

GOVERNMENT REGULATION OF THE NEGOTIATION AND TERMS OF COLLECTIVE AGREEMENT: AN ADDRESS *

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While the Wagner bill was being debated in Congress, the Chairman of the Senate Committee on Education and Labor gave this exposition of its scope:

“When the employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is to escort them to the door of the employer and say, ‘Here they are, the legal representatives of your employees.’ What happens behind those doors is not inquired into, and the bill does not seek to inquire into it.”¹

For better or worse we have come a long way since 1947. The National Labor Relations Board was never able to resist the temptation to eavesdrop, or even to peek through the keyhole in order to see how the discussions between employer and employees were progressing. In recent years the government has slipped in to seek a seat at the bargaining table. Yet we have not gone too far, I think, to ask ourselves whether the governmental activities ought not to be confined to the organizational stages of industrial relations. The inquiry is obviously pertinent in any serious effort to revise our basic labor laws either by statutory amendments or by reshaping the course of administrative decisions.

Thus far the gradual but nonetheless marked increase in government regulation of the negotiation and terms of collective bargaining agreements has flowed in four currents, each fed by the others:

- (1) the concept of bargaining “in good faith”;
- (2) the regulation of the procedures of collective bargaining;

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1. 79 CONG. REC. 7660 (1935).

(3) the definition of the scope of collective bargaining by listing not only the subjects upon which an employer must bargain but also the proposals which may not be interjected;

(4) the statutory restriction of the terms which management and labor may include in their agreements.

It will be convenient to examine the problem separately under each of the four heads.

I

It is a familiar rule that the statutory obligations imposed on management and union by Sections 8(a)(5) and 8(b)(3)² are not satisfied merely by meeting and discussing proposals for a collective bargaining agreement; the duty is to bargain "in good faith." "[I]t is the obligation of the parties to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement, and a sincere effort must be made to reach a common ground."³

I call attention to the doctrine for two reasons: The first is to emphasize its indispensability. When Lloyd Garrison proposed making it an unfair labor practice to refuse to bargain collectively, he explained:

"It is essential to the bill; there is no purpose in forbidding discrimination and providing for elections, if an employer can tell the designated representatives 'Run along, I'm too busy.' The end of the whole process is collective bargaining."⁴

The bargaining status of a union may be destroyed by going through the motions of bargaining with the intention of avoiding agreement just as effectively as by saying to the representative, "Run along, I'm too busy." Even today the NLRB reports are filled with cases in which a union won an election but lacked the economic power to use the strike as a weapon for compelling the employer to grant it real participation in governing the plant. So long as some employers go through the forms of bargaining without the substance, so long as there are unions which can be talked to death, protection of the rights of self-organization and collective bargaining would be incomplete without the imposition of a duty to bargain in good faith.

Some may object that good faith cannot be created by law—that a clever negotiator can go through all the motions of bargaining with-

2. Statutory references throughout this paper are to the National Labor Relations Act, as amended. 29 U.S.C. §§ 151 *et seq.* (Supp. 1952).

3. *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 686 (9th Cir. 1943).

4. *Hearings before Committee on Education and Labor on S. 195*, 74th Cong., 1st Sess. 79 (1934).

out really accepting the union yet without furnishing evidence of an unfair labor practice. The objection is well taken, but there are several answers. A good many companies would have done no more if listening politely would have satisfied their statutory obligations. The law can influence men's attitudes up to a point by declaring a higher standard of conduct than the legal machinery can enforce. It was successful, I think, in adding "good faith" to the bare forms of bargaining. Furthermore, the employer who is seeking to destroy a union while he goes through the forms of bargaining, usually is not quite clever enough to mask his purpose. If he slips, the ensuing NLRB proceeding may give the union a new lease on life because the Board will order the employer to bargain with the union even though the union has lost its majority status.⁵

