NOTES AND COMMENTS

DRAFTING PROBLEMS AND THE REGULATION OF FEATHERBEDDING—AN IMAGINED DILEMMA

A construction worker sits alone, “painting” pre-painted pipe with a dry brush.1 His union requires all pipe to be painted before being installed and the contractor purchased pipe painted at the factory. A typesetter carefully sets an advertisement, runs a proof sheet, dutifully corrects any mistakes, gets the completed type approved by his supervisor, and then discards the entire job in the melting bin.2 In the late 19th century, a technique was developed for making a printing plate from papier-mache matrices which require no typesetting, and the unions, in allowing this speedy process to be used, required, and still do require, that the type be reset by hand at some later date. On the production line, an ambitious young worker produces too many units per day.3 His union warns him and, when disregarded, fines him for over-production. There is a fireman in a diesel train which burns no coal,4 a fourth man in an airplane cockpit designed for three,5 a stage crew for a production with no scenery,6 an orchestra which stands by while another plays.7 These are examples of featherbedding activities—union demands which have the purpose of creating or maintaining work and thus employment for their members.

Congress has passed three pieces of legislation specifically directed at featherbedding. Twice this legislative effort came in fits of pique directed at particular fact situations embodying special abuse. The Lea (anti-Petrillo) Act8 applies only to featherbedding activities in the broadcasting industry. The Hobbs Act9 amended the Copeland Anti-Racketeering Act to outlaw the New York City Teamsters’ practice of stopping every out-of-town truck at the city line and demanding, as a toll upon trucks entering their jurisdiction, a full day’s wages for an unneeded member of the local. The only general

4. See Emergency Rail Board’s Denial of Demand for Extra Diesel Firemen, 24 L.R.R.M. 53 (1949). See also note 11 infra.
7. See Countryman, The Organized Musicians, 16 U. CHI. L. REV. 56 (1948), and 239 (1949), for a history of this and other musicians’ practices.
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legislation, the so-called anti-featherbedding provision of the Taft-Hartley Act, was so narrowly drafted and interpreted as presently to be a nullity. The Railway Labor Act contains no anti-featherbedding provisions.\textsuperscript{10} 11

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\item \textsuperscript{11} See Van de Water, \textit{A Fresh Look at Featherbedding}, 7 BAYLOR L. REV. 138 (1955). The act attempts to avoid disruptive strikes by requiring that minor grievances, defined as disputes over the terms of an existing contract, be sent to an adjustment board, and that major disputes be negotiated in an atmosphere of good faith collective bargaining. The Supreme Court has held that the Norris-LaGuardia Act, 47 Stat. 70 (1932), as amended, 29 U.S.C. §§ 101-115 (1958), which prohibits federal injunctions in labor disputes, does not apply to railroad strikes concerning disputes which the Railway Labor Act defines as minor grievances. Brotherhood of R.R. Trainmen v. Chicago R. & Ind. R.R., 353 U.S. 30, 40-41 (1957). Some featherbedding disputes are settled through this mechanism by labeling them contractual disputes. Baltimore & O.R.R. v. United Railroad Workers, 271 F.2d 87 (2d Cir. 1959) (dispute over elimination of job of oiler in modernized tug-boats referred to adjustment board). Disputes over such things as work rules, the main subject of the present controversy, and large scale job displacements arising from abandonment, can by no definition be labeled contractual disputes.

The government has long been involved in one aspect of the featherbedding problem: what provisions are to be made for workers whose jobs are eliminated? See 54 Stat. 906-07 (1940), 49 U.S.C. § 5(2) (1958); ICC v. Ry. Labor Ass'n, 315 U.S. 373 (1941) (pre-statutory ICC power upheld); United States v. Lowden, 308 U.S. 225 (1939) ($250,000 of $500,000 savings from abandonment must be used for displaced workers); Railway Labor Ass'n v. United States, 339 U.S. 142 (1949) (post-statutory Commission power broadly read). But see Railroad Telegraphers v. Chicago & N.W. R. Co., 362 U.S. 330 (1960), where the Supreme Court refused to enjoin a union attempt to block an ICC and state approved abandonment of one-man railroad stations by insistence on a no elimination of jobs clause.

In the case of Brotherhood of Locomotive Engineers v. Baltimore & O. R.R. Co., 372 U.S. 284 (1963), the issue was a proposed management revision of the railroad work rules, probably at present the most costly instance of union featherbedding activity in the country. Brotherhood of Locomotive Engineers v. Baltimore & O. R.R. Co., 310 F.2d 503, 506-07 (7th Cir. 1962). This was a union suit to enjoin the B & O and 15 other named railroads from putting into effect the new rules. The union was in an extremely weak position; it had rejected the report of a Presidential Commission, which the Carriers had accepted; it had rejected a National Mediation Board proposal to subject the problem to arbitration, which the Carriers had accepted; and, with the withdrawal of the mediation board, collective bargaining was at an impasse. See Horowitz, \textit{The Diesel-Fireman Issue — A Comparison of Treatment}, 14 LAB. L.J. 694 (1963).

The union's argument was that the management promulgation was, in effect, a rule that there would be no rules, and that the absence of rules governing the terms of employment is contrary to the stability in labor relations which is the goal of the Railway Labor Act. See 310 F.2d at 506 for the court's characterization of the management proposal. The court of appeals found against them on this narrow question, feeling the rules set down were, although flexible, not subject to this criticism. The union had conceded the right of management to unilaterally change rules after bargaining to impasse, so that their entire case failed with the Supreme Court finding that the railroads had followed the statutory notice that was required and that bargaining was indeed at an impasse. 372 U.S. at 291. See also Pullman Co. v. Order of Railway Conductors, 316 F.2d 556 (7th Cir. 1963) (Railway Labor Act requirement of notice complied with).

Thus, absent executive seizure or legislative enactment, the government was powerless to prevent a nationwide rail strike over featherbedding. After several voluntary postpone-
This minimal and sporadic regulation in no way prohibits the most important instances of featherbedding practices. Union demands for make-work practices were a major cause of the recent New York City newspaper dispute, and featherbedding is the essential issue in the current nationwide railroad dispute over work rules. The railroads have demonstrated that annual wages paid by them for what they regard as unneeded labor total 500 million dollars. Loss in all industries resulting from make-work practices has been


The arbitrator's award allowed the railroads to eliminate, over a two year period, 90 percent of the jobs they claimed were unneeded; workers with over two years' seniority may not be dismissed but must be transferred to other jobs. New York Times, Nov. 27, 1963, p. 1, col. 3. Union attacks on the arbitration proceeding have failed. Brotherhood of Locomotive Firemen v. Chicago, Burlington & Quincy R.R., 32 U.S.L. WEEK 2336 (USDC D. C. Jan. 8, 1964).

