THE COLLECTIVE BARGAINING AGREEMENT: ITS NATURE AND SCOPE

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In this paper I shall discuss some of the aspects of collective bargaining and labor agreements as these things look to a law professor. Although I have had considerable experience on War Labor Board panels and as an arbitrator, I know very little at first hand about the actual bargaining process. Hence, in this connection I shall confine my remarks to the coercive bargaining techniques of unions. And in connection with the collective agreement, most of what I say will concern its legal nature.

Collective bargaining, as we know it today, is the substitution of bilateral for unilateral decisions in the field of labor-management relations. It normally leads to a collective labor agreement between the negotiating parties. The whole process, from the union's demands to enforcement of the contract, occurs in a complicated context of federal and state labor laws. Management and the unions are still trying to catch up with these laws. In the meanwhile, our lawmakers seem unable to make up their own minds. Many partisans are impatient with the law, saying that it defeats the ends of true collective bargaining. But all conflicts of interest must be governed by laws of some kind. This is especially true of the struggle for power going on in the labor relations arena.

The law must set a limit on the manner in which this struggle is conducted. Then it must define the proper objectives of this conflict for power. Most people probably do not think of collective bargaining as recourse to economic pressures. But the union's best bargaining tools are the strike, the boycott and the picket line. With modern anti-injunction laws, the Wagner Act, removal of unions from under the Sherman Act, and the Supreme Court's protection of picketing as free speech, these tools became very potent. And while the Fair Labor Standards Act, as applied, has tended to disrupt smooth collective bargaining, yet it has given the unions strong floors to stand upon. At the same time, management's recourses to counter pressures were

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drastically curtailed by the Wagner Act. That law forbade the use of economic coercion against employees and virtually abolished the area within which management could refuse to bargain at all.

After 1937, powerful unions became established where they could never before get footholds; and they acquired bargaining power never before dreamed of. Immune from the laws against monopolistic practices, they have been making hay while their political sun was shining. But since 1947 their sun seems to be on the wane. This is plain from the passage and retention of the Taft-Hartley Act. But it is almost more apparent from the output of the courts. Some of these judicial developments are important in their effect upon union bargaining power.

The NLRA declares that employees shall have the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. And the right to strike still remains substantially unaffected by that Act. Now most unions don't like to strike; and they certainly don't want to get caught violating no-strike pledges. Hence, union officials have thought up ingenious ways of getting the effects of a strike, without actually calling one. Examples range from prayer meetings during working hours to have the Lord soften the employer's heart, to a continuous unadjourned union business meeting lasting for several days. They include the slow-down as well as the insistence of employees upon performing their work in a manner agreeable to them. The Wisconsin Briggs-Stratton case is a good example.[1] Over a period of four months the union called 26 short business meetings during working hours. These meetings were unscheduled and were called without any advance warning. The members simply laid down their tools and walked to the union hall. No bargaining demands were made because the union claimed it was not striking. The effect on production was disastrous. Apparently this was a softening-up strategy.

Briggs-Stratton did not discipline the union employees. Rather, it asked the Wisconsin Employment Relations Board to order this practice stopped. That Board issued an order prohibiting these stoppages; the Wisconsin courts enforced this order; and the union appealed to the Supreme Court on consti-

1. International Union, U. A. W., A. F. of L., Local 232 v. Wisconsin Employment Relations Board (1949) 336 U. S. 245, 69 S. Ct. 516.

tutional grounds. In March the Supreme Court upheld Wisconsin's power to prevent this practice. But dissenting justices declared that this was a denial of recourse to concerted economic bargaining pressures guaranteed in the National Labor Relations Act. The majority insisted that no such guaranty has ever been made by Congress in that Act.

This decision curtails the collective bargaining power of unions in the federal arena. It means that the states may pass statutes declaring unlawful certain new types of peaceful union economic practices. It has been assailed on the ground that it deprives the Federal Labor Board of its proper jurisdiction over matters of this kind. But as Mr. Justice Jackson pointed out, there was nothing in this case to go to the NLRB. The union conduct involved was not illegal under the Taft-Hartley Act; and by not firing any of its employees engaging in these work stoppages, Briggs-Stratton had astutely avoided handing the union a Section 8 (a) (3) discrimination charge.

But supposing Briggs-Stratton *had* fired the leaders of this strategy and 8 (a) (3) discrimination charges *had* been filed? It is not at all clear that the Federal Labor Board would have held management's action to be an unfair labor practice. And if it had, it is doubtful that the federal courts would have enforced the Board's order of reinstatement. If I read the cases correctly, unions are free to strike in the sense that they concertedly walk out and stay out. Any discipline then imposed by management is illegal, because the conventional, honest-to-goodness strike is protected activity. But the Supreme Court will probably not regard these pseudo-strikes as protected activities under the labor act.