The second reason for dwelling on the duty to bargain *in good faith* is to emphasize its dangers. The doctrine forms a bridge from government protection of weak unions during their organizational stages into government regulation of the processes of negotiation, of the scope of the contract and of the terms on which a bargain can be struck. The statute is said to require "an open mind and a sincere desire to reach an agreement . . ." ⁶ "[A] sincere effort must be made to reach a common ground." ⁷ Read literally, these expressions are inconsistent with complete freedom to hold out for whatever terms one wishes, for the chance of finding common ground is measurably increased by willingness to compromise. Where then is the balance to be struck between the positions an employer—or a union—may take in the exercise of the freedom to contract only on such terms as it deems acceptable and the positions which it must surrender out of "an open mind and sincere desire to reach an agreement"? Must the employer offer proposals that the government deems "reasonable" and abandon "unreasonable" positions? The risk of sliding into some such doctrine is increased by the problem of proof. How can the Board determine whether an employer is seeking to reach an agreement or to destroy the union? Suppose the employer makes proposals which no self-respecting union would accept and steadfastly holds his ground through repeated conferences. Shall we say that he is a bit odd? A tough negotiator? Or shall we say that a man who takes such a position must be trying to break the union? Good faith is subjective; in the absence of admissions, anti-union discrimination or threats to close

5. *Franks Bros. Co. v. NLRB*, 321 U.S. 702 (1944).

6. *NLRB v. Reed & Prince Mfg. Co.*, 118 F.2d 874, 885 (1st Cir. 1941), *cert. denied*, 313 U.S. 595 (1941).

7. *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 686 (9th Cir. 1943).

the plant, our only way of delving into the state of the employer's mind is to look at the way he conducts himself in the negotiations and measure it against what we suppose would be done by an ordinary man acting in good faith. The natural tendency is to suppose that an ordinary man acting in good faith would make reasonable proposals and therefore to conclude that a company which fails to make reasonable proposals is violating its statutory duty. Russell Smith argued some years ago that:

"As a practical matter, a 'duty to bargain' must, in order to be capable of enforcement, be given a *special* definition. Two possibilities are: (1) that it be deemed simply to require union recognition and negotiation; (2) that it be deemed to require that plus the making of objectively reasonable proposals."⁸

We have turned away from the former course. Does this mean we must follow the latter?

Thus far the Board has successfully steered between Scylla and Charybdis. The logical difficulty can be minimized by recognizing that what good faith requires is a willingness to contract on some terms—in other words, the absence of a desire to avoid entering into a collective bargaining agreement. This formula explains most of the decisions. With respect to the others, perhaps it is enough to say that our legal system offers a good many examples of legal duties which we can express only by stating an antinomy made up of postulates as self-contradictory as the freedom to reject any proposals you deem objectionable regardless of the reason and the duty to make a sincere effort to reach common ground. The danger lies in stressing one branch of the antinomy at the expense of its opposite. Last year an NLRB Associate General Counsel told the Supreme Court that the Board would find bad faith if it judged an employer to be unreasonable.⁹ More recently the Board found that a labor union had failed to bargain in good faith because it made a proposal during the course of negotiations which, while inherently reasonable, was calculated to make the negotiations more difficult.¹⁰

II

The difficulty of reconciling the duty to bargain in good faith with freedom to insist on one's own terms as the price of agreement

8. Smith, *Evolution of the "Duty to Bargain" Concept in American Law*, 39 MICH. L. REV. 1065, 1108 (1941).

9. Transcript of Oral Argument, NLRB v. American National Ins. Co., 20 U.S.L. WEEK 3238 (U.S. March 11, 1952).

10. International Brotherhood of Teamsters (Conway's Express), 87 N.L.R.B. 972 (1949), *enforcement granted sub nom.*, Rabouin v. NLRB, 195 F.2d 906 (2d Cir. 1952).

has its counterpart in regulation of collective bargaining procedures. There is the same clear case for intervening to strike down outrageous tactics and the same temptation to restrict the freedom of the parties and the flexibility of collective bargaining as a method of governing life in an industrial plant.

As a starting point consider the doctrine that Section 8(a)(5) imposes on employers the duty of furnishing a union with information concerning merit increases, incentive systems and other data likely to be helpful during the course of negotiations. The earliest cases arose upon evidence showing that the employer had pursued tactics calculated to break the union, stalled the negotiations, pleaded inability to pay a wage increase, and then refused to open his profit and loss account to either the union or a certified public accountant. The Board concluded that under such circumstances the withholding of data to support the plea of poverty was evidence of bad faith.¹¹ The idea of bad faith gradually dropped into the background. More and more emphasis was placed on the unions' need for information. In the end the initially narrow rulings were converted into the doctrine that an employer violates Section 8(a)(5) by refusing to furnish the union with relevant information.¹²

The doctrine itself is sound. The plea that the information is confidential usually expresses an emotional desire to keep it secret rather than a rational conclusion supported by legitimate interests. But implications are troublesome. Saying that there is a duty to furnish information because withholding it would hamper the negotiations recalls the ruling that a union committed an unfair labor practice by interjecting a demand which made negotiations more difficult.¹³ I wonder whether the one did not lead to the other.

