strike clause, the Court held in *Lucas Flour*² that where there was an arbitration clause, a no-strike obligation would be implied.

Third, the WLB promulgated the policy that certain subjects were “management prerogatives” about which the employer need not bargain. In addition, the employer could change such terms without consulting the union, and the union could not strike over these terms. The WLB thereby excluded the union from having any voice in matters such as paid sick leave, choice of personnel, and opening or closing of units. The employer had unilateral control over these issues. Ultimately, the Board extended the concept of management prerogatives by approving employer demands for express management prerogative clauses in collective agreements; and listing certain matters such as hiring, promotion, transfers, and scheduling of work which were bargainable subjects as exclusively for management during the contract term. The decisions of the WLB in this area shaped the law under the National Labor Relations Act. In *Borg-Warner*,³ the Supreme Court adopted the principle that there was no duty to bargain about “non-mandatory” subjects. Although the category of “mandatory” subjects has been expanded, the principle that certain subjects, such as plant closure which directly affects employees’ jobs, are still beyond the employees’ right to a voice persists. The Supreme Court, following the precedent of the WLB, further limited the union’s voice in *American*

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

2. *Local 17, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962).

3. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958).

*National Insurance*⁴ by holding that employers could insist on imposing a management prerogative clause which gives the employer unilateral control during the contract term over mandatory subjects. Strong employers can thereby substantially shrink the area of joint decision making.

Fourth, one of the most pervasive and troublesome issues before the WLB was the unions' demands for union security. The WLB was unwilling to grant a closed or union shop, but the unions needed some institutional security because they were strictly limited in their ability to get wage increases or to strike for other benefits. The WLB hit on a compromise, maintenance of membership. Although new employees were not required to join, and present members could get out during a brief window when the agreement terminated, in fact, most new employees joined and few employees opted out. In practice, maintenance of membership gave the unions the security of a union shop. Maintenance of membership, however, did not survive; after the war unions returned to the union shop. The Taft-Hartley Act provided the agency shop as a different compromise. This system requires employees only to pay regular dues and initiation fees, but not to become and remain members of the union. This limited union security has been further circumscribed by the Supreme Court, limiting compulsory dues to that portion used for collective bargaining purposes.⁵

Professor Atleson's thesis is that "legal regulation, policies and pressures during the war had a profound effect on labor union structures, labor law and collective bargaining in the post war period."⁶ He dramatically demonstrates that major institutions and practices took shape under the wartime pressures and legal regulations. He makes a less convincing case that our collective bargaining system, union structures, and labor law would have been significantly different, but for the wartime experience. A strong case can be made that the war only accelerated developments which would have occurred anyway.

Grievance arbitration was not born of the WLB. It had existed since the turn of the century in the coal industry and in the garment industry since the 1920's; General Motors and the UAW established an arbitration system in 1937. The WLB built on these models. Without wartime pressures both union and management would likely have come to realize that neither could afford a process of resolving day to day disputes over the meaning of the agreement by the alternatives to arbitration of union surrender or a strike. The WLB hastened the learning process, but there

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

5. *Communication Workers v. Beck*, 487 U.S. 735 (1988); *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435 (1984); *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961).

6. Preface at ix.

were existing models from which the parties would have learned, just as parties after the war learned by the WLB example. Other countries have recognized the need for peaceful dispute resolution procedures through neutrals, most often labor courts; with a working model of arbitration, there would be little enthusiasm by unions and management for the labor court alternative.

Professor Atleson emphasizes that grievance procedures and arbitration tend to centralize dispute resolution. Increasing reliance on professional staff and bureaucratization resulted in the loss of contact and common perspectives between officers and worker rank and file. Established unions, however, were bureaucracies before the war, many of which did not have centralized grievance procedures. Bureaucracy in unions is more the product of aging and Michael's "Iron Law" than the method of dispute settlement. Unions in Germany and Sweden are far more centralized, more bureaucratic and less democratic, with no structured grievance procedure or arbitration. Centralization of control in unions is almost inevitable when dealing with employers with centralized control, and this is particularly true in multi-plant enterprises.

The no-strike clause is almost a necessary complement to any procedure for the peaceful settlement of disputes. Arbitration cannot fully serve its function of providing peace during the term of the agreement if the union can choose either to strike or demand arbitration. For the union only to be able to choose either to obey an award or strike makes a mockery of the process. Once there was acceptance of arbitration as a method of resolving disputes, it was inevitable that strikes for arbitrable disputes would be banned. Conceivably, disputes over terms not settled by the collective agreement could be left to economic conflict, but that would require acceptance of the view that terms and conditions left open for the duration of the agreement, as well as all unmentioned terms, remain open for settlement by trial by battle. This issue was moot after the war, but the wartime assumption prevailed that the contract settled all bargainable terms, either regulating them or leaving them to management control.

"Management prerogatives" as a sacred area walled off from union voice was articulated, promoted, and written into collective agreements by the WLB. Unlike arbitration and no-strike clauses, this was not a necessary element in a working collective bargaining system. On the contrary, it undermines the purposes of the duty to bargain. The premise of the duty to bargain is that the process of discussion and exchange of views will lead the parties to better understand each other's felt needs and discover possibilities to resolve or compromise conflicting interests. It thereby furthers labor peace. To declare certain subjects in which the union has an interest as non-discussable forecloses the values of bargaining and increases the likelihood of economic conflict. If the union feels that it has

an interest in a subject, that should be enough to require discussion. The employer is always free to say "No" and provide reasons for its refusal. Had the WLB not walled off "management prerogatives," our collective bargaining system might have developed with a more open bargaining process, as is the case in most other systems. We would have kept off the bargaining table a bitter fruitless issue of whether a subject was bargainable, and have been spared the never-ending litigation as to what are "mandatory" subjects of bargaining. In this area, Professor Atleson makes a convincing case that the WLB shaped our system, and not for the best.

The "no-strike" pledge given by the unions after Pearl Harbor had long term consequences that are difficult to trace. It cultivated a public view that strikes were unnecessary, or even intolerable. Workers had an opposite view, fed by wage restraints accompanied by inflated corporate profits in the defense industries. This generated resentment and rebellious response in the plants. One of Professor Atleson's best chapters describes sources of the numerous wildcat strikes and the union leaders' efforts to quiet them. Because the media and the politicians accented the number of strikes and their costs in lost production, but neglected the reasons for the strikes, the public supported legislation to prohibit the strikes. After the war, the public image of unions was one of irresponsibility and strikes were seen as a major union abuse. In the years after the war, in a effort to recoup lost ground due to WLB restraints, the unions became involved in a wave of strikes against corporations which had enjoyed excess profits. It was this sequence of events which provided the political fuel for demands to curb unions which were "too strong." The result was the Taft-Hartley Act. The wartime experience thus may have had a long lasting and profound effect.

However one might view the unprovable cause and effect relationships, Professor Atleson has written an exceedingly illuminating and detailed history of the crisis years when our collective bargaining system was force-fed to maturity.