The trend of decisions on picketing indicates a retreat from the Supreme Court's Thornhill doctrine[2] of 1940—that peaceful picketing is constitutionally protected free speech. State and lower federal courts are now taking the position that even peaceful picketing to achieve an illegal objective is properly enjoinable. Apparently this is true whether the objective is declared illegal by statute or by the courts at common law. And in its first picketing decision in six years, a unanimous Supreme Court recently decided in the *Giboney*[3] case that peaceful picketing to

2. Thornhill v. Alabama (1940) 310 U. S. 88, 60 S. Ct. 736.
3. Giboney v. Empire Storage & Ice Co. (1949) 336 U. S. 490, 69 S. Ct. 684.

compel an employer to do an illegal act is properly enjoinable. That was where a union of ice-wagon drivers in Kansas City picketed an ice manufacturer in order to make it agree with other ice manufacturers that they would sell ice wholesale only to unionized deliverers. Holding that the ice manufacturer's compliance with this picketing request would be a violation of the Missouri anti-monopoly statute, the state court upheld an injunction against this picketing. It is hard to say exactly what this decision means. But it suggests that state legislatures may now circumvent the constitutional protection of peaceful picketing by declaring unlawful what the employer is requested to do in compliance with such picketing. And other cases imply that secondary peaceful picketing used to put across statutorily illegal boycotts may also be enjoined as attempted circumvention of state and federal prohibitions against boycotting.

All of this, taken with certain parts of the Taft-Hartley Act and the Supreme Court's Lewis[4] case of 1947, means that organized labor's collective bargaining strength has been weakened. As a result, arm's length dealing between management and the union is heightened. At the same time, other fairly recent decisions have put management on the spot. Thus, before the Wagner Act, if an employer did not wish to bargain with the union over certain demands, he did not have to do so. Of course, he might provoke a strike by such a refusal to bargain; but he was free to fight it out with economic weapons if he wanted to. Section 8 (5) of the Wagner Act gave the unions a great advantage, compelling an employer to bargain with the union in good faith. While this did not compel agreement, it did require counter-offers, and so forth. And it virtually put an end to unilateral disposition by management of all matters concerning terms and conditions of employment.

At first the employer's statutory obligation to bargain in good faith was assumed to apply only to the traditional subject-matters of collective agreements. Employers still claimed an area of exclusive management prerogative within which they were still free to take unilateral action. That is, they were still free to manage. But in the *J. H. Allison* merit increase case,[5]

4. United States v. United Mine Workers of America and Lewis (1947) 330 U. S. 258, 67 S. Ct. 677.

5. NLRB v. J. H. Allison & Co. (C. C. A. 6, 1948) 165 F. (2d) 766, *cert. denied.*

and in the *Inland Steel* pension bargaining case,[6] the Supreme Court has put an end to that notion. It begins to look as if there is nothing sacred left at all in the way of exclusive management prerogative. For almost everything at some point or other affects terms and conditions of employment and is thus a subject of collective bargaining under the NLRA.

Of course, management does not have to agree on any proposals raised by a union. But to bargain in good faith, it must make counter-proposals. Management fears that the union will snap up one of these counter proposals, in order to apply the principle of the entering wedge. Skilled management will try to avoid these embarrassing bargaining demands by tying them in with matters which the unions regard as more vital, playing one off against the other in order to wear the union down. But if the Board makes employers bargain on isolated demands during the term of an agreement, this strategy may be defeated.

Some management lawyers believe that the way out of this dilemma is to have Congress outline an area of exclusive managerial prerogative or to set up a list of the items which are the only proper subject-matters for collective bargaining. I am inclined to think, however, that their only escape is to persuade Congress that it should repeal Section 8 (a) (5) altogether. But it is probably too late, for the idea that the employer is obliged by law to bargain in good faith is now deeply imbedded.