Even in the field of procedure one may wonder where the decisions lead. Several years ago the tripartite Slichter Commission discussed ways of improving the techniques of collective bargaining.¹⁴ One suggestion was that both parties should forego public statements during the course of negotiations. A few unions bitterly criticized the suggestion on the ground that whipping up community sentiment is

11. *Pioneer Pearl Button Co.*, 1 N.L.R.B. 837 (1936); *Sherwin-Williams Co.*, 34 N.L.R.B. 651 (1941), *enforcement granted*, 130 F.2d 255 (3d Cir. 1942).

12. *Vanette Hosiery Mills*, 80 N.L.R.B. 1116 (1948), *enforcement granted*, 179 F.2d 504 (5th Cir. 1950); *B.F. Goodrich Co.*, 89 N.L.R.B. 1151 (1950); *Southern Saddlery Co.*, 90 N.L.R.B. 1205 (1950); *NLRB v. Yawman & Erbe Mfg. Co.*, 187 F.2d 947 (2d Cir. 1951).

13. See note 9 *supra*.

14. *Report to the Governor of Massachusetts on Labor-Management Relations*, House No. 1875, reprinted in 1 INDUSTRIAL AND LABOR RELATIONS REVIEW 110 (1947).

necessary to lay the groundwork for an effective threat to strike. Should the rule requiring an employer to furnish information extend as far as its reason and proscribe public statements where silence would also facilitate negotiations? The question is not entirely fanciful. A few years ago a United States District Court held that General Electric Co. had failed to bargain in good faith chiefly because it asked for an adjournment of the negotiations and then released a statement of its position to the public before giving it to the union.¹⁵ If the making of public statements may be an unfair labor practice when it threatens to impede negotiations, may not the same ruling be extended to all other items on the Slichter Commission list?

There are fallacies in the argument that each step down the road of intervention into the processes of collective bargaining must be followed by its logical successor. It leads all too easily to seeing ghosts under the bed. But before the government takes additional steps it would be equally foolish not to look to the implications and decide whether we are prepared to accept them or how are we to avoid them if we will. This is a terrain where a few short steps may start us running downhill.

The danger is scarcely less in the case of statutory regulation. Section 8(d) of the Taft-Hartley Act is the first instance of Congressional regulation of collective bargaining procedures. Thus far the regulation consists only of prescribing a series of notice periods which must elapse before either management or union may terminate or modify a collective bargaining agreement and resort to economic weapons. The measure is harmless enough—perhaps it has done good—but even this slight degree of regulation may have an unexpected backlash. One reading of *Boeing Airplane Co. v. NLRB*¹⁶ is that an agreement to continue production under the terms of the old contract pending negotiation of a new one started the 60-day period running a second time. Such a rule obviously tends to discourage interim agreements—a consequence that the draftsmen of the statute can scarcely have foreseen. May not such repercussions be inevitable whenever government moves into this delicate field?

III

For a number of years after the enactment of the Wagner Act there was little occasion for public labor policy to be concerned with

15. *General Electric Co. v. Gojack*, 68 F. Supp. 686 (N.D. Ind. 1946).

16. 174 F.2d 988 (D.C. Cir. 1949).

the subject matter of collective bargaining.¹⁷ Many of the older craft unions strong enough to present broader demands were content to bargain about such traditional subjects as wages, hours of work, seniority, and union status. Other unions were busy organizing new workers and securing collective agreements upon familiar matters of employee concern. Later the scope of union demands expanded until they came into conflict with management's reluctance to surrender its "prerogatives," and controversies resulted over the proper functions of management and union not only over pensions and merit increases but also over shift schedules, subcontracting and technological change. Usually the issues were settled by negotiations resulting in an endless variety of arrangements—with or without resort to economic sanctions. The scope of collective bargaining was defined by collective bargaining with all the flexibility and private responsibility of that institution. But in recent years there has been an increasing tendency to carry the issue to the NLRB and the courts.