12. A short history of the "bogus type" practice in the newspaper industry is useful to demonstrate the deep union commitment to featherbedding which often occurs. In the late 19th century, typesetters were paid by the piece, and the unit of measure was the "em," the amount of space the letter "m" occupied in type. Since advertisements had much blank area and could be set quickly in relation to the number of ems, they were regarded by typesetters as "fat." Newspapers developed a practice of lending plates, or papier-mâché matrices from which plates could be made, since most advertisements were run in all the local papers. This seriously threatened typesetters' income, and unions extracted the concession that all such type, although it could be used to save time, had to be reset by hand at some later date. SLICHTER, UNION POLICIES AND INDUSTRIAL MANAGEMENT 182 (1941). The logical time to end this practice was when the typesetters switched from piecework pay to hourly salary. Since this revision did not occur then, it would thereafter have been a step backward for the union and detrimental to the employment level of its members to give up this vested right without the receipt of a comparable benefit. None was forthcoming and so generations of typesetters have carefully set uncountable pages in type, have proofread them, edited them, and then destroyed them. LIPSET, TROW & COLEMAN, UNION DEMOCRACY 22 (1956). Some 70 years after the beginning of this practice we find "bogus" as one of the central issues of a printers' strike, with management declaring that bogus "is the one issue we must have progress on," and the union replying "[T]his is one thing we just won't bargain on." Time Magazine, March 1, 1963, p. 15. See also American Newspaper Publishers Ass'n v. NLRB, 345 U.S. 100, 103 (1953), and text at notes 72-73 infra.

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estimated at one billion dollars each year. The absence of comprehensive or effective legislation against featherbedding does not reflect a consensus that these practices are not harmful to the general economy. Featherbedding activities, some economists contend, cause an inefficient deployment of manpower which limits ultimate production and inhibits technological change. This inefficiency is said to slow down the whole economy, creating the paradox that practices which labor fights to continue have the ultimate effect of limiting the potential for achieving full employment. The late Professor Slichter of Harvard once stated, "If make-work rules or practices become prevalent, they will substantially hold down the output of industry and the standard of living of the country." Whether or not union demands for featherbedding are self-defeating in the long run, unions cannot themselves be expected to moderate their make-work practices in the interests of the whole economy. True, many commentators feel that featherbedding is a by-product of the formative period of labor unions, and that the increased economic awareness that comes with union maturity, coupled with a heightened realization of the obligations of unions to society, will lead unions gradually to eliminate featherbedding, through the normal processes of collective bargaining, in favor of more productive benefits. But there are two essential flaws in this argument. It may be true that

15. "[M]ake-work rules give the union membership only a temporary benefit and . . . in the long run a large part of the cost of such rules falls on the members themselves." Slichter, The Challenge of Industrial Relations 65 (1947). See also Slichter, The American Economy 162, 166-67 (1948). In 1961, Professor Slichter, in his last book, advanced the hypothesis that there was "the growing realization that the greatest need of all countries was more production." Slichter, Economic Growth in the United States 7 (1961).

17. Harvard Professors Sleckman and Slichter, writing separately, advocate that unions must gradually abandon featherbedding practices, since they conflict with the overall public interest. Professor Sleckman states that . . . the [union] drive for economic gain must be harnessed to considerations of productivity and costs. Group solidarity must be integrated with wider communal loyalties. In our interdependent economy, unions must accept responsibility for general welfare, not only for special-group welfare. Sleckman, Labor Relations and Human Relations 179-80 (1947). Professor Slichter declares that "[A]voiding the wasteful use of labor is an obligation which both the employer and the union owe to the community." Slichter, The Challenge of Industrial Relations 59 (1947).

Many economists feel that any union which practices featherbedding does so because of economic ignorance. Professor Yoder feels that such unions . . . apparently accept . . . the "lump of labor" theory, which holds that there is so much work to be done, regardless of labor costs. They recognize no elasticity
the elimination of featherbedding and resulting increased efficiency of resource allocation would increase employment in the long run. But this increase neither occurs when featherbedding is eliminated, nor necessarily benefits those who are displaced. The salt industry is a classic example of the detriment possible to workers in one industry in one sector of the economy where featherbedding is eliminated. The demand for salt is inelastic—the amount of salt purchased will be constant no matter how much consumers earn, no matter how low the price of salt drops. Thus, an increase of efficiency in the salt industry, however beneficial to the economy as a whole, must decrease the number of employment opportunities for saltworkers. The saltworkers' union, if it chose to defend employment levels against innovations which might bring higher wages for those who would remain, would be performing its traditional function of representing its members' interests. Even in industries where the product demand is elastic, employment levels will benefit from increased efficiency only in the long run; "labor, while it realizes that long run prospects are bright indeed, is also fond of quoting Lord Keynes' remark that 'in the long run, we are all dead.'"

Furthermore, whether or not unions could be convinced that featherbedding beneficial to its membership is harmful to the general economy, we should not hold unions responsible to take the path of self-denial. Unions are special interest groups primarily concerned with the welfare of their members, not in demands for labor; they do not see that the price of labor may affect the quantity that will be employed.

Yoder, MANPOWER Economics and Labor Problems 477 (1950). The inference is that as soon as these unions become economically sophisticated, featherbedding will disappear.

But see Selekman, A Moral Philosophy for Management 175 (1959), in which Professor Selekman, in contrast to his earlier position, notes that unions must be accepted as self-service rather than public service institutions.


19. The most important factor in an industry's ability to create new jobs for the technologically unemployed is the price elasticity of demand for its goods. Yoder, Manpower Economics and Labor Problems 242 (1950).


Professor Steiber of the Michigan State University Labor and Industrial Relations Center notes that

Workers and unions may agree that limiting output is bad for the company, for the economy, and even their own long run employment opportunities. . . . But the individual knows . . . that changing technology and high productivity may mean less work for him next week, next month, or next year.


public service organizations charged with furthering the general welfare. The statutory scheme of collective bargaining under the N.L.R.A. demands that the unions play an adversary role on behalf of their members, so that the optimum benefits will be obtained for them through the processes of bargaining and the use of union economic strength. The role of a union leader in relation to his membership, as Professor Wellington has pointed out, is similar to that of a corporation president in relation to his stockholders. For a union leader to renounce featherbedding concessions whose continuance is desired by his members would be equivalent to the president of a coal corporation urging consumers to shift to more efficient energy sources such as gas or electricity. Featherbedding, where it still exists, remains because the unions place a higher value on jobs retained than management places on jobs eliminated, and the union has the bargaining power to enforce this valuation. Unless the management valuation for some reason changes, featherbedding cannot be expected to disappear through employer efforts at collective bargaining. Make-work practices will only be eliminated by legislation controlling the substantive terms for which the unions are free to bargain.