When 8 (5) first appeared in the Wagner Act, it seemed absolutely necessary to the entire statutory plan. At that time there is little doubt that it contemplated bargaining only over the then-traditionally recognized subjects of collective agreements, as they were known in 1935. But statutes seem to acquire new meanings with the changing of the times. Yet it is hard to see how the NLRB and the courts could refrain from regarding almost everything in industry as affecting conditions of employment. Now that unions are so well established, however, Congress might well decide that they no longer need a crutch like 8 (a) (5) to make employers bargain over novel items. Indeed, I think it is apparent that they do not. And the continued good relations between employers and a non-complying union prove this. In the meantime, Congress has ducked the issue by declar-

6. Inland Steel Co. v. NLRB (C. C. A. 7, 1949) 170 F. (2d) 247, *cert. denied.*

ing in the Taft Act that unions are also required to bargain in good faith. Now, at least, if a union lays down unilateral demands from which it refuses to budge, the employer is permitted to be equally arbitrary and to ignore them.

From a pressure group point of view, collective bargaining does not make a very pretty picture. It has been said that management has it to give and the employees have it to get; and that the unions are there to see that they get it. This implies that management and the unions are the only parties really involved and that anything they agree upon is all right. The bargaining process is seen as a compromise between management prerogative, based on the ownership and control of property, on the one hand, and union monopoly of labor on the other. But this is hardly a true picture; or, if it is, it ought not to be. Management is no longer a private group, free to do only what is expedient. In our system, management is entrusted with the production and distribution of goods for the entire community. Thus, it fronts for all of us as consumers. Management is the group responsible for the profitable operation of our production and distribution systems. Thus, it fronts for all of us as investors—and that means everyone who owns stocks and bonds, who has savings in the bank, or who has bought life or retirement insurance. Management is in direct control of our means of making a livelihood. Thus, in a way, management fronts for all who have to live by wages and salaries earned from employment in production and distribution enterprises. And most small retail enterprises, banks and landlords are indirectly dependent on the successful operation of local industries.

This relationship of trust toward the entire economy involves management in a terrific responsibility. In discharging this responsibility, management cannot insist on freedom to do what it finds most convenient, merely because it has control of property. At the same time it needs scope to exercise whatever managerial acumen and discretion it has. Responsible management should exercise its stewardship in a manner most consistent with the recognition of all these interests for which it is fronting. If it does, it will then be the conduit through which all these interests are served.

Actually, much the same can be said about unions. Indeed, unions and union leaders are a new type of management, with

much the same responsibilities that the conventional management class has inherited. They perform an important function in protecting individual workers from arbitrary treatment and against some of the vicissitudes of economic life. By their control of the most basic element in all production and distribution —labor—they can affect the interests of all of us as consumers. Certainly their thoughtless use of power can imperil investment in the enterprises on which we all depend. Hence, unions should also act as conduits through which these various interests are represented.

Thus, successful collective bargaining is more than just two warring factions achieving industrial peace on the basis of any expedients available. It is true that each group has to get results for their immediate constituents; and frequently this is attempted regardless of the social cost. But this process can sometimes be harmful to all of these other interests dependent upon efficiently operated industry. The wonder is that the community does not step in to see that this bargaining is fairly and skillfully carried out. Collective bargaining as we know it today is a kind of cultural lag. It is conducted in the same way, and on the same free enterprise assumptions, that prevailed in the days of individual bargaining, when we really had a free market economy. But with the development of employers' associations, administered prices, labor monopolies, industry-wide bargaining and wage pattern-setting by the power centers like the U. S. Steel and the United Steel Workers, it is sometimes hard to believe that we still live in a free market economy. If our economy is subject to such controls, why do we leave these controls in private hands?

I would like to point out a few homely analogies, to illustrate what I have in mind. In England, the king's proctor is present in all divorce litigation. His job is to see that the parties raise all matters before the court. He is there to preserve the public interest in the institution of marriage. In some continental European countries, the equivalent of our attorney general always appears in important private litigation. His job is to see that all implications of a precedent-making decision are carefully considered. What he reports gets full publicity, so that the community will know just what is going on. When some burning issue arises before our own Supreme Court in a suit between private parties, there are thousands of others whose interests

depend on the precedent set, although they don't have a cent involved in this case. Hence, the Supreme Court allows them to file briefs as *amici curiae*—friends of the court—to be sure that all points of view are considered.

By analogy, why shouldn't the various dependent outside interests insist that their points of view be considered in collective bargaining between private parties? The question is, how can it be done? There is probably more to lose than gain by compulsory arbitration—the public imposition of the terms and conditions of employment. The War Labor Board technique was all right for a national emergency; but it would be of dubious value now. I guess that we must simply trust management and unions to assume and discharge their fiduciary responsibilities in their private bargaining. But as a public we can insist that the parties know what these responsibilities are in each case; and as a public we are entitled to know in detail just how the parties faced and dealt with these matters. This would mean complete publicity of all that goes on in private collective bargaining, with the sanctions of adverse public opinion when community interests are ignored. But it also means a public which cares about and understands what is going on. It could also mean systematic mediation in all important bargaining—and not the glorified horse-trading kind which is used to get any sort of agreement at all costs. Such mediation, rather, would see that all interests are considered and dealt with intelligently, with the threat of adverse publicity if they are ignored.