There is little in the basic statutory provisions to suggest that the NLRB and ultimately the courts should define the scope of collective bargaining. Section 8(5) provided that it should be an unfair labor practice for an employer: "to refuse to bargain collectively with the representatives of his employees subject to the provisions of Section 9(a)." Section 9(a) added only that the representatives designated by a majority of the employees, "shall be the exclusive representatives . . . for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." An employer who insists on negotiating with individual employees or who takes unilateral action without consulting the union is denying the union full recognition.¹⁸ An employer who takes the position that "the collective bargaining relationship [consists] of presenting grievances by the [employees'] representatives, fair consideration by the Management, and issuance by the Management of necessary instructions covering the decisions reached," cannot be said to have accepted the principle of collective bargaining.¹⁹ Possibly an employer who refuses to discuss such a subject as wages, or hours of work, or seniority, or the establishment of a grievance procedure could be said to be committing an unfair labor practice, for tradition teaches us that every union which has received true recognition has bargained about those

17. A considerable part of Section III of this paper is adapted—with some direct quotation—from Cox and Dunlop, *Regulation of Collective Bargaining by the NLRB*, 63 HARV. L. REV. 389 (1950).

18. *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944); *Medo Photo Supply Co. v. NLRB*, 321 U.S. 678 (1944); *Great Southern Trucking Co. v. NLRB*, 127 F.2d 180, 186 (4th Cir. 1942).

19. *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 686 (9th Cir. 1943).

subjects. But if the employer recognizes the union and engages in collective bargaining, ought he to be held to violate Section 8(a)(5) by refusing to discuss such questions as job content, shift schedules, or subcontracting—subjects which have long been handled in different ways in different industries?

Although the Supreme Court has passed no opinion on the question, the current of Board and court decisions is flowing strongly in the direction of government regulation. The Board has declared that Section 9(a) covers, in addition to wages and hours, such subjects as holiday and vacation pay,²⁰ discharges,²¹ pensions,²² bonuses,²³ profit sharing,²⁴ work loads and work standards,²⁵ insurance benefits,²⁶ the closed or union shop,²⁷ subcontracting,²⁸ shop rules,²⁹ work schedules,³⁰ rest periods³¹ and merit increases.³² Most of these statements can be put aside as unnecessary dicta but a number involve square determinations that the Board has the power and duty to decide which subjects an employer must discuss during contract negotiations and which, if any, he may exclude. Approval of this postulate is implicit in several court of appeals decisions.³³

20. Singer Mfg. Co., 24 N.L.R.B. 444 (1940), *enforcement granted*, 119 F.2d 131 (7th Cir. 1941); Athens Mfg. Co., 69 N.L.R.B. 605, 606-7 (1946).

21. NLRB v. Bachelder, 120 F.2d 574 (7th Cir. 1941).

22. Inland Steel Co., 77 N.L.R.B. 1, *enforcement granted*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949).

23. Union Mfg. Co., 76 N.L.R.B. 322 (1948).

24. *Ibid.*

25. Woodside Cotton Mills Co., 21 N.L.R.B. 42, 54-5 (1940).

26. W. W. Cross & Co., 77 N.L.R.B. 1162 (1948), *enforcement granted*, 174 F.2d 875 (1st Cir. 1949); General Motors Corp., 81 N.L.R.B. 779 (1949).

27. NLRB v. Winona Textile Mills, Inc., 160 F.2d 201 (8th Cir. 1947); Andrew Jergens Co., 76 N.L.R.B. 363 (1948); Alexander Milburn Co., 62 N.L.R.B. 482 (1945).

28. Timken Roller Bearing Co., 70 N.L.R.B. 500 (1946), *enforcement denied on other grounds*, 161 F.2d 949 (6th Cir. 1947); *cf.* Emerson Electric Mfg. Co., 13 N.L.R.B. 448 (1939).

29. Timken Roller Bearing Co., *supra* note 28.

30. Inter-City Advertising Co., 61 N.L.R.B. 1377, 1384 (1945), *enforcement denied on other grounds*, 154 F.2d 244 (4th Cir. 1946); Wilson & Co., 19 N.L.R.B. 990, 999, *enforcement granted*, 115 F.2d 759 (8th Cir. 1940); Woodside Cotton Mills Co., 21 N.L.R.B. 42, 54-5 (1940).

