

BOOK REVIEWS

EMPLOYMENT AND WAGES IN THE UNITED STATES. By W. S. Woytinsky and Associates. New York: The Twentieth Century Fund, 1953. Pp. xxxii, 777. \$7.50.

"Lawyers are harmful. Don't consult them." That refrain, variously expressed, is increasingly heard with respect to labor relations questions, especially the collective bargaining process.

The National Planning Association has made a series of case studies in which it has endeavored to determine what are the causes of industrial peace under collective bargaining. The final report¹ of this series found, among other things, that where there was a history of industrial peace neither party to the bargaining had adopted a legalistic approach to the solution of the various problems they had. At one point the report states: "There was substantial evidence to indicate that lawyers could make negotiations more peaceful by staying away from the bargaining table than by injecting themselves into the negotiations."²

At another point the report states:

But there was one point on which virtually all companies and unions agreed in regard to the make-up of the negotiating teams: the exclusion of lawyers. (See for example, Dewey and Almy, p. 18; Sharon Steel, pp. 6-7; Nashua Gummed and Coated Paper Co., p. 62.) The lawyer may plead in his own defense that he is being made the whipping boy for all of the troubles that labor and management had in the past. Whenever the parties did not trust each other, their lawyers were called in to put the agreements into legal jargon; but frequently this jargon merely spelled out the basic conflict of the parties—a development which could not justly be blamed on the lawyers.

The aversion to lawyers in harmonious relationships, however, goes beyond this reasoning. It seems to grow out of new independence on the part of the bargainers, a feeling that they understand each other and can say what they want to without the help of an outsider, and without the fear that the agreed-upon words subsequently would be stretched to mean things not mentioned at the negotiations. This attitude was best summed up in the words of a company president to a union official, "I know the steel business and you know the union business, so let's keep lawyers out of this so they won't obscure our mutual objectives." (Sharon Steel, p. 7.)³

Why are lawyers so often *persona non grata* in the area of industrial relations? Many reasons have been given, among which the following are illustrative: Lawyers frequently approach collective bargaining with a litigious frame of mind with the result they inject an adversary atmosphere in the bargaining process. Many lawyers look for precedents in contract clauses which have been legally interpreted by searching the services rather than working out clauses which express the understanding of the parties and which will work in the particular situation. Some lawyers are prone to look to the day the parties will have a dispute when the construction of the contract language will be a determinative factor instead of considering the contract as a "living document" which should encourage constructive day-to-day operation. It is often said that lawyers are not psychologically attuned to the bargaining process; that they sometimes precipitate a strike situation in order to preserve a legal position. Then when the strike is over, the employer may find that he has won a "point," but that it has been costly, not only in the direct costs of the dispute, but also with

1. National Planning Association, *Fundamentals of Labor Peace, A Final Report*, Case Study No. 14 (Feb. 1954).

2. *Id.* at 89.

3. *Id.* at 90.

respect to the after affects of lowered morale and productivity. A very common charge is that many lawyers have insufficient knowledge of the practical aspects of business operations or of the various economic factors involved, yet knowledge of these factors is essential if sound industrial relations are to be established. This list of charges could be extended at some length.

Actually, is there a proper role for the lawyer in labor relations or in collective bargaining? The various companies and unions studied by the National Planning Association are not typical. The companies are relatively large companies which have adequate personnel and industrial relations departments. It is quite likely that some of the personnel in those departments, while not private practitioners, had legal training. No doubt, even though counsel did not participate in actual negotiation, he was consulted concerning the legal ramifications of matters under consideration particularly if new questions such as the guaranteed annual wage or a pension plan were involved. Moreover, the years of stable relationship meant that the parties had long ago passed through the stage of finding out what each was like, what their goals and tactics were. The parties had bargained with each other long enough to know pretty well where each one stood and what could be expected with respect to any particular situation. There is no doubt that the parties in such situations can bargain more effectively and understandingly than could an "outside" lawyer.