This thesis rests on the fact that a collective agreement is not a contract between private parties in the ordinary sense of that term. It is more like a privately drawn code of laws to govern the employment relationship in a limited area. Indeed, the French have virtually adopted collective agreements as public statutes; and our Railway Labor Act of 1926 was drafted by the railroads and the brotherhoods themselves and was then enacted as law by Congress. Our courts have frequently referred to the collective agreement as a treaty between warring factions. Indeed, the English courts would not enforce these agreements at all. They said that the parties must do it themselves by recourse to economic conflict, just as nations have always enforced treaties. Anyway, if collective agreements are like little laws and treaties, governing broad areas of important social activity,

then it is a matter of public interest what these agreements contain and how they are achieved. And delegation to management and the unions of the power to make them is a trust that the public has the right to see fulfilled.

The legal significance of a collective agreement has always been uncertain. Some courts have called it a mere gentlemen's agreement, unenforcible at law; and the treaty analogy is still made. Our Supreme Court has said it is not a contract of employment at all. It is, rather, merely a schedule of terms and commitments, which become part of the individual workers' contracts of employment, whether or not they belong to the union. Insofar as the collective agreement *is* a contract at all, it has to to be one between the employer and the union. This has led to much confusion, since most unions are not incorporated and thus cannot be legal parties to contracts. And if they are not legally recognized parties, they cannot act as plaintiffs in law suits to enforce these so-called contracts; nor can they be sued on them. Traditionally, only individual employees could enforce the terms of collective agreements, in some states only the members of the unions.

In recent years, however, our courts are beginning to recognize collective agreements as legally binding contracts. This development means that unions may secure rights for themselves in contracts, over and above the rights secured for their constituents, with the legal power to sue for the enforcement of these rights. This recognition of unions as legal persons, capable of acting as parties to contracts and law-suits, has largely been the result of legislation. And now the Taft-Hartley Act permits unions to sue and be sued in the federal arena on their collective agreements.

These new developments have raised some interesting issues. Just what rights can a union secure under a collective agreement; and just what obligations does it assume? The general idea has always been that a collective agreement is merely a series of concessions by management. To begin with, management has everything; and the agreement represents the whittling down of management's rights due to collective bargaining. Most of these concessions are made on behalf of the employees, to govern the terms of their personal contracts of employment, and are not promises of benefits to the union, as such. About the

only things that unions get for themselves are recognition, some form of union security like the union or the preferential shop, and the right to initiation fees and union dues check-offs, with possible controls over apprenticeship and the like. For breaches of these commitments, unions have been permitted to maintain actions against employers, including suits brought to require the return of runaway shops. The employees themselves have to sue for the enforcement of the other terms of these agreements, concerning wages, seniority, and the like. Surely their unions should be allowed to maintain class suits on behalf of the employees, although this privilege is usually denied. The resulting cumbersome and costly recourse to the courts is a case of arrested development, which would be serious if employers and unions had not worked out the practical solution of voluntary arbitration.

How about the obligations of unions under collective agreements? About all an employer can get in exchange for his commitments in a collective agreement is continued production—no work stoppages for the life of the agreement. Most employers assume that they don't get even this unless the union signs a no-strike pledge and promises that the union officials will take action against wild-cat strikes and work stoppages. Of course, unions say that employers get a supply of labor in exchange for their concessions in collective agreements. But employers get no more labor now than they did before unions existed—and now they get it in a controlled labor market.

Some curious angles show up in actions to enforce the terms of collective agreements. When individual workers sue under these agreements, money adjustments are usually appropriate. When unions sue employers under them, however, their rights can normally be enforced only by court orders requiring the employers specifically to comply with the contract provisions. Thus, compliance with a closed or union shop agreement occurs only if the commitment is actually complied with. And the harm caused by a runaway shop is cured by ordering the shop to be brought back. In effect, courts can enforce union rights under a contract only by the equitable remedy of the injunction. In the past courts have denied unions such remedy because there was no mutuality of obligation on the unions' part. That is, the unions have promised nothing in return. But this is changing; and a binding consideration can now be supplied through no-

strike pledges. Some unions will not make these pledges while they are subject to suits for damages under the Taft Act. If they refuse to sign them, however, they give employers a strong bargaining advantage. And if they do sign them, they give employers an effective protection against strikes during the life of the contract, either by suits for damages against the unions or by direct disciplinary action.