That such legislation has not been forthcoming, despite severe and recurrent public concern with featherbedding practices, suggests that fundamental policy objections have been raised to regulation of this nature. Aggravation of the problems of adjusting to automation, departure from accepted models of government participation in labor-management relations in a free economy, and dubious economic gain suggest themselves as objections which might have been identified. But, in fact, such objections have rarely been raised; the history of regulation of featherbedding, such as it has been, suggests that other, less substantial objections have prevented direct confrontation with, or precise framing of, these issues. Thus, legislators faced with the question of regulating featherbedding questioned their ability to do so without sweeping “legitimate union objectives”—for example, protecting health, safety or comfort of workers—within the scope of the ban. The propriety of criminal sanctions and judicial enforcement, both integral to past proposals, was likewise questioned. These objections, more pragmatic than theoretical in nature, are worthy of analysis; if they can be met, as this Comment suggests they can, it should then be possible to place in clearer light the complex and in-

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23. Senator Taft stated, in relation to featherbedding, that
I want to call your attention to the difficulties that we are up against as a method of trying to work up practical solutions to problems even if we agree on the principle.

herently political problem of regulating union demands for make-work prac-
tices.

PAST ATTEMPTS TO REGULATE FEATHERBEDDING

The Sherman Anti-Trust Act

The application of the Sherman Act to most forms of featherbedding is
now of merely historical interest. The Justice Department, through Assist-
ant Attorney General Thurman Arnold, decided in 1939 to apply the act
vigorously to what were considered unregulated restraints of trade. Arnold
announced this policy in a letter to the Indianapolis Central Labor Union,
stating that the Justice Department would consider, among other things, “un-
reasonable restraints designed to prevent the use of cheaper material, improved
equipment, or more efficient methods” and “unreasonable restraints designed
to compel the hiring of useless and unnecessary labor” violations of the act,
and as such subject to criminal penalties.

Criticism came from every side. Labor’s reaction was predictable—vigorous
denunciations were immediately forthcoming. Less predictable was the at-
titude of the labor experts. Dean Shulman questioned Arnold’s basic tenet,
that such activity was not a legitimate labor objective. He stated,

[A] demand for the hiring of so-called useless and unnecessary labor
may be but an inartistic and clumsy way of expressing a desire for
shorter hours or spreading of employment opportunities. And resistance
to improved equipment or more efficient methods may be but a way of
expressing . . . the desire for continued employment and earnings. Both
may be but means of safeguarding labor from receiving the entire shock
of technological change.

The courts proved similarly unsympathetic. In United States v. Carrozzo, the
union had clearly violated both of Arnold’s prohibitions. They sought to
prevent the introduction of efficient cement mixers which mixed the cement in
the truck on the way to the job, or, in the alternative, to retain the unneeded
services of the men employed to mix cement at the job. The issue was squarely
faced:

The indictment alleges . . . that the use of truck-mixers would result in
a saving of labor costs through reduction of the number of men em-
ployed. Defendants insist that this is exactly what they are objecting

26. For a more detailed account of the attempted application of the Sherman Act
to featherbedding practices, see Aaron, Governmental Restraints on Featherbedding, 5
27. See generally, Arnold, The Bottlenecks of Business 240-59 (1940).
28. Id. at 251.
31. 37 F. Supp. 191 (N.D. Ill. 1941), aff’d per curiam sub nom. United States v.
International Hod Carriers. 313 U.S. 539 (1941).
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The trial court agreed that these employment demands were legitimate union activities and refused to apply the Sherman Act. The Justice Department attempted only one other similar prosecution and again was rebuffed. The issue was essentially foreclosed by the Supreme Court in United States v. Hutcheson, which held the Sherman Act could not be used against labor union activities unless the unions combined in restraint of trade with non-labor groups.

Arnold’s attempt to regulate featherbedding through the Sherman Act was open to many serious objections. The first, as Dean Shulman noted, was that there was no consideration of the problem as a labor relations problem, no articulated analysis as to whether or not the creation of artificial employment was a legitimate labor activity. But even if the decision to regulate is assumed to be proper, the area Arnold designated for regulation was excessively vague. “The hiring of useless and unnecessary labor” gives no indication to the labor leader where the line between such factors as employee health, safety, difficulty of work, and rest periods and uselessness lies, and no standards to the judge who must evaluate the union action. Since an adverse decision in this grey area could mean a jail sentence, this regulation would inevitably inhibit union efforts to secure better working conditions. An unsympathetic judge, for example, might feel that efforts to promote safety, which required the hiring of more men than were formerly necessary, were in reality efforts to create employment. Clear delineation of the area of regulation, or provision for an adjudication of statutory coverage before the activity becomes punishable, if not both, seems necessary if regulation is to avoid inhibiting desirable union efforts.

The Hobbs Anti-Racketeering Act

The Copeland Anti-Racketeering Act, inspired by frequent and violent hijacking and extortion incidents during the Bootleg Era, outlawed, in inter-

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32. Id. at 195.
34. 312 U.S. 219 (1941).
37. A fact situation where such a result might follow is exemplified by Waterfront Employers Ass’n of Pacific Coast, 6 Lab. Arb. 719 (1947).
40. See United States v. Local 807 (Teamsters), 315 U.S. 521, 530 (1942).
state commerce, robbery and extortion carried out through the use or threat of force or violence. Conviction under the act carried a maximum penalty of twenty years imprisonment, a fine of $10,000, or both. The act exempted from the definition of extortion “wages paid by a bona-fide employer to a bona-fide employee.” In United States v. Local 807 (Teamsters), the Supreme Court broadly construed the “bona-fide employee” exemption. The New York City Teamsters Local had a standing practice of requiring out-of-town trucks to employ one of their men for New York deliveries or pickups. The teamsters would stop these trucks at the city line and exact the immediate payment of a full day’s wages for one man; a local member would offer to accompany the trucker. Since the teamster’s services were generally unneeded, the truckers usually declined the offer; the day’s wages were considered a protection fee. A trial court found that the conduct fit within the proscription of the Copeland Act because the wage demand contained an implicit threat of violence. The Supreme Court, however, was unwilling to apply a criminal statute aimed at professional gangsters to a union official who didn’t personally profit from his activities; it succeeded in fitting this conduct into the labor exemption. Key factors for the Court were the teamsters’ offer to work for the money and the fact that the wages actually went to the man making the offer, albeit his offer was not often accepted. It characterized the money paid as “wages,” the trucker as a “bona-fide employer,” and the teamster as a “bona-fide employee.” This statutory construction, although strained, enabled the Court to avoid a drastic change in the regulation of labor relations—a change for which there was no clear congressional mandate.

The mandate was three years in coming. The Hobbs Amendment eliminated the “bona-fide employee” exemption, specifically to bring such union activity as was involved in Local 807 within the Copeland Act. The Hobbs Act was first applied to labor activities in United States v. Kemble, in which the facts almost exactly duplicated those of Local 807. Threatening

41. 315 U.S. 521 (1942).
42. See id. at 527.
43. [T]he jury was bound to acquit the defendants if it found their objective and purpose was to obtain by the use or threat of violence the chance to work for the money but to accept the money even if the employers refused to permit them to work.
315 U.S. at 538.
45. Representative Hancock stated, during the House debate on the amendment, that [T]his bill is made necessary by the amazing decision of the Supreme Court in the case of the United States against Teamsters' Union 807, 3 years ago. That decision practically nullified the antiracketeering bill of 1934. . . . We think a mistake was made by the Supreme Court, we are attempting to correct it through enacting a new law which will accurately and definitely reflect the attitude of Congress, the general public and the honest, law-abiding members of labor unions.
91 Cong. Rec. 11900 (1945).
violence, the union exacted a day's pay for its members from all trucks delivering in its jurisdictional area. Affirming a conviction below, the Third Circuit held that

[Payment of money for imposed, unwanted, and superfluous services such as the evidence shows Kemble attempted to enforce is within the language and intendment of the statute.]

