

ALEXANDER H. FREY—ARCHITECT AND CRAFTSMAN IN LABOR LAW

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Any sketch of Professor Frey's contributions to labor law—and they are impressive—would be dry without some reflection of his charming, forceful, and exuberant personality. Much of his success as a labor arbitrator and administrator has been due, I am sure, to the trust and confidence he immediately inspires. No friend can think of him without recalling his infectious laughter, his gaiety of spirit, and his quiet strength. During the preparation of a casebook¹ on which many labor-law teachers worked together, I had the good fortune to meet with him often. The story of that book is something of a saga in itself. I mention it here, however, because those meetings brought me the privilege of working with Alec Frey.

As an architect in labor law, Professor Frey is an ardent champion of sound collective bargaining as a bulwark of our cherished system of free enterprise. This is the main thrust of his theoretical writings in this field. As an arbitrator of many minor practical, actual labor disputes, furthermore, he displays the skills of a master craftsman.

In the early days of the labor movement, the employers and the gentry, and the many judges who reflected their interests, saw the process of collective bargaining as something subversive, almost revolutionary. It challenged the power and the profits of the establishment.

In his 1941 casebook,² Professor Frey effectively took up the cudgels of reason against that approach to labor's claims. He pointed out that bargaining is the normal way of doing business in a free society, and that group bargaining—*collective bargaining*—is the rule in adjusting all relationships within a business enterprise except those between employer and workingman. Stockholders, bondholders, and management, by collective bargaining, agree upon their shares. No one calls this a subversive process. The worker, alone, is helpless unless and until he can bargain through a union. His labor has little

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¹ LABOR RELATIONS AND THE LAW (1st ed. R. Mathews 1953, 2d ed. D. Wollett & B. Aaron 1960, 3d ed. J. Williams 1965).

² A. FREY, CASES ON LABOR LAW 1-6 (1941). The book dealt mainly with cases and legislation relating to the struggle for unionization and the results of successful organization when achieved, and with the law governing unions as associations, *e.g.*, their formation, internal regulation, amenability to suit, responsibility, and so forth.

or no scarcity value because others stand eager to step into his shoes. He cannot, Professor Frey points out, hold back his work for sale at a better price because work not done has disappeared. He cannot hold out long even in the face of intolerable conditions, because he has no reserves with which to pay the rent and feed the family. Where one segment of society is at such a disadvantage, government has to intervene, either to fix rates or to try to establish some equivalence of power. "Infancy laws, usury statutes, and fiduciary standards are traditional examples; so, too, are temporary controls on rents, commodities, wages, etc., when emergency conditions disrupt the normal balance of bargaining power."³ So the government intervenes, in the United States as in many other countries, to create at least a rough equivalence of power between employers and unions. It has no alternative, Professor Frey argues, except to fix wages by fiat; and with that must also come the fixing of prices and profits. Free enterprise, instead of being fortified by a limitation on collective bargaining, would be annihilated by it.⁴

Professor Frey has been consistent in his devotion to collective bargaining (and to truly voluntary arbitration as an integral part of that process) with one brief but interesting deviation, occurring in 1943. I can understand and sympathize with it because in that year I agreed. We were both working, then, in different parts of a novel and exciting national experiment, on a vast scale, with something very close to compulsory arbitration (which, as Professor Frey insists, is not really arbitration at all). The National War Labor Board was engaged in settling the nation's labor disputes by fiats called "directive orders." Professor Frey was the Vice-Chairman of its Third Regional Board for Pennsylvania, southern New Jersey, Delaware, Maryland, and the District of Columbia. He was also the Chairman of the Third Region's crucial Enforcement Division. In both capacities he was doing a superlative job as the leader of a number of brilliant and devoted younger men, some of whom had been his students at the University of Pennsylvania Law School. The work was creative, with no precedent; it exacted, and from him it received, the highest qualities of heart and mind.

I myself was working in Washington as a public member of the NWLB's appeals committee, and I fell under the spell of excitement and enthusiasm for the work, somewhat as Alec must have done.

The NWLB was a sprawling, jerry-built emergency affair. It

³ Quoted in *LABOR RELATIONS AND THE LAW* 55 (3d ed. J. Williams 1965).

⁴ See, for greater detail, the excerpts from Professor Frey's work in *LABOR RELATIONS AND THE LAW*, *supra* note 3, at 53-61. For a contrasting view, see Simons, *Some Reflections on Syndicalism*, *id.* at 61-66.

had acquired neither the strait jackets of bureaucracy nor, on the other hand, the accumulated wisdom that grows up within a long-established public service. We all worked thoughtless of hours, and vaulted obstacles—from lack of legible stenography to lack of adequate preparation and knowledge—as blithely as we doubtless vaulted violations of due process of law. Our work had some breath of contagion from the spirit which animated the men in the trenches and on the landing craft by the stormy coasts of Normandy.