A recent development, however, endangers the legal effect of collective agreements. About three months ago a labor lawyer friend of mine told me about a suit he had brought in a federal court. This suit was to procure, under a maintenance of membership clause, the discharge of three employees who had been deprived of membership because they had refused to pay certain fines. The employer's contention that non-payment of fines is not non-payment of dues under the Taft-Hartley Act is not involved, because the employer moved the court to dismiss the action. The employer argued that this was a labor dispute between itself and the union, in which the court had no jurisdiction to grant injunctive relief under the Norris-LaGuardia Act. My labor lawyer friend was furious at the impertinence of this defense. The company hiding behind the Norris-LaGuardia Act, indeed!

This is both funny and serious at the same time. How can a breach of contract be a labor dispute within the meaning of the federal anti-injunction act? For equitable relief to enforce contracts is quite different from using the injunction to break up bargaining and organizational strikes. This is apparent from the history of the labor injunction and of the law passed to prevent its abuse. And if the employer's argument is sound, many collective agreements will become virtually unenforcebale. This would compel unions to use economic coercion to enforce contracts. So I said to my lawyer friend: "Look; suppose your union had signed a no-strike pledge in its agreement with the company. You would agree that if your union nevertheless called a strike in breach of its contract, the company could secure an injunctive order requiring compliance with the pledge." When he shouted: "No, that's entirely different," I really wanted to laugh.

But it looks as if the federal courts are going to adopt the position proposed by the company in this case. In my opinion this is entirely wrong; but the Supreme Court seems to have

encouraged such loose usage of the term "labor dispute," that it alone can repair this damage done to the enforcement of collective agreements under modern anti-injunction acts. In the meantime, employers rely on Section 301 of the Taft Act to enforce no-strike pledges by actions for damages.

So dubious is the status of the collective agreement in our courts, that the arbitration of grievances arising under such contracts has become the main hope for the future. This device of arbitration is flourishing these days. And it affords a versatile, expeditious and inexpensive method for interpreting and applying the terms of collective agreements. If it were not for this safety valve, it is hard to say how the thousands of collective agreements in this country would be administered.

But even arbitration would be a flop if it were not for the good sense of the employers and unions themselves. For labor arbitration does not have much standing before the law. At common law the courts did not like arbitration of any kind, regarding it as a rival undertaking to oust them of their rightful jursidiction. This hangover still exists today with respect to labor arbitration. Most of our legislatures have made an honest institution of commercial arbitration, although they have surrounded it with technicalities. But few of them have put labor arbitration on a solid footing. Agreements to arbitrate in the labor field are enforceable in only a few states. In many of them a written submission to arbitration of an *existing* dispute is enforceable, if all of the technical statutory requirements are fulfilled. But in some states even such submissions are legal nullities. And the courts will enforce awards rendered in arbitrations only if all of the technicalities required by the statutes have been observed.

The agreements to arbitrate contained in modern collective agreements are absolutely unenforceable in most of our courts. This is because only a few states have statutes providing for the enforcement of *future* disputes involving labor matters— that is, of present agreements to arbitrate future disputes which have not yet arisen. The flourishing state of labor arbitration in this country is a high tribute to the determination of employers and unions to provide their own private courts for the settlement of grievances, the state of the law notwithstanding.

What we need is a uniform practice for the enforcement of

collective labor agreements. The constitutional power exercised in passing the Wagner Act, which is responsible for most of our labor agreements, would certainly permit Congress to enact a uniform method for the enforcement and administration of these same agreements. This would mean not only a standard method of enforcing these collective agreements in the courts, but also a uniform procedure to govern labor arbitration. Such a course seems imperative under a master agreement between a corporation and an international union covering the company's plants in many different states. Why should an agreement of this sort be left subject to various different interpretations and applications from state to state? Yet where Congress leaves the enforcement of collective agreements to the states, this is exactly what could happen.

My enthusiasm for arbitration is confined to the adjudication of grievances raised under already bargained and executed agreements. I do not like so-called terminal arbitration—the arbitration of collective bargaining disputes. My reasons for this are simple. In the arbitration of grievances under a contract, the arbitrator has some standards to apply in making his awards. These standards are the provisions of the contract itself. In terminal arbitration the arbitrator has no standards to follow. In making his award he is reduced to guesswork. Furthermore, he is doing a job which the parties themselves should be doing. They have abdicated in favor of a neutral and are dodging their proper responsibilities. And if the arbitrator hands them, or either of them, a lemon, it is their own fault. Naturally, there are some occasions when terminal arbitration is a wise recourse —when almost anything the arbitrator does is better than having a strike. But these instances are few and chiefly in enterprises where strikes simply cannot be afforded.