31. National Grinding Wheel Co., 75 N.L.R.B. 905 (1948).

32. Aluminum Ore Co. v. NLRB, 131 F.2d 485 (7th Cir. 1942), *enforcing* 39 N.L.R.B. 1286 (1942); NLRB v. J. H. Allison & Co., 165 F.2d 766 (6th Cir.), *cert. denied*, 335 U.S. 814 (1948), *enforcing* 70 N.L.R.B. 377 (1946); *cf.* National Grinding Wheel Co., note 31 *supra*. In 5 NLRB ANN. REP. 43 (1940), the Board stated that it had also held that "a union demand upon an employer to discharge a supervisor was a demand with respect to conditions of employment. . . ." The report implied that the ruling involved § 8(a)(5), citing Aladin Industries, Inc., 22 N.L.R.B. 1195, 1216 (1940). Examination of the case makes it plain that the Board held only that employees who struck to enforce such a demand did not lose their position as employees under § 2(9).

33. *E.g.*, Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949).

In 1947 Congress endorsed the same position. Section 8(d) defines the duty to bargain collectively as embracing the obligation of employer and union to "confer in good faith with respect to wages, hours, and other terms and conditions of employment." Although this section was not intended to create new obligations, the ease with which the recital was put into the Act is so indicative of the climate of opinion that it must be regarded as settled, in the absence of new legislation, that both union and employer must bargain collectively, upon request of the other, about each and every subject the NLRB finds to be embraced by Section 9(a).

Before attempting to appraise the impact of this degree of government regulation of the subject matter of collective bargaining, attention should be called to three decisions which seriously intimate that the National Labor Relations Board and the courts may next assert the power to exclude certain proposals from collective bargaining. In *Dalton Telephone Company*³⁴ the company and union thrashed out all the provisions of a collective agreement except the company's demand that the union subject itself to suits for breach of contract by registering with the Secretary of State in a manner provided by Georgia law. The NLRB held that the company violated Section 8(a)(5) by insistence on this proposal. The Court of Appeals for the Fifth Circuit affirmed the ruling, saying:

"There are certain things about which the parties may bargain or negotiate, but which cannot be insisted upon as a condition precedent to the making of a contract. The present case presents such a situation. Respondent, by insisting that the union become an entity amenable to suit in the state courts, left the sphere of 'terms and conditions of employment,' and conditioned his willingness to sign the agreement on a matter outside the area of compulsory bargaining."³⁵

In the second case a trucking concern called a conference for the purpose of negotiating a settlement of a prolonged strike. The union demanded a \$5,000 compliance bond before signing a contract on the ground that the employer had repeatedly violated previous agreements. The Board concluded "that the Union's insistence upon a bond, in the circumstances of this case, was not wholly unreasonable and that it was not . . . designed to frustrate the settlement of the strike." Nevertheless the Board ruled:

" . . . [T]he Union's good faith in advancing this proposal is not decisive of the issue. It is the *tendency* of such proposals to 'delay

34. 82 N.L.R.B. 1001 (1949).

35. NLRB v. Dalton Telephone Co., 187 F.2d 811, 812 (5th Cir. 1951).

or impede or otherwise circumscribe the bargaining process,' which renders them improper. We conclude that by demanding this bond as a condition of settlement of the strike, the Union violated Section 8(b)(3) of the Act."³⁶

It is difficult to know what development these decisions presage. The generalization underlying the *Dalton Telephone* ruling would seem to be that an employer violates Section 8(a)(5) whenever he conditions his willingness to accede to the contract proposed by a union upon the union's making some concession on a subject outside the scope of compulsory bargaining. If so a union violates Section 8(b)(3) whenever it conditions its willingness to accede to a proposed agreement upon the employer's making a concession on a subject outside the scope of collective bargaining as defined by the Board. The result of the *Conway's Express*³⁷ case confirms this inference, although the language of the opinion makes the different but still more troublesome assertion that the union's position was unfair because it had a tendency to "delay or impede" the bargaining process.

The import of the question raised may be illustrated by specific examples. Suppose that the United Mine Workers were to inform the Bituminous Coal Operators Association that it would accept the terms of a proposed collective bargaining agreement if the Operators would agree to open the mines only three days a week. Would the United Mine Workers be technically guilty of an unfair labor practice because it had conditioned its willingness to enter into a collective agreement upon the employer's agreeing to curtail the volume of production? Would the case turn on whether volume of production is or is not a compulsory subject of collective bargaining? To take another case, suppose that the United Automobile Workers were actually to espouse the view its officers have sometimes expounded and condition its willingness to execute an otherwise satisfactory contract upon an automobile company's promise not to raise the price of cars? Are the prices of the employers' product embraced within the phrase "rates of pay, wages, hours, and other terms and conditions of employment"? If not, would the UAW's insistence upon its proposal be an unfair labor practice?