And, miracle of miracles, the jerry-built structure worked! Under the stresses of patriotism the operation succeeded. No wonder we, two cogs in that great machine, were tempted, irresistibly tempted, to embrace the idea that what could be done for war could also be done for peace. I agreed with Alec, therefore, when he wrote in 1944 that any hope of world peace needed something like the NWLB to inculcate and foster the habit of resolving labor disputes without strikes or lockouts.⁵ How else, his cogent argument ran, can we expect nations to follow rules of law when their own internal labor disputes cannot be resolved without strikes or lockouts, the small equivalents of war?

The argument was appealing; but hindsight shows that it was misconceived. It was too rational for this world's irrationality. When management and labor met in 1945, all agreed that nothing of the wartime experience could or should endure, except for some encouragement for voluntary arbitration.

Professor Frey, classical defender of collective bargaining, soon reverted to its cause. In 1947, with no mention of his momentary heresy—his short flirtation with adjudication—he restated flatly his old thesis: collective bargaining must be free and uninhibited.⁶ In answer to the arguments for legislation requiring “compulsory arbitration” with, or without, a labor code, he pointed out that no code could ever set up rigid standards for judicial or quasi-judicial settlement of contract disputes in the infinite variety they display. Nor could any “peacetime equivalent of the National War Labor Board” create such standards itself or operate successfully without them.⁷ He continued,

A procedure to which either the employer or his organized employees do not willingly submit, and out of which there emerge for the employment relationship decreed terms with which one of the parties (or possibly both) does not agree,

⁵ Frey, *Arbitration and the War Labor Board*, 29 IOWA L. REV. 202, 219-20 (1944). The plea is primarily for voluntary arbitration but, failing that, for “agencies similar to the War Labor Board, to which disputants must resort for the settlement of unresolved disputes.”

⁶ Frey, *The Logic of Collective Bargaining and Arbitration*, 12 LAW & CONTEMP. PROB. 264 (1947).

⁷ *Id.* at 273-74.

is ill-devised to produce a mutual feeling of fair treatment. Without such a feeling low morale, petty bickering, suspicion, distrust, and their disruptive effects are unavoidable. At best the losing party will insist upon a highly technical interpretation and application of the order in an effort to minimize its detrimental effects, and will strive to bring about new or border-line conditions as a basis for challenging its continued applicability. Litigation will multiply, and increasingly the time and attention of both employer and employees will be focused on court or board proceedings to the detriment of their joint task of production.⁸

And in a footnote he adds,

The magnificent record of the National War Labor Board might seem to refute these dire predictions. But the very fact that it operated under wartime conditions of intense patriotism, government financing, and extreme labor shortages explains the absence of significant resistance to its orders. Former members of the board are themselves among the foremost opponents of a prolonged extension of such compulsory procedures to a peacetime economy.⁹

And finally, Professor Frey says, the one ultimate objection to settling labor disputes by decree is that no law—no hated law—can ever force men to work effectively. To achieve that *sine qua non* of productivity, the only way is free collective bargaining buttressed by a right to strike and supplemented, where necessary, by arbitration consented to by both sides.

To these wise judgments of twenty-one years ago I may add only that those years have shown us that even collective bargaining (with its right to strike) is not a panacea. But it is still true, I believe, that for our economy to keep its health such bargaining should continue to be the chief method for settling labor disputes over contracts. In some cases, however, strikes, or contracts that victimize the public, are not tolerable; in those cases other methods of settlement have to be used. If impartial experts in labor relations can be the artisans who fabricate those settlements, the results will harmonize with the results achieved elsewhere by collective bargaining, and so will avoid most of the evils Professor Frey rightly saw in a national peace labor board.¹⁰

The first of Professor Frey's private arbitration cases to be reported was a pioneering award that brought into play his skill as an

⁸ *Id.* at 274.

⁹ *Id.* at 274 n.23.

¹⁰ For an able exposition of this view, see Williams, *Settlement of Labor Disputes in Industries Affected With a National Interest*, 49 A.B.A.J. 862 (1963).

architect in a highly explosive area. In *Phoenixville Publishing Co.*¹¹ in 1946, he had to arbitrate, among other issues in a first contract, a demand for a union-shop clause requiring every employee to join the union. The company, which published a small daily newspaper and ran a job printshop, argued that it could not operate with a union shop. Professor Frey was not convinced of that. He noted that the local guild was, concededly, a responsible union. He examined practice in the industry and found that forty-eight per cent of the guild's contracts, nationally, were union-shop while twenty-two per cent more were maintenance-of-membership, requiring all employees who had already joined to continue as members.