One school of thought is that a collective agreement cannot and should not attempt to cover all aspects of the relationship between an employer and a union. According to this school, a collective agreement is merely a framework of general provisions which indicate only roughly what the terms and conditions of employment shall be. It must be made definite by the parties themselves during their processing of grievances arising under it. If they are unable to do this, the gaps must be filled in by an arbitrator. According to this school, the arbitrator should be

guided as far as possible by the terms of the agreement; but he should expand the agreement to take care of situations overlooked or omitted by the parties.

But this is anathema to the proponents of another school of thought. They believe that an agreement should express all of the commitments made by management. If anything is left out, the assumption should be that it was not intended to be covered. These people look on the arbitrator as a judge, merely to interpret and apply the agreement as it is written and not to add to it or to change it in any way. All they want to know is where they stand under the contract. Of course, they admit that the arbitrator must resolve ambiguities in the agreement and breathe meaning into its provisions in specific grievances. And they concede that an arbitrator must define such terms as "just cause" in discharge cases, where neither the contract nor the plant rules have defined all the causes for discharge.

Personally, I believe that there is room for both of these schools of thought, depending upon what the parties themselves want. Some employees and unions, realizing the practical shortcomings of written words and phrases, actually want a permanent umpire to help them make their collective agreement a living and growing document. They want him to add to it, as occasion arises, by the judicious interpolation of new provisions. This is a process analogous to the growth of the common law, where precedents assume authoritative force in themselves, aside from the already existing law. But this is a dangerous process to entrust to *ad hoc* arbitrators; and many companies and unions, jealous of their own bargaining privileges, refuse to hand over this power even to a permanent umpire. So I say, if the parties themselves want an outsider to help them make their agreement grow and to settle all grievances for them, then I can see nothing against it if they can find one. But such people are *extremely* rare. And it is far more consistent with the traditions of arbitration to have the arbitrator act merely as a judge.

The scope of modern collective agreements is an enormous subject in itself and impossible to cover at this time. But a few deserve special mention.

One of the most troublesome items is union security. Of the several kinds of union security, probably the type most desired by unions and most disliked by employers is the closed shop. Of

course, this gives the maximum of security to a union. But some unions seem to need it far more than other unions do. The closed shop is objectionable because it gives unions a strangle hold on job opportunities and interferes with the intelligent choice of employees. This is especially true if the union is free to stipulate entrance requirements and the conditions of remaining in good standing, and also has the right to demand the discharge of non-members. But certain unions, notably those in the typographical, building and maritime enterprises, value the closed union shop for these very reasons. Here are groups of workers who move frequently from job to job, from employer to employer. They regard union membership as the only safe test for proficiency in their trades and as the only guarantee that their potential jobs won't be grabbed away from them by unqualified workers who are willing to underbid them. You can't blame unions in these enterprises for adhering to this monopolistic pattern and for trying to change the Taft Act in this respect.

For industry in general, however, it is hard to make out a convincing case for either the closed or union shop. Before the Wagner Act was passed, the closed or union shop offered the only way for a union to protect its standards from the undercutting influence of non-union competition in a particular plant. But by making a union the exclusive bargaining representative of all the workers in a unit, whether or not they belonged to the union, the Wagner Act eliminated that competitive hazard. But it created an entirely new incentive for the closed and the union shop, because of the introduction of so-called "free-riders." These are the non-union workers in a bargaining unit who profit by the union's efforts but who do not support it by paying dues. Actually, they do the same work as union members and take home more money; for they keep the amount the others pay as dues and initiation fees.

To eliminate this inequality, many union leaders have sworn that they will get the closed or, under the Taft Act, the union shop. This would make all workers who are serviced by the union, pay for such service; and it would bring non-union take-home pay *down* to the union level. But this is like burning down a house to get rid of the pests. A much simpler device would satisfy most unions in general industry. And this device has none of the undesirable features of the closed or even of the

union shop, under any present or future state of the law. This is the universal dues check-off—the so-called Rand[7] formula.