There is a strong temptation to push the *Dalton Telephone* and *Conway's Express* cases aside as sports, attributable to the early abuse of performance bonds. But before that explanation is too readily ac-

36. International Brotherhood of Teamsters (*Conway's Express*), 87 N.L.R.B. 972, 979 (1949), *enforcement granted sub nom. Rabouin v. NLRB*, 195 F.2d 906 (2d Cir. 1952).

37. International Brotherhood of Teamsters (*Conway's Express*), *supra* note 10.

cepted, note should be made of one judicial decision. Early in 1950 the General Counsel of the National Labor Relations Board was persuaded to intervene in the coal dispute which had embarrassed the government for many months. He sought an injunction under Section 10(j) upon the ground, among others, that the United Mine Workers had failed to bargain collectively by insisting upon the inclusion of the so-called able and willing and memorial period clauses in the national agreement. The court sustained this contention partly on the ground that such a clause was inconsistent with Section 8(d) and partly on the ground that the purpose of the provisions was "to control production and ultimately, through such control, at least indirectly, to fix prices."³⁸

The NLRB decisions discussed above have gone a long way towards committing the Board to regulating the scope of collective bargaining by including some subjects and excluding others. How should one appraise the development? Is it good, bad, or indifferent? And if it is bad, what should be done to check the trend? Although the arguments are not all on one side, the serious objections to government regulation of the subject matter of bargaining seem weightier than the advantages.

In the first place one of the great sources of strength in collective bargaining is its flexibility and adaptability to the needs of particular situations. In some industries it may be desirable or even necessary for employee representatives to participate in the award of merit increases, the scheduling of shift operations, and decisions upon whether to subcontract work. In other industries the balance of convenience may lie on the side of exclusively managerial decisions. The proposition is demonstrated by the wide variety of ways in which industry and labor have agreed to handle such matters.³⁹ If it may be said that there is nothing in the NLRB rulings which precludes each industry from working out its own solution to these problems,⁴⁰ the answer is that although this is theoretically true, the practical effect of decisions requiring an employer to bargain this or that subject creates heavy pressure for uniform arrangements according to the prescription of the Board. Surely no one denies the impact of the *Inland Steel*⁴¹ decision

38. *Penello v. United Mine Workers*, 88 F. Supp. 935, 940 (D.D.C. 1950).

39. Materials illustrating this proposition may be found in Cox and Dunlop, *Regulation of Collective Bargaining by the NLRB*, 63 HARV. L. REV. 389, 401-418 (1950).

40. *General Controls Co.*, 88 N.L.R.B. 1341, 1342 (1950); Findling and Colby, *Regulation of Collective Bargaining by the NLRB—Another View*, 51 COL. L. REV. 170, 171-2 (1951).

41. See note 22 *supra*.

on the spread of pension plans. If the case had gone the other way, it would have thrown the weight of government against their development.

Second, collective bargaining is a changing, dynamic institution. In one area its scope may be expanded. In another, the parties' relationship may not have matured to the point where it is wise to expand joint discussions beyond such conventional subjects as wages, hours, seniority and a grievance procedure. Moreover, those who fear that management might be able to restrict the scope of bargaining today in dealing with weak unions should remember that there is another side to the coin—that the power to define the scope of collective bargaining by inclusion implies the excluding of other subjects, as the decisions cited above portend. If the pension issue had arisen in 1936, would the NLRB, not to mention the courts, have decided that pensions were within the phrase "rates of pay, wages, hours of employment or other conditions of employment"? Should the issue arise today, would the courts surely hold that the quoted phrase includes technological changes, job content, subcontracting, prices or the level of production?

Third, the government's competence to act wisely upon such questions is doubtful. An administrative agency is far removed from the subtle practicalities which vary from industry to industry and plant to plant. The NLRB is staffed chiefly by lawyers, most of whom lack practical experience. Staff advice and, therefore, Board decisions are all too often based upon conceptualism or abstract generalities; precedents are extended by the process of logical deduction without much appreciation of the practical significance of apparently small changes in the facts. The fault lies not so much in the agencies as in lifting the problems out of the hands of those who must live with the solution.