The whole issue, as I have said, was a hotly-disputed one. President Roosevelt had stated that government would never order a man to join a union. Labor leaders insisted that unions, giving up their right to strike, must have their membership protected. On this rock the NLRB's predecessor had foundered; and the NLRB had evolved maintenance-of-membership as an emergency compromise.

Now in a voluntary case Professor Frey awarded the union shop, grounding his decision on the social importance of strong unions. (He regretted, however, that there was no feasible way to make sure that the local guild should continue to deserve the trust which his award reposed in it.) Maintenance-of-membership was not enough, he said; it did not prevent the unfairness and bitterness that arise when employees sponge on a union without supporting it. Although the guild might not be inconsolable with nothing more than maintenance, he could not in good conscience deny them a union shop. It was a courageous decision, and one which had a significant influence.

Turning now from Frey the architect to Frey the craftsman, I can suggest, on the limited data available,¹² that his work on small disputes has been fully as wise, uninhibited, and deep-seeing as his larger contributions to labor-law theory.

Most of his reported cases dealt with minutiae, but I say this (as a brother-arbitrator) with no thought of derogating from their importance. Perhaps almost the reverse. Good bricks are needed for a good brick wall. So sound judgments are needed to build a sound and enduring edifice of healthy labor relations. Consider the following examples.

In one case¹³ he had to arbitrate the propriety of the discharge of a transport driver because he had had four accidents in seventeen

¹¹ 2 Lab. Arb. 10 (1946), reprinted in *LABOR RELATIONS AND THE LAW* 557 (2d ed. D. Wollett & B. Aaron 1960).

¹² Many awards are never published because the parties do not agree to publication.

¹³ *Interstate Bakeries Corp.*, 38 Lab. Arb. 1109 (1962).

months. On its face the employer's response to this challenge seemed reasonable enough. But the first and third accidents, concededly, were not caused by any fault of the driver. The second was the result of coming too quickly over the brow of a hill and finding an overpass not high enough for the truck to get through. Serious property damage resulted. The driver received a warning and one week's suspension. The last accident was caused by sudden, unexpected ice where the truck was turning off a service road into a throughway. To the company, this was the straw that broke the camel's back. But the camel-back approach is not the proper one for a discharge case. A driver might be justifiably discharged for conduct which did not result in an accident, such as driving while intoxicated. The management could conceivably have discharged the driver for his second accident, but it did not do so. Neither the first nor the third accident was ground for discipline. The fourth, therefore, had to stand on its own feet. Thus viewed, while it involved some fault, it was comparatively trivial and did not justify "resurrecting" the "supreme penalty" of discharge. Four weeks' disciplinary layoff without pay was justifiable, and this penalty the arbitrator could and did impose.

In another discharge case¹⁴ a mechanic's helper at a Pennsylvania Greyhound garage had been fired for refusing to make an accident report. The evidence was conflicting and puzzling, but much of it indicated that the man accused could not have been involved in the accident. Some vehicle had rammed a brick wall at a parking lot. The helper had driven a bus to the lot that morning. But much testimony seemed to show that the helper's bus was still on the road when the crash occurred. If he had agreed to make the accident report, he would not have been fired but would have received merely a two-day layoff. Although he knew this, he steadfastly insisted that he had not had anything to do with the accident and so continued to refuse to sign a report. Professor Frey found his attitude persuasive of innocence, and reinstated him with back pay.

Another interesting case¹⁵ arose out of the following facts: X (the grievant) and two other workmen found both of two coffee machines, intended for the workers, to be out of order. Without asking permission, they went to a coffee machine in the office area reserved for the use of management. Two company officials asked them why they were going to get coffee from the management machine. The other two workmen explained that their own machines were broken. One official said that they were not allowed to get coffee in that area

¹⁴ Pennsylvania Greyhound Lines, Inc., 18 Lab. Arb. 724 (1952).

¹⁵ Linear, Inc., 48 Lab. Arb. 319 (1966).

at any time. *X* thereupon told him, in pungent and indecent terms, what to do with his coffee machine; and the three workers walked away empty handed. *X* received a three days' disciplinary layoff, allegedly for insubordination. Professor Frey upheld this punishment. He found insolence, rather than insubordination, which is a more serious offense. He disclaimed reliance on the vulgarity of *X*'s remark. That was "shop talk" of a kind freely used by some workers "in talking to one another and even to their foremen, and vice versa." *X*'s conduct would have been just as intolerable if he had said, "Aw, throw the damn coffee machine out the window." Management had a right to make its rule about the use of the machine, whether *X* thought the rule snobbish or not. *X* had "no right to verbally insult and belittle management publicly for having enforced its rule against him." He could have asked permission; instead, "he sought to act in deliberate defiance of the rule, and then insolently revealed his bitterness when the rule was not waived in his favor." The gist of the offense was "insolence and effrontery in addressing executives of the company in the presence of other employees."