This Rand formula is essentially as follows: Let the employer agree to check off and pay to the union the equivalent of union dues for everybody in the bargaining unit, whether or not he belongs to the union. This removes most of the incentive for the closed or union shop. At the same time it gives monetary recognition of the service the union is providing for the non-union workers. Some workers may object because they do not want to join the union but are nevertheless required to support it. Also the check-off of dues in some states is illegal without the consent of the workers. But I think it should be permitted by statute, both state and federal. For the union earns this contribution, not only by representing all of the workers in the bargaining of contracts, but also by servicing the grievances of members and non-members alike. Payment for this function may result in a more effective servicing of the grievances of non-members. Furthermore, the analogy to the payment of taxes is apparent. It would certainly be odd if Republicans could avoid paying taxes in a Democratic administration. And the non-union worker is free to join the union at any time, especially if he wishes to influence the policies of the union.

In the meantime the union shop under the Taft Act achieves the same result. Many employers will still not concede the union shop. But some have found it satisfactory under the Taft Act because the union cannot request the discharge of ousted members except for the non-payment of initiation fees and dues. Thus, some employers have agreed to the union shop with the proviso that it shall remain only so long as these Taft Act restrictions are on the books.

An essential in every collective agreement is a grievance procedure providing for arbitration as the last step. This is the device that makes a labor contract ultimately effective. The function of the grievance procedure is to furnish the workers and the union with an opportunity to have alleged wrongs righted in accordance with the terms of the collective agreement. Some people believe that management should have the right to file

7. In re Ford Motor Company of Canada *and* United Automobile, Aircraft and Agricultural Implement Workers of America (CIO), 1 La. 439, (1946).

grievances and have them processed through arbitration. But management does not need this right because it is already in a position to take action. Thus it may change rates, job assignments and otherwise modify the terms of employment. And it may discipline workers who are thought to be breaking the plant rules or terms of the contract. The grievance procedure allows the union and the workers to call management to account if they think it has violated the agreement or has dealt unjustly with any of the employees. This leaves management the power to act and provides a brake on such power.

There is much to say about the limitation of periods during which grievances may be filed. The parties to contracts should agree upon time limitations and live up to them. They should also reflect upon some of the following matters. May a grievance filed under one contract carry over into another contract period? May a so-called test grievance apply retroactively to other members of the unit who are in the same position but who have not filed grievances of their own? May the union itself file blanket grievances for all employees affected in cases of this type? Here is a rather unique situation. An employee in a unit missed eligibility for a three week vacation in 1949 because on the cut-off date he lacked just five days of the necessary 15 years of service. This presents a current 1949 grievance. But in the arbitration of this grievance may the employee question a two months' lay-off in 1938 by showing that it violated the seniority provisions of the 1938 agreement, when he had neglected to file a grievance in 1938? Remember, the current grievance is whether he has the necessary 15 years service in 1949; and if the 1938 lay-off period is not subtracted from his seniority, he has it. Would it be desirable to include in the grievance procedure a clause requiring an arbitrator first to determine whether the union may go back of the current agreement at all, before he hears evidence on the merits of the 1938 lay-off issue? While this device of deciding preliminary issues might detract from the educational value of airing all the matters underlying the main grievance, it might prove to be most convenient in other ways. Or should contracts simply provide that incidents occurring under previous agreements cannot be considered except under grievances filed at that time?

A talk like this can hardly scratch the surface. Think of all

the problems involved in seniority and wage provisions, with all aspects of overtime. While I don't blame unions for trying to establish strict seniority, I don't blame employers for insisting upon merit rating to govern promotions in a line of progression. Most unions will admit that ability to perform should be a condition to promotion. But where a union agrees that seniority shall prevail only where *relative* ability to perform is equal, then I think it must accept a merit rating plan for determining this comparison, if the employer wants it that way. Of course, it may bargain over the details of this plan. If it does not wish to do so, however, the employer may write his own ticket, as long as he does it fairly.

But some unions hate to bargain about such things as merit rating, job evaluations and incentive plans. If these items are to be introduced, they prefer to have the employer assume the entire responsibility and then attack his position in grievances and arbitrations. Where unions refuse to bargain on these items, does an employer have a free hand to develop techniques unilaterally? I would have supposed that he does, although nowadays the field of unilateral action is narrowing rapidly.