This holding has been criticized on grounds that the court should have required an intent to extort rather than to create employment, that a bona-fide offer to work should remove the activity from the statute, and that, in any case, only when the money goes to the defendant, not the union members, is conviction justified. Yet, however persuasive these policy considerations may be, Congress plainly rejected them; no result other than the court's was possible.

The result calls attention to the flaws of the act. First, its criminal sanctions are both disproportionate to the harm caused by the featherbedding demands, and inhibiting to legitimate activity. Second, and more grave, the sanctions are irrationally imposed and withheld. This objection is starkly illustrated by the case of United States v. Green. Local union policy required the hiring of a "swamper" to walk in front of every bulldozer and to warn of dangerous obstacles. At the time of Green, and at the present, the enforcement of such a requirement is a legitimate union objective under the NLRA, and insistence upon it would not be an unfair labor practice. However, in the instant case, the defendant union official attempted to cow a recalcitrant construction employer into accepting the requirement by marching to the construction site with between 700 and 1,500 men; minor violence ensued. The United States brought a Hobbs Act indictment, and obtained a conviction. The trial judge refused to believe that minor violence, punishable only as a misdemeanor under local law, transformed a federally protected union activity into outlawed conduct punishable by twenty years in prison and a $10,000 fine, and granted a motion in arrest of judgment. The Supreme Court, still apparently paying penance for the Local 807 decision, reversed, concluding that the legislative history of the Hobbs Act showed it to cover the employer-employee situation. 

47. Id. at 892.
53. See text at notes 63-76 infra.
Since minor violence must always be anticipated, severe criminal sanctions lurk in the background of virtually every serious labor dispute involving featherbedding demands. Such sanctions must inevitably have a sharply inhibitory effect on union activity. Yet the Hobbs Amendment, as interpreted by Green, creates a curious policy: featherbedding demands are not unlawful, but such demands accompanied by any degree of violence are grossly punished. Why violent featherbedding should be singled out for condemnation or, conversely, why peaceful featherbedding should be approved, is unclear. The withdrawal of the labor exemption of the Copeland Act was a spasmodic congressional reaction to a narrow Supreme Court holding that action close to extortion in the trucking industry was not covered. But Congress, justified only in closing a loophole in the "bona-fide employee" exemption, battered down the entire facade, and moved, without consideration of the underlying problems, from regulation of a semi-criminal fringe area of labor relations into regulation of normal labor disputes. Fortunately, the Green case has never yet been applied in a similar fact situation; apparently through exercise of prosecutorial discretion, no Hobbs Act prosecutions have since been instituted in such situations.

The Lea (Anti-Petrillo) Act

The Lea Act, passed by Congress shortly after the Hobbs Amendment, is the only federal criminal statute dealing specifically with non-violent featherbedding practices and, disregarding the ineffectual anti-featherbedding pro-

55. Section 7 of the Labor Management Relations Act, 29 U.S.C. § 157 (1958), states:
   Employees shall have the right . . . to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid. . . .
   This section is modified by § 8(b), 29 U.S.C. § 158(b) (1958), which makes some concerted practices illegal. The anti-featherbedding provision, § 8(b) (6), would not, however, apply to the union demands in Green, since the employee in question was ready to perform. See text at notes 63-76 infra. Therefore, under federal law, such demands, broadly authorized by § 7 and not included in the limitations of § 8(b), are lawful. See Comment, Featherbedding and the Federal Anti-Racketeering Act, 26 U. CHI. L. REV. 150, 157 (1958), which describes the paradox that union action punishable by a 20 year jail term under the Hobbs Act may not even be classified as an unfair labor practice under the National Labor Relations Act. The question remains whether, on the subject of featherbedding, the federal legislation preempted the states from regulating such practices. See note 84 infra.

56. Not all Congressmen were unaware of the possible broad implications of the Hobbs Amendment. See 91 CONG. REC. 11900-01; 11902 (remarks of Rep. Celler); 11903 (remarks of Rep. Gwynne). Representative Celler declared,
   [T]his bill . . . is a strikebreaking bill. It is a time bomb with a false label. It is a booby trap aimed at labor, only wrapped in silken terms.
   Id. at 11902.
   For an argument against having statutes, other than primary labor relations measures, apply to labor activities, see Comment, Featherbedding and the Federal Anti-Racketeering Act, 26 U. CHI. L. REV. 150, 161, 164 (1958).

vision of the Taft-Hartley Act, the only congressional action directed at such featherbedding. The statute is extraordinary in that it was directed solely at the activities of one man—James Caesar Petrillo, then president of the American Federation of Musicians. In form, the Lea Act is an amendment to the Communications Act; it applies only to featherbedding in the broadcasting industry.

In 1946, and for decades earlier, Petrillo had had complete control over virtually every professional musician in the country; he had frequently used this power to secure makework practices which would offset the loss of work to his musicians caused by radio and recorded music. By tactlessly and openly forcing unneeded standby orchestras to be paid, dictating the number of musicians to be hired for any performance, demanding royalties for all recordings sold in the country, and eliminating public performances by amateurs, he goaded Congress to action. The resulting legislation outlawed attempts to coerce broadcasters to employ "any person or persons in excess of the number of employees needed . . . to perform actual services," to pay money in lieu of hiring such persons, to pay more than once for services performed, or to pay for services not to be performed. The act provided maximum penalties of one year imprisonment and a fine of $1,000.

The only prosecution ever attempted under this act was an immediate prosecution of Petrillo, who had continued to dictate the number of employees to be hired by radio stations. The trial judge held the statute unconstitutional for vagueness, stating, "there is no means, or guide, or standard by which the defendant may know 'the number of employees needed.'" The Supreme Court reversed, finding that there was no less vague way to express the congressional intent, and that the intent was permissible. The language was definite enough to designate a clear violation, and, the Court suggested, in marginal cases the indictment should be dismissed. On remand, the trial court threw out the case at the close of the prosecution's evidence, finding a failure of proof on the issue of whether Petrillo actually knew the musicians in question were unneeded. The statute, albeit drafted after full consideration of what was being regulated, is open to the same objections as earlier.

58. See generally, Countryman, The Organized Musicians, 16 U. Chi. L. Rev. 56 (1948), and 239 (1949).

59. When he learned that the National High School Orchestra was scheduled to broadcast a concert over the NBC network [in 1928] . . . Petrillo demanded that a union orchestra of 50 members be paid the union scale for such a broadcast without performing.