There are, however, many other situations where as a practical matter, the lawyer can play a significant and proper role. For the most part, union negotiators are today well trained and skillful. Bargaining is for them an every day experience. Many unions maintain excellent research staffs and the negotiators are supplied with economic information and contract proposals to make their bargaining more effective. On the other hand, many employers, particularly small and medium sized establishments, do not have, and cannot afford to have, industrial relations departments. In such situations the bargaining is usually done by the president or a vice president, as one among a myriad of other duties he has to perform. Such a person is usually not a skilled negotiator. He seldom knows, or has readily available, economic data or information concerning current contract practices and trends which he should know if he is to bargain intelligently. He knows there are a host of legal ramifications involved in collective bargaining, but he does not know the precise nature of these ramifications. He often is virtually inarticulate as compared with the union negotiators. He sometimes has no idea how to present his situation adequately as against the "standard" demands the union presents, and the union's demands are fortified by the ever present possibilities of a strike. Indeed, the bargaining table in such situations might, as Professor Jesse T. Carpenter has pointed out,⁴ be nothing more than a myth.

4. In CARPENTER, *EMPLOYER'S ASSOCIATIONS AND COLLECTIVE BARGAINING IN NEW YORK CITY* (1950), Professor Carpenter states:

For union officials do not sit down at a conference table to work out the terms of a labor contract with each individual employer, any more than individual employers in nonunion shops *negotiate* in any real sense with every prospective worker who comes seeking an available job. In both cases, the "bargaining table" is a myth.

Id. at 12.

[T]he union establishes a fixed set of working conditions which it offers to all rank-and-file employers whose workers are organized. These standard conditions are generally incorporated into a "form contract," which is a blanket agreement drafted at union headquarters, complete in every detail and ready for signature. Most employers accept these terms without question. There is little else they can do if they want to stay in business. The

Such an employer can in no sense be said to have a bargaining position equal to that of the union. Consequently, such employers seek help, and their attorneys are a logical source of such help.⁵

The fact remains that any attorney who undertakes to advise clients concerning industrial relations must, if he is to do a creditable job, have sufficient knowledge of the economic and practical aspects of the company, the union and industry involved. The legal aspects of industrial relations cannot be neatly severed from the other related questions. The ultimate goal of sound industrial relations is to develop a healthy and constructive day-to-day relationship between labor and management. The lawyer's role should be such that he supports that goal. This raises some difficult questions for lawyers. To what extent should a lawyer prepare himself concerning the economic aspects of industrial relations? Should a lawyer who knows he does not have adequate economic and practical knowledge of the issues involved so inform the client? Should a lawyer "insist" on the client spending some time in educating him about the practical aspects, the terminology, etc., of the operations of the company, the union or the industry? Is the area of industrial relations becoming specialized so that the practitioner who is only occasionally confronted with an industrial relations problem should seek co-counsel?

At a recent Labor Law Institute sponsored by the Missouri Bar, the Rev. Leo C. Brown, S.J., an able arbitrator of extensive experience, gave a penetrating talk on the role of the lawyer in labor relations. He emphasized the necessity of lawyers knowing the setting and climate of industrial life and working toward a continuing constructive relationship. The discussion which followed revealed a keen interest on the part of a number of the lawyers in discovering how they could develop their knowledge of the economic factors involved. W. S. Woytinsky and his associates on the Employment and Wages Survey of the Twentieth Century Fund have produced a superb volume which will be of invaluable assistance to any lawyer who wants to understand the economic aspects of our wage system.

Employment and Wages in the United States is a massive volume, clearly written and intelligently organized. The book is divided into four parts. Part One is entitled "Wages: Theory, Trends and Outlook." It deals with such questions as wage theories, the trends in production, national income, wages and hours, cyclical variations and the relationship between productivity and wages. Part Two is entitled "The Institutional Setting." In this part, one finds lucid chapters on such matters as labor unions, collective bargaining, work stoppages, arbitration, health insurance and the various regulatory laws. Part Three is entitled "Employment and Unemployment." This part considers the nature of labor force and such matters as seasonal and cyclical variations, demand for labor, employers, the age factor in employment, and the composition, measurement and distribution of unemployment. Part Four is entitled "Wages and Earnings." This part discusses such matters as the forms of wages, job evaluation, age, sex and race factors, industrial, occupational and geographical differentials, union and non-union wages, and trends in wage differentials.