This suggests another question. What if an agreement is completely silent about a certain matter, such as whether or not separate operations may be coordinated and put on assembly line production, and whether or not the various jobs in a certain department may be changed from an individual to a group incentive basis? If these matters are not covered at all, does this mean that management has the right during the life of the contract unilaterally to make these changes as part of its function to manage? I have always supposed that it did mean just that. Naturally, the union may interpose bargaining demands concerning these changes, with a view to modifying them in the next contract. But I should think management would have to have this unilateral right, as long as its acts are not inconsistent with provisions of the current agreement. I do not think this right is dependent on the management clause in the contract, because I believe that such clauses are generally meaningless. About all they fairly imply is that management has the right to manage, which leaves the main question up in the air. Nowadays this unilateral right is always subject to curtailment if the union insists upon bargaining over the subject matter involved.

Whether or not management's unilateral innovations become modified depends entirely upon the course of the bargaining itself.

Another word or two about pension plans. It comes hard for employers with established pension plans to agree to share the administration of these plans with unions. By and large, retirement plans conform to rather rigid patterns. To what extent is it possible for unions to effect changes in these patterns? Do they want to have a say in the investment of the funds or in the choice of the trustees handling the funds? Can unions help to secure a greater return on the funds invested in these plans, and should they be given a chance to see if they could? To the extent that such plans cover employees outside the bargaining unit, is not union bargaining on these plans inappropriate? These and other questions may have to be answered; yet they seem out of place when it transpires that this whole fuss over pension plans goes back chiefly to the union's desire to prevent compulsory retirement under these plans at the age of 65. Certainly these plans are conditions of employment under the NLRA. Employers value them because they stabilize employment. Workers with vested rights in such plans will think twice before they lightly discard this advantage. The pension is quite as important as the other money items like wages and vacations.

To avoid some of the difficulties which bargaining over pension plans has caused, it has been suggested that they should all be abolished and the funds and contributions be used to support an improved government social security program. By thus taking these plans out of the area of collective bargaining, it is said, all of the difficulties of sharing administration of them with unions will disappear, a healthy mobility of labor will ensue, absolute uniformity of retirement planning will follow, and workers may retire at any age. Furthermore, the employees will not be inhibited in bargaining over the traditional items of collective agreements, since they will have less to lose if they are fired for unprotected activities and can pick up their retirement status unimpaired at any new plant they go to. But employers will not see it in this light. They will object to losing the advantages of stability inherent in private pension plans. And many employees, who are not so enthusiastic about government social security, may also object. Anyhow, by extending the scope of the em-

ployer's obligation to bargain to cover this and other novel items, the Labor Board had opened a veritable Pandora's box in the industrial world.

The whole matter of bargaining and administering a collective agreement is hard to cover in advance by rules of law. In our system the parties themselves set the pace. The legislatures, administrative boards and the courts follow the lead, interfering to set the rules only after the parties have become obstreperous. This is essentially a *laissez faire* philosophy, where the parties are expected to create the pattern for themselves. But even when intervention becomes necessary, the cooperation of the parties is welcome, as in the original Railway Labor Act. Indeed, many faults of the Taft-Hartley Act are due to organized labor's refusal in 1947 to discuss frankly the questionable practices of unions.

Most of the experts—people like Davis, Taylor, Leiserson, Witte and Garrison—say that the whole process should be left to the parties themselves. But as I said before, we have to have some rules. Employers cannot be left free to bust unions, to discourage organization and unilaterally to impose the terms of employment. And unions cannot be left free to run employers into bankruptcy or to defy the operation of the general economy. This applies not only to conventional employer unfair practices. It applies also to extreme bargaining techniques like sympathetic pressures, union refusals to bargain, blind wage-pattern following, and the defiance of restraints on anti-competitive conduct. And it means that the parties must develop a proper regard for the interests of other parts of the community.

Concerning the scope of collective agreements, the sky may be the limit if the parties use their power in a trustworthy fashion. But their rights and duties begin to ask for definition when they push too far for selfish ends. We know just enough about the whole collective bargaining process to realize that the parties themselves are most familiar with its procedures, its uses and its needs. But the public can recognize abuses when they occur. And it should leave the development of the whole process to the parties as long as—but only as long as—they remain responsible.

This is also true concerning the enforcement of collective agreements when they are made. Here again we have a self-develop-

ing process of the parties which so far is admirable. But arbitration must be carefully nurtured and respected by the parties. If it is not, then the resulting legislative restrictions may stifle its development.

In this whole field of labor-management relations it is up to the parties to keep the rules of the game so fluid, so adaptable and so beneficial, that the public is willing to leave them alone. And the parties must learn to stop looking at arbitration awards and court decisions simply as victories if they win or as defeats if they lose. They must regard them as parts of a process of education and development where, in the long run, everybody wins. In these ways we stand to achieve a stable and lasting state of labor-management peace and cooperation.