60. United States v. Petrillo, 68 F. Supp. 845, 848 (N.D. Ill. 1946), rev'd, 332 U.S. 1 (1947). The trial judge also concluded: 1) the statute was a denial of equal protection of the law because only musicians were forbidden to featherbed; 2) it violated free speech in as much as it prohibited picketing for featherbedding demands; and 3) it violated the 5th and 13th amendments by restricting the employment of labor.


regulatory attempts—that it could inhibit desired activity because of vague-
ness, providing no guidelines for a labor leader and conferring great latitude
upon a judge, and that it is criminal.

The Taft-Hartley Act

The Lea Act's greatest importance came in its influence on congressional
consideration of broad scale regulation of featherbedding as part of the Taft-
Hartley Act. The debates on Taft-Hartley followed passage of the Lea Act
by a year, and marked the first and only congressional consideration of
comprehensive regulation of featherbedding practices. Representative Hartley
was considerably disturbed by featherbedding: the House bill, which he
sponsored, lifted the prohibitions of the Lea Act virtually verbatim, applying
them to all labor relations. As in the Lea Act, unlawful featherbedding
was to be determined by a federal court rather than by the NLRB. Unlike
the Lea Act, the prohibition carried no criminal sanctions, but was to be
enforced by injunctive relief and damages for the complaining employer.

The Senate bill, sponsored by Senator Taft, contained no featherbedding
prohibition; the House-Senate Conference compromise, on the present lan-
guage of section 8(b)(6), was in effect a victory for Senator Taft, who
had strenuously opposed regulation. The Conference eliminated the extensive pro-
hibitions copied from the Lea Act; the only featherbedding demand desig-
nated an unfair labor practice was for a union "to cause or attempt to cause
an employer to pay or deliver or to agree to pay or deliver any money or
other thing of value, in the nature of an exaction, for services which are not
performed or not to be performed." The courts and the NLRB, in apply-

MYER, op. cit. supra note 57, at 87-109 for a more detailed history of 8(b)(6).
64. More employer resistance to unions is generated from possible featherbedding
demands than from any other single factor. . . .
67. Representative Hartley was quite disturbed by this compromise. He stated sub-
sequently that "the anti-featherbedding sections were particularly hard to let go in con-
ference." HARTLEY, op. cit. supra note 64, at 156. He felt his bill would have solved the
featherbedding problem.

The original provisions of the Hartley bill on this subject were patterned after
the anti-Petrillo bill passed by the 79th Congress. They included an adequate
definition of featherbedding. . . .
68. Labor Management Relations Act (Taft-Hartley Act) § 8(b)(6), 61 Stat. 142
ing this prohibition, have further consolidated Senator Taft's victory, to the point where the only area possibly remaining for application of section 8(b) (6) is clear extortion, where money is demanded for work which is not done and for men who do not appear for work or have no intention of working.69

The facts which called forth this restrictive construction are instructive; involving the most flagrant of featherbedding practices, they plainly showed it to be no result of litigative happenstance. Thus, the Board and the Second Circuit refused to find a violation in circumstances resembling the New York Teamsters' day wage demand,70 the court saying that it could not "read into the section a requirement that the work must have been done by the one to receive the wages...."71 And the Supreme Court refused to see unfair labor practices in two classic instances of featherbedding, "bogus type" practices in the printing industry and provision for a "standby orchestra" in the entertainment industry. In American Newspaper Publishers' Assn. v. NLRB,72 the Court stated,

However desirable the elimination of all industrial featherbedding practices may have appeared to Congress, the legislative history of the Taft-Hartley Act demonstrates that when the legislation was put in final form Congress decided to limit the practice but little by law.73

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69. As the dissenting Member Reynolds declared,

[Unions can avoid liability in all circumstances by the simple expedient of insisting upon the performance of nonexistent and unwanted work tasks. In consequence the statutory provision becomes a nullity for all practical purposes.


70. Conway's Express (Rabouin), 87 N.L.R.B. 972 (1949), aff'd, Rabouin v. NLRB, 195 F.2d 906 (2d Cir. 1952). This case involved a union demand that pursuant to contract it be paid full wages by a trucking company for runs already made by a non-union driver. The Board's rationale was that this was not featherbedding since actual work was done by someone and that the union was merely demanding the money a union driver would have earned had he been employed on the run, as a union driver should have been. 87 N.L.R.B. at 977.

71. Rabouin v. NLRB, 195 F.2d 906, 912 (2d Cir. 1952). It takes a very literal interpretation of the phrase "services which are not performed" to hold that a demand by a third party for wages for work done by someone else does not fit within its scope. See Conway's Express (Rabouin), 87 N.L.R.B. 972, 991 (1949) (Commissioner Reynolds, dissenting in part).

72. 345 U.S. 100 (1953). The dissenting Mr. Justice Clark felt that the Court had solved "complex interpretive problems by simply scrapping the statute." Id. at 114.

73. Id. at 106. The issue was not as clear-cut as the majority opinion portrays it. See id. at 112 (Douglas, J., dissenting). As Justice Douglas correctly points out, all the legislative history of the Taft-Hartley Act shows is that Congress decided not to regulate the classic featherbedding situation in which the question is the number of men required to do a given job. See 93 Cong. Rec. 6441, 6443, 80th Cong., 1st Sess. (1947) (remarks of Senator Taft).

However, although the Court appears mistaken in believing the issue was foreclosed by the act's legislative history, the result seems correct. Justice Douglas would fit "bogus type" into the phrase "services not performed" by refusing to classify the doing
In *NLRB v. Gamble Enterprises, Inc.*,\(^74\) involving the Musicians Union’s demand for the hiring of a local, “standby orchestra” during concerts given by out of town orchestras, the Board had found that the union demands were offers in good faith of substantial performance by competent musicians, even though the orchestra rarely played. The Court agreed, holding that these offers did not come within the proscription of section 8(b)(6) concerning “services which are not performed or not to be performed.”\(^75\) Senator Taft was not at all unhappy concerning this construction of the section; three weeks after the *Newspaper Publishers* and *Gamble* cases were decided, he stated,

> ... the Court was probably right in its construction. We purposely made it very narrow. ... In fact it was so narrow that in 1949 I proposed to repeal the whole thing. It seemed to me we either better repeal it or else try to work out some way to make it much stronger.\(^76\)

### A Possible Amendment to Section 8(b)(6)

Senator Taft’s objections to the original Hartley anti-featherbedding provision had been threefold:\(^77\) (1) The Hartley bill provided for a court evaluation of labor activities to determine whether a union practice was featherbedding with resulting union civil liability; (2) The Lea Act, on which the Hartley Bill was based, used an extremely vague definition of featherbedding, which had just been ruled unconstitutional by a district court,\(^78\) and was currently before the Supreme Court; and (3) The task of arbitrarily determining, from the outside, how many men are necessary to do a particular job in an industry involved extreme difficulties which could not be surmounted.