The chief arguments against this conclusion are two. One is that it negates the basic policy of the Act—the philosophy that industrial unrest is minimized by discussing any issue which the employees wish to raise. Perhaps so; but it is not the policy of the Act nor would it be a wise policy to pursue industrial peace at the expense of every other social or economic ideal. The second argument is that employers or unions having disproportionate strength would be able to remove from the scope of bargaining issues which everyone will agree ought to be negotiated. Some companies in the South have narrowed the area of bargaining by asserting that subjects which most of us would regard as negotiable are management prerogatives. The ITU might remove from joint conferences such important matters as the proportion of apprentices to journeymen. To some extent the government must intervene in favor of weak unions—and today, perhaps, in favor of

weak employers. The Wagner Act was an avowed attempt to protect the weak against the strong. Some aspects of the Taft-Hartley Act were intended to weight the scales in favor of employers in cases where a union could exert disproportionate economic power. It is one thing, however, to protect employees in forming unions and to support weak unions in seeking to secure bona fide recognition. It is quite another for the government to enlarge the scope of the bargaining merely because a union lacks the economic power to compel the employer to negotiate on all the subjects it desires.

If it is correct to say that the NLRB and courts have been moving too far in the direction of government regulation of collective bargaining the question becomes, "How shall we check the trend?" Three answers suggest themselves.

The solution proposed by the Chamber of Commerce, is for the Congress to define management functions which need not be the subject of collective bargaining.⁴² The cure would be worse than the disease. The objections advanced against Board and court decisions apply with greater force to statutory regulation. Statutory regulation would have the additional defects which will be mentioned below in the discussion of Congressional regulation of the terms of collective agreements.

An alternative legislative solution would be enactment of one of the bills offered both at the previous and current sessions of Congress to forbid the Board to define the scope of collective bargaining.⁴³ This would leave the scope of bargaining to the forces of persuasion backed by economic power. The bills are not subject to criticism on the ground that they would compel uniformity, freeze present practices or substitute government determination for personal, private responsibility. We should be better off if this provision had been in the law from the beginning; but the advantages of writing it into the law today may be somewhat offset by the risk that once the Congress intervenes—even to the point of telling the NLRB to get out—the step may create pressures for further legislation.

Perhaps the answer depends on the chance that the Board will reevaluate its policy—or be compelled to make a reappraisal by the court. In *NLRB v. American National Insurance Co.*⁴⁴ the Supreme Court of the United States held that it was not a violation of Section 8(a)(5) to bargain in good faith for a clause allocating wide functions

42. See summary of testimony before the House Committee on Labor reported in 31 LAB. REL. REP. 346 (1953).

43. See, e.g., S. 369, 83d Cong., 1st Sess.; H.R. 2510, 83d Cong., 1st Sess. (1953).

44. 343 U.S. 395 (1952).

to management during the term of a collective agreement. By overturning the NLRB doctrine that management could not lawfully insist upon unilateral control of any term or condition of employment, this decision cut off the worse features of government intervention. Similarly, it is not too late to hope for reexamination of the statement that a party commits an unfair labor practice by raising demands which may impede the bargaining process or by making agreement upon some matter outside of the scope of compulsory bargaining a precondition to agreement upon other issues.

There remains the practice of defining those matters which either party must discuss at the request of the other. It is too late now for the NLRB itself to change this doctrine. Were it to change, the courts might well adhere to the previous decisions. However, some of the unwholesome effects of government prescription would be eliminated if the Board were to decide that each party must bargain on any subject that the other wishes to raise. If this solution is impractical or unsound, then Congress should deprive the Board of power to define the scope of bargaining by including some subjects and excluding others.

IV

In one sense the legislative branch of the government has gone farther than the executive or judicial branches in regulating the substance of collective bargaining. Although the Sherman Act by judicial construction, the Clayton Act of 1914, the Norris-LaGuardia Act and the Wagner Act were all instances of government intervention profoundly affecting the balance of power between employers and employees, the Taft-Hartley Law marks the first occasion on which the Congress regulated the terms that might be included in collective agreements for the purpose of settling in favor of one side or the other specific issues which had theretofore been left to discussion and the interplay of economic forces.