Neither party to this tiny dispute attracts our sympathy. The management might have been more cooperative, but it did not have to be. The workers might have asked permission instead of picking a quarrel. Incidentally, I doubt the dictum (but commend the holding). I doubt, in other words, that the offense would have been quite the same if the vulgar phrase had been bowdlerized in the way Professor Frey suggested; the vulgarity—innocuous though it might have been between equals in the shop—did seriously aggravate the insult. But with the result I agree. One major element of an insult, or verbal aggression, is that it outrages the anticipations of its addressee. Dr. Jerome D. Frank has recently called attention to some investigations of the nature of verbal aggression which indicate that violation of expectations is an important ingredient. After recounting several ingenious experiments, Dr. Frank concludes, ". . . behavior accepted calmly in an equal or superior is 'insolent,' and therefore anger-arousing, in an inferior since it is not commensurate with what is expected of him."¹⁶

In the last illustration of crartsmanship which I shall mention,¹⁷ the contract required that a workman, to qualify for holiday pay, should have worked "the day before the holiday and the day after the holiday." The holiday in question was a Labor Day Monday. The contract also provided that the regular work week should be Monday through Friday, and that Saturday work should be paid for

¹⁶ J. FRANK, *SANITY AND SURVIVAL—PSYCHOLOGICAL ASPECTS OF WAR AND PEACE* 75-77 (1967).

¹⁷ Quaker Shipyard and Machine Co., 19 Lab. Arb. 883, 885 (1952).

at time and one-half. For four or five weeks before Labor Day everybody had been working six days a week, and everybody was scheduled to work on the Saturday in question. On Friday the company had posted a notice that an employee must work on Saturday if he wanted the Labor Day pay. The two grievants did not work and did not get the pay. The union argued that there could be no duty to work on a Saturday because the contract excluded that day from the work week—no worker could properly be penalized for not working on a Saturday. Therefore, the “day before the holiday” must mean Friday in a case like this. The company argued that the Monday-to-Friday clause merely fixed the days when straight time, rather than overtime, should be paid. It was for management to decide whether business required a five- or a six-day schedule. Arbitrator Frey sustained the company.

He said he did not need to decide whether a worker, if requested to work on a Saturday, was obliged by the contract to do so. Even if he was, the “day before” in the contract could mean the last working day of the regular straight-time work week. Even if he was not, the “day before” could mean the last day when the company asked him to work. The answer must lie in the purpose of the provision. Clearly it was to ensure the company an adequate work force just before and just after the holiday. (It was not to deprive any individual of his customary privilege of taking the occasional day off without pay.) Financial inducement to workers to stay on the job on Saturday, whether under a duty to do so or not, was a privilege which the company had reserved to itself by the words of the contract, and this privilege was a reasonable means to the company’s end.

This case presents a good example of Professor Frey’s method as an arbitrator. First he searches for the purpose which one party sought from the clause of the contract in question (and to which the other party, by acceding, agreed). In the light of his conclusion on that point, he then interprets and applies the clause so as to let it serve that end.

I shall end as I began, on a somewhat personal note. Alec did much that has but scant mention in the books. As early as 1938 he was the Chairman of the Pennsylvania Minimum Wage Board for the Hotel Industry, and in 1941 and 1942 he served on United States minimum wage committees. His work in 1943 and 1944 for the Third Region of the NWLB I have already mentioned. During the next two years he was public member of the Third Regional Wage Stabilization Board which picked up some of the pieces after the NWLB itself dissolved. Glowing reports come from those days of his forceful and effective work: how he drove his staff relentlessly, but took burdens

on himself to shield its members from improper pressures; how he insisted firmly on full penalties for conscious breakers of the law; how he used to flare up in intolerance of any slipshod work. One sentence from an old staff member I cannot refrain from quoting: "He was a severe taskmaster, but the standards he set for us were no higher than those he set for himself concerning rectitude and competence."

Labor law and labor relations in this country are the better because of Professor Frey's long service to them. All his many friends will hope, with me, that his retirement from teaching will merely mean more time and energy to devote to the improvement of labor law and labor relations, to which he has already given so much.