To draft a featherbedding prohibition which would meet Taft’s first objection is not difficult. Jurisdiction to determine the scope of the prohibitions of entirely useless work as services performed. Section 8(b)(6) does not, on its face, bring into issue the utility to the employer of the services, but merely requires their existence, and there is no evidence Congress intended utility to be in issue. See *Hearings on Proposed Revisions of the Labor-Management Relations Act of 1947, Before the Senate Committee on Labor and Public Welfare*, 83d Cong., 1st Sess., pt. 1, at 258 (1953) (remarks of Senator Taft on the *Newspaper Publishers* decision). The Court’s conclusion definitely indicated § 8(b)(6) was a nullity. The Court, although acknowledging that “bogus type” was featherbedding, stated,

> Section 8(b)(6) leaves to collective bargaining the determination of what, if any, work, including bona fide “made work,” shall be included as compensable services and what rate of compensation shall be paid for it.


\(^74\) 345 U.S. 117 (1953).

\(^75\) Id. at 123.


\(^78\) See text at note 60 *supra*; *Note, 39 VA. L. Rev. 536* (1953).
could be delegated to the NLRB. A finding by that body of an unfair labor practice would not subject the union to civil or criminal prosecution. The inhibitory effect of such regulation is significantly reduced since no penalties are incurred for violation until after a full adjudication of coverage and issuance of a cease and desist order.

Taft’s second objection was, in its specific import, answered once the Supreme Court upheld the constitutionality of the Lea Act. But his constitutional doubts related to policy doubts about definitional vagueness; these formed the heart of his third objection to regulation of featherbedding. Taft stated,

The difficulty we had was in determining who was going to determine whether this [union featherbedding] demand was a reasonable demand or not. We hesitated... to go into every industry and decide how many men were needed and how many men were not needed. Taft visualized something called featherbedding, conceded the difficulty of a comprehensive definition but, despite this, felt obliged to write, if anything, an overall prohibition of featherbedding—a prohibition which would at the same time spare legitimate union practices and destroy the rest. It was in this vein that the Hartley Bill used the phrase “in excess of the number of employees reasonably required... to perform actual services;” Taft could see no choice but comprehensive prohibition of all featherbedding or no prohibition at all.

But in regulating featherbedding, what is really desired is the prohibition of certain activities. Professor Slichter has to some extent clarified these activities:

The efforts of unions to make work for their members fall into nine principal groups: (1) limiting daily or weekly output; (2) indirectly limiting the speed of work; (3) controlling the quality of work; (4) requiring time consuming methods of doing the work; (5) requiring that unnecessary work be done or that work be done more than once; (6) regulating the number of men in a crew or on a machine or requiring the employment of unnecessary men; (7) requiring that the work be

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79. United States v. Petrillo, 332 U.S. 1 (1946). The Lea Act makes it unlawful to coerce a broadcaster into employing “any person or persons in excess of the number of employees needed... to perform actual services.” 60 Stat. 89, 47 U.S.C. § 506(a)(1). In replying to an assertion that this prohibition was unconstitutionally vague, the Court declared,

The language here challenged conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more.


done by members of a given skilled craft or occupation; (8) prohibiting employers or foremen from working at the trade; (9) retarding or prohibiting the use of machines and labor-saving devices. 82

Not all practices fitting into one or another of these categories should be considered unproductive "make-work." For example, union limitations on the amount of coal dug by a man per day, and union prohibition on use of sand blasting equipment each may bear a direct relationship to the workers' health and safety, and exist for no other reason. What is important to note is the wide range of activities covered, each presenting varying difficulty to the legislator who wishes to regulate it. Taft seized on regulation of work crew size, possibly the most difficult because it involves a determination of the number of men required to do a specific job, and used this difficulty as an excuse to not regulate any of these practices at all. 83 Had he accepted this limitation, taken a more particularized approach, and gone on to consider the various types of practices we call featherbedding, and the susceptibility of each to regulation, he might have discovered the possibility of regulating at least some practices without giving rise to the practical difficulties to which he objected. Rather than worrying about determinations of the degree of usefulness of an employee working at a set task, he might have attempted to define situations in which the employee's services, or some tasks which the employee was required to perform, were of no benefit to the employer. There is no way to draft a statute which will cover all Congress might wish to regulate, and yet which leaves no room for infringement into areas of desired union activity; a more limited objective is necessary.

The first step in such a limited approach is identification of the types of featherbedding which can be clearly defined, since only these are susceptible to regulation. The prohibition must then exclude from the reach of its particularized definitions the kinds of union demands for which protection is desired. Moreover, the scheme of enforcement of the prohibition must take account of the peculiar intensity of union commitment to featherbedding practices and the fact that these practices are concessions for which the union has made sacrifices in negotiating for a collective bargaining agreement. There is no reason, in prohibiting featherbedding, to rob unions even temporarily of the bargaining power used to secure these practices, and the enforcement scheme should be designed to permit unions to bargain for alternative concessions.

The following draft section is offered as a suggestion that the formulation of the statutory sections is not an impossible chore. This suggestion is made, however, with full cognizance that the ability to articulate a potential solution to the featherbedding problem does not mean that the solution articulated is


the best solution possible, or that any solution is desirable. The choice between alternative methods should only be made, of course, after elaborate investigation with the full participation of affected groups. The choice to regulate at all must be made at a level more fundamental than that which has occupied prior discussion. The draft section suggested here is an attempt to show how the practical problems of regulations raised to date might be avoided; it would replace the present section 8(b)(6) of the Labor-Management Relations Act.

It shall be an unfair labor practice for a labor organization or its agents—

(6) to cause or attempt to cause an employer, with primary intent to create or maintain employment,

(A) to agree to pay wages for employees who do not report to the employer's place of business and neither perform nor are expected to perform any services in furtherance of the employer's business; or

(B) to agree to pay wages for employees who, employed on a job basis, neither perform nor are expected to perform services in furtherance of the employer's business; or

(C) to agree to pay wages for employees who are required by contract or union rule to spend any portion of their working time performing work which is not in furtherance of the employer's business; or

(D) to agree to use work crews containing more employees than the number actually used to perform services in furtherance of the employer's business; or

(E) to agree to pay wages for any employee performing a specific job when a substantial portion of the services originally required by that job are not to be performed or are no longer in furtherance of the employer's business; or

(F) to agree to refrain from introducing any machinery; or

(G) to discriminate by any means against employees paid on a piece-work basis, because of excess employee production, or for the union or its agents to so discriminate.