The survey report is well supplemented by numerous charts and tables. There are 242 statistical tables in the text and 118 tables are presented in the appendix.

contract is their license to operate. Only the unusual employer gets individual attention.

Id. at 14.

5. It should be noted, however, that employers are more and more turning to labor relations counselors for help rather than to lawyers. Also many small and medium sized employers are forming or joining associations which they designate as their bargaining agents. Such associations are often the only practical method of approaching an equality of bargaining power.

The most provocative feature of the volume is the Conclusions and Recommendations of the Twentieth Century Fund's Committee on Employment and Wages. Various members of the Committee submitted footnotes to the general conclusions in which they either disagree with or place different emphasis upon various statements. Also, six members submitted supplementary statements in which they expound their individual views more fully. These Conclusions and Recommendations are stimulative reading.

No effort has been made in this review to indicate the nature of the findings, conclusions, and recommendations of the Survey or the Committee. These should be explored personally by anyone interested in this area. Those lawyers who sincerely want to understand wage economics will find a careful reading of *Employment and Wages in the United States* an enlightening and rewarding experience.

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CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE. By Robert Wyness Millar. New York: The Law Center of New York University, 1952. Pp. xvi, 534. \$7.50.

This book is one of a series published under the auspices of the National Conference of Judicial Councils, the series being designed ". . . to help promote a better, more efficient judicial system." Previous articles by the author comprise a few of the chapters and parts of some of the others. It is an historical survey of trial procedural developments in England and in the state and federal courts in the United States.

Beginning as it does with Anglo-Saxon procedure and coming down to the present day, it is necessarily somewhat general. Actually, covering such a period, it is remarkable that Professor Millar has been able to incorporate as much detail as he has in slightly over five hundred pages. His plan of writing, after sketching the Anglo-American trial procedural background through the nineteenth century, is to trace separately in nineteen chapters certain specific developmental phases from that point on, such as "Joinder of Parties," "Joinder of Demands," "Counter-Demands and Cross-Claims," and "Third Party Participation."

The value of the book to the reader is the bird's-eye view of trial procedural progress it gives, and the stimulating historical march of Anglo-American trial procedural betterment it reveals. As a corollary to the view of where we have been, it provides a glimpse of where we can go.

There will be great satisfaction to an American reader in the appreciation gained of the trial procedural contributions made by us to the common law since it came to our shores. In historical perspective there is little doubt that the outstanding concentrated trial procedural advancement on either side of the Atlantic was the adoption of the Field Code in New York in 1848. The only preceding similar effort was the English Hilary Rules of 1834, and they realistically, as Holdsworth has pointed out, were more retrogressive than progressive. The various Common Law Procedure Acts in England which followed the Field Code in point of time were not nearly its equal in progress. Not until the Judicature Act of 1875 did England surpass in trial procedure that existing in the jurisdictions of this country, they, in the main, having followed the lead of the Field Code. The rules subsequently adopted under the rule-making grant of that Act borrowed lavishly from the Field Code. Those rules as since amended

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now govern English procedure, and though originally they went somewhat further, and now, of course, considerably, their core came from the New York reform of 1848.

Since that first notable American advance we have moved ahead with the Federal Equity Rules of 1912 and the Federal Rules of Civil Procedure, both drawing heavily on the English advances. With the substantial adoption of the latter in so many states we have arrived at our present enlightened and somewhat unified trial procedural state.

As always, there is still room for Anglo-American trial procedural progress. For those interested in its areas and their delineation, Professor Millar's book is valuable. It gives a grasp of the trial procedural past and a handhold on the trial procedural future.

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