One illustration is Section 302, which prescribes the conditions on which employers and labor unions may establish trust funds for the benefit of employees and their families. After the war the spreading demand for pension plans and various forms of insurance met with corresponding resistance in some management circles. The controversy was especially keen in the case of the United Mine Workers. In 1946 federal legislation was proposed by southern Congressmen in the interest, if not at the request, of southern coal operators who were unable to carry their point in the bargaining process. Apparently this was

the source of Section 302, although its actual effect is to allow the payments on three conditions: First, the trust funds must be held only for the purposes specified in the act. Second, employers and employees must be jointly represented in the administration of the fund, with an impartial person to decide disputes. Third, the funds for providing pensions and annuities must be segregated.

Since health, welfare and pension funds represent large accumulations of money held for the benefit of employees by union officials, there could be little question of the wisdom of government supervision similar to State regulation of mutual savings banks and mutual insurance companies. No one should complain of public scrutiny who holds other people's money. But when the regulation is cast in terms of what a collective agreement may provide instead of supervising the administration of any fund it may establish, when the law sets up the employer as the watch dog for the protection of beneficiaries, it becomes a legislative attempt to resolve collective bargaining issues rather than normal public supervision of fiduciaries. The bill introduced by Senator Taft to amend Section 302 would interject the government still farther by prohibiting the payment of moneys into a fund until its provisions had been reviewed and approved by the Secretary of Labor.⁴⁵

Similar doubts arise concerning the Taft-Hartley prohibition of the closed shop and its limitation reducing the union shop to a device for securing financial support from all the employees in a bargaining unit. The 1947 hearings produced overwhelming evidence of the need for some legislation upon the subject. Union security agreements put enormous power in the hands of officials chosen by a majority of the employees that may be used to oppress individuals and minorities within the group. A few unions used this power to establish job monopolies, to suppress fair competition or to punish individuals with divergent political views. Although the abuses are rare and most unions can be relied upon to correct them, it is inconsistent with our democratic ideals to deny minorities protection on the ground that the majority will not abuse its power very often. But the union security question is not simply a problem of minority rights. It has been fought out over the conference table and on the picket line because the union desired security against internal disintegration and interunion rating, while the employer wished to preserve his relative bargaining power by denying this added strength to the employees' representative. Moreover, not every company opposes closed or union shop agreements. Several weeks ago I was present at a meeting of personnel men who

45. See S. 658, 83d Cong., 1st Sess. (1953).

were roundly scolding the government for not outlawing all forms of union security. My rather mild objection served to arouse only stronger feelings until one man in the back of the room arose and said this:

"You don't really understand the problem. I was Personnel Manager for a big western contractor. Any device by which a union delivers the number of workers you want with the skills you require 500 miles out in the sage brush where there just wasn't anybody before you got there, all without cost to you, is a damned good arrangement."

It is not my purpose to argue that union security is good or bad. It is to ask whether it is really desirable to have the issue between employers and employees resolved by legislation instead of bargaining. The Massachusetts Slichter Law and not a few court decisions show how the necessary protection of minorities can be achieved without outlawing the closed shop or making non-payment of dues the only permissible ground of discharge under a union shop agreement.⁴⁶

Personally, I think the question should be answered in the negative. The uniformity inherent in any statutory rule is not suited to an economy made up of an infinite variety of businesses with all sorts of needs and customs. In some industries it may be wise for employers to join in the administration of welfare funds. In others it is a futile burden. Indeed Senator Taft's amendments to Section 302 have the merit of relieving employers from this necessity, although I cannot understand why joint or single administration should depend exclusively on the employer's decision. The closed shop has been abused in some industries; it serves no useful purpose in others; but I cannot help thinking of my friend who wanted to hire through the union because it relieved his construction company of the need for recruiting labor. What is the objection to such an arrangement provided that there are safeguards which prevent it from being an instrument of oppression?

Another important aspect of the problem, perhaps, is embraced in the old aphorism, "What the government gives, the government can take away." When unions went to a sympathetic NLRB to expand the scope of collective bargaining, they themselves created the risk that industrialists would go to a sympathetic Congress to curtail it. When industrialists lift the problem of union security from the bar-

46. The Massachusetts legislation and cases in other states are discussed in Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 274, 291-299 (1948).

gaining table into the Capitol, do they not create the risk that the Congress may some day resolve the issue, but in the opposite manner? In New Zealand and Saskatchewan a certified or registered union is entitled to maintenance of membership or compulsory membership by statute.

Last—and perhaps too philosophical—we must ask ourselves whether it is wise to make such issues national problems instead of letting them remain small questions to be settled variously, in different ways, in different places, on different occasions.