Nothing in this section (6) shall render any union demand an unfair labor practice when an object of that demand directly relates in good faith to safeguarding employee interests in relation to health or safety or the lessening of mental or physical difficulty. Nothing in this section (6) shall apply to money or any other thing of value paid by any employer for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying the costs of apprenticeship or other training programs. Where a union demand is designated an unfair labor practice by this section (6), and the employer has agreed to such demand in a final collective bargaining agreement, the remedies of this act shall not apply to such agreement. A determination that a union has committed an unfair labor practice under this section (6) shall be given no effect unless the practice recurs after the issuance and judicial enforcement of a cease and desist order.84

84. The draft section, if enacted, would pre-empt any state regulation of union featherbedding in areas where the NLRB asserts jurisdiction. The question of whether the NLRA currently pre-empts state jurisdiction over featherbedding is open; the argument against pre-emption asserts that since the NLRB can give no relief for most featherbedding activities, the pre-emption rule of Garner v. Teamsters Union, 346 U.S. 485 (1953),
The draft section prohibits narrowly defined practices whose effect is to increase or maintain employment, and which the union cannot justify as designed for other objectives. Assuming union demands are, prima facie, within one of these categories, the union may demonstrate in two ways that its intent in pressing them exempts it from the proscriptions of the statute. First of all, the union may show that the creation or maintenance of employment is not its primary intent. In referring to the creation or maintenance of employment, the statute does not deal with the "pure" extortion situation, in which no pretense is made of rendering services for money received. The instances of featherbedding which the section seeks to regulate all involve wasted manpower; for it to apply, it is necessary that some person be withdrawn from the labor market to the employer's "use" without there being any substantial likelihood that the employer will derive, or seek to derive, economic benefit from his services, or that employees be assigned to some task which involves a similar lack of economic contribution to the employer's business. Since primary intent to create or maintain employment is an essential element of the unfair labor practice, the burden of proof is on the complainant; such does not apply. In Garner, Pennsylvania courts were held without power to enjoin picketing where it was "clear that the Board was vested with power to entertain petitioners' grievance." Id. at 489. International Ass'n. of Machinists v. Gonzales, 356 U.S. 617 (1958).

Gonzales is the crucial case for the argument that NLRB inability to deal with a problem allows the state courts to do so. The argument against pre-emption goes on to state that the legislative history of the Taft-Hartley Act indicates that Congress was opposed to featherbedding. See, e.g., 93 Cong. Rec. 6443 (1947) (remarks of Senator Taft); Hartley, Our New National Labor Policy 110, 156-57, 182 (1948). Since Congress was aware of state regulations in the area, no intent to pre-empt can be inferred. See Note, Lea Act, Taft-Hartley and State Remedies for Featherbedding, 55 Colum. L. Rev. 754, 758 (1955).

Professor Aaron, who feels that the featherbedding problem is best handled by collective bargaining, says if there is to be governmental regulation at all it should be at the state level, where different types of efforts in the various jurisdictions will provide for wide experimentation. Compare Aaron, Governmental Restraints on Featherbedding, 5 Stan. L. Rev. 680, 718 (1953), with Van de Water, The Broader Effects of the Taft-Hartley Act on Make-Work Practices in Industry, 3 U.C.L.A. L. Rev. 27, 32 (1955).

Analysis of the legislative history of the Taft-Hartley Act dictates a contrary conclusion. Although opposed to featherbedding, Congress recognized the great difficulty in regulating these activities, and consciously concluded that, because of this difficulty and the consequent disruption of legitimate union activity regulation would cause, it was better to regulate featherbedding only to a limited degree. See notes 23, 67, 76 and 80 supra. A Congress which believed the NLRB and the federal courts were incapable of determining what was and what was not featherbedding can hardly have expressed an intent to allow state courts to do so. Gonzales, supra, only allowed state regulation of an area with which Congress had not dealt — expulsion from, and reinstatement to, unions. Congress has dealt with the problem of featherbedding and its policy judgment of limited regulation is binding on the states. The states could still regulate industries over which the NLRB does not assume jurisdiction. 73 Stat. 542 (1959), 29 U.S.C. § 164(c)(2) (Supp. IV 1959).

85. A prima facie case could be made out by a showing that the normal result of the union efforts would be increased or artificially maintained employment, and the
intent would be the natural inference in most circumstances which are described by the specific subsections, however, so that this burden would then be readily carried. Once primary intent is established, the union may escape regulation by showing that its efforts have as a good faith object "safeguarding employee interests in relation to health or safety or the lessening of mental or physical difficulty." The union, which need only show that it holds one of these objectives "in good faith" as one motive for its demands, might well meet this burden even though the trial examiner is properly satisfied that its primary intent is increased or maintained employment. This minimal requirement is derived from a conviction that any commingling of "make-work" intent with a good faith motive to protect employee welfare in concededly legitimate fashion creates a marginal situation where proscription is likely to have an excessively inhibitory impact on union activity. In the marginal case, a statute should opt against regulation, in order to protect legitimate union demands and to avoid inhibiting unions fighting for the welfare of those whom they represent.

Subsections (A)-(D) proscribe various union demands, all of which are described as "not in furtherance of the employer's business." This phrase is not precisely defined in the draft section, and it is intended that the phrase be given exact content in case-by-case adjudication by the NLRB. The following example indicates the function intended for the phrase. A Carpenter's Union demands that its members plane and sand all bookcases manufactured by Firm X. The firm argues that its carpenters are employed to build "unfinished" bookcases, that planing and sanding are not in furtherance of his business and that the union demand thus violates (6) (C). The inquiry then focuses on the precise nature of the employer's business, i.e., his clientele, the price he charges for his bookcases, etc., to determine whether the planing and sanding has economic value to him. If his consumers purchase his bookcases burden would then shift to the union. Generally the union defense of alternative motive would center not about primary intent but about the health, safety, or difficulty of labor exemption.

86. Changes in the nature of work are expected to bring increased mental and psychological strain on workers. Shultz and Weber, Technological Change and Industrial Relations, Employment Relations Research 190, 193 (Heneman, ed. 1960).

87. For an example of the type of inquiry which would occur under this exemption, see Emergency Rail Board's Denial of Need for Larger Diesel Crew, 23 L.R.R.M. 54 (1949); and Emergency Rail Board's Denial of Demand for Extra Diesel Firemen, 24 L.R.R.M. 53 (1949) (no safety factor, contra union claim).

88. See Waterfront Employers Ass'n of Pacific Coast, 6 Lab. Arb. 719 (1947).

The employers contend that these ten men — eight longshoremen, one gang boss, and one winch driver — are all that are required. The union contends that an eleventh man, a hatch tender, must be added.

Ibid. The arbitrator concluded that this so-called featherbedding demand should be allowed since it bore a direct relation to the safety of the work crew.

89. Many union make-work efforts take the form of requiring a higher quality of workmanship than the employer wishes, which adds to the time necessary for production. SLICHTER, UNION POLICIES AND INDUSTRIAL MANAGEMENT 177 (1941).
at a low price with the expectation that they will themselves plane and sand them, it is evident that the union demand is "not in furtherance of the employer's business."

Subsection (A) is designed to cover the union demands proscribed by the current 8(b) (6);90 that is, wage demands for work which is not done and for men who do not appear and who have no intention of working. It is assumed that this conduct would be differentiated from extortion, in at least a formal sense, by the appearance of the payees' names on the employer's wage rolls; it is presumed that they have no other employment. That the present 8(b) (6) has no regulatory vitality indicates how fine this particular category may be.

Subsection (B) is intended to regulate make-work practices which are not incident to continuing relationships between employer and employee, and which thus are not covered by collective bargaining agreements. Such union demands as the Musicians' Union requirement that a standby orchestra be employed when an outside orchestra is hired,91 or the truckers' practice of exacting a day's pay for a local teamster from out-of-town truckers92 would be included.

Subsection (C) prohibits such practices as the typesetters' "bogus type" and other general requirements that work be done twice or that wholly extraneous work be done.93 The limitation in the application of this subsection to proscribing union demands for "work" is intended to indicate that (C) does not apply to union demands for rest periods, for example—demands which in any event would most likely be exempted by the first proviso.

Subsection (D) is the closest the draft section approaches to regulation of the number of men required to do a given job. It is meant, however, to apply only to situations such as the Longshoremens' Union practice of requiring an employer to hire a 20 man crew, for example, and then limiting the number of men who can work in the hold of a ship to 8 out of 20, so that only 4 men are needed outside to support those in the hold.94 Thus 8 men do nothing. Evidence that the employer believes that a given job could be done by fewer employees is not relevant. The only evidence which could determine a sub-

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93. See note 12 supra.
94. See Hearings on Bills to Amend and Repeal the National Labor Relations Act, Before the House Committee on Education and Labor, 80th Cong., 1st Sess., at 568 (1947).

[O]rganized restrictions on production have severely reduced the amount of work produced by a longshoreman. Ten years ago longshoremens were handling, on the average, 20 or more tons of cargo per gang hour. Now it is down to 11 in many ports and to 14 or 15 in the better ports.

See also id. at 545 (union slowdown), and 767 (railroad featherbed rules).
section (D) violation is evidence that the work is actually done by fewer men than the employer is required to hire.

Subsection (E) prohibits union demands that an employer agree to a “no elimination of jobs” clause if the jobs in question are no longer required due to automation or some other reason. A similar prohibition (or requirement of arbitration) in the Railway Labor Act could apply to stationmasters at rarely used stations or to firemen on diesels. Note that in all these instances the union could argue that their demand was exempted by the good faith “health . . . safety or . . . mental or physical difficulty” proviso. The subsection does not prohibit a “no attrition” clause, which would allow workers whose jobs had been curtailed to be transferred to other jobs, since only a requirement that the employee fill the now unneeded job is prohibited. And although the subsection forbids union block-


No position in existence on December 3, 1957, will be abolished or discontinued except by agreement between the carrier and the organization. 
Id. at 332. See also Bethlehem Steel Co., 26 Lab. Arb. 146 (1956) (if major duties of job eliminated, it may be abolished and remaining minor duties assigned to other employees); Lone Star Steel Co., 26 Lab. Arb. 161 (1956) (if duties of job remain, it cannot be abolished); Cochran Foil Co., 26 Lab. Arb. 155 (1956) (can eliminate job if no anti-union motive).


97. The proposed section, in form an amendment to the Labor-Management Relations Act, as drafted, does not apply to featherbedding demands of railway unions. According to that act, The term “employer” . . . shall not include . . . any person subject to the Railway Labor Act . . . 

The term “employee” . . . shall not include . . . any individual employed by an employer subject to the Railway Labor Act . . . 
29 U.S.C. § 152(3). The proposed section could be redrafted to cover such parties by substituting the phrase “any person” for “an employer” and the phrase “any individual employed by any person engaged in commerce or in industry affecting commerce” for “employee.” Cf. 73 Stat. 542 (1959), amending 29 U.S.C. § 158(b) (4). The so-called secondary boycott section of the Labor-Management Relations Act was amended to substitute the above phrase for the term “employee.” Note that by the above change supervisors, excluded from the definition of employee, 29 U.S.C. § 152(3) (1958), would be brought within the coverage of the draft section.

The policy considerations for such a change would revolve around a wish to use the NLRB as a means to uniformly regulate featherbedding practices in contrast to a wish to make use of the specialized knowledge of railroad operations of the Railway Labor Board. Cf. note 11 supra.

98. As Professor Yoder states, “unions often argue that such [make-work] practices are necessary . . . as health or safety measures . . . ” YODER, MANPOWER ECONOMICS AND LABOR PROBLEMS 476-77 (1950). The reason unions so argue is that many alleged featherbedding demands do in fact involve serious health or safety considerations. See, e.g., Waterfront Employers Ass'n of Pacific Coast, 6 Lab. Arb. 719 (1947).
ing of a re-allocation of job functions when the manpower requirements of a job are demonstrably reduced, it does not attempt to question the employer-union determination of the degree of reduction to be effected. Such a determination would be limited only by the prohibition of subsection (C) against performing work not in furtherance of the employer’s business. Thus, if a machine designed for one man replaces a machine designed for four, a union insistence on three men would not violate (E) but might, depending on the circumstances, violate subsection (C). The phrase “mental or physical difficulty” in the limitations at the end of the section particularly modifies this subsection. A union effort to require one man for every machine when one man could conceivably tend two such machines is not prohibited if “mental or physical difficulty” is a good faith union motive.

Subsection (F), forbidding direct restraints on the introduction of machinery, is closely allied to subsection (E); such introduction will be the most frequent sources of subsection (E) disputes. It is recognized that unions frequently impose restraints on the introduction of more efficient work methods not involving machinery, but a prohibition of such activity would necessarily be subject to broad and unpredictable interpretations which might include marginal cases involving working conditions. In general, it is the intent of the draft section to select for regulation the obvious and prototypical cases of make-work practice, and to avoid involving the adjudicator in fact questions requiring finely chiseled analysis. Here, as in other subsections, this interest has dictated that the category of prohibited practice be narrower than the scope of acts commonly designated as featherbedding.

Subsection (G) prohibits union-imposed restraints upon the individual initiative of employees whose rate of pay depends upon the amount they produce. This restraint is usually imposed by a union decision as to what constitutes a normal day’s production, plus a formal or informal rule forbidding production in excess of this norm. Enforcement can be through direct union action, such as fines, or through union-induced employer action. The words “discriminate . . . by any means” are meant to include all such enforcement. As in subsections (E) and (F), the limiting proviso excepting union conduct which lessens the “mental or physical difficulty” of work is of significance; it would not apply, however, unless the lessening of difficulty is in the interest


[T]he standard of living of employees depends upon technological progress, better tools, methods, processes and equipment . . . [and] to produce more with the same amount of human effort is a sound economic and social objective.

of the employee who exceeded quota; that is, the union must show that it believed “in good faith” that the excess production was harmful to his “health or safety” or increased the “mental or physical difficulty” of his job to his detriment.

As noted, the draft section does not prohibit all practices whose sole effect is to create or maintain employment. Many union efforts which might fit this broad definition are not susceptible to regulation. Senator Taft was certainly correct in fearing the difficulties to be faced by anybody required to decide for a given job in a particular industry how many men of those presently employed in a work crew assigned to do that job are required by it. The finding is far more difficult than a finding that a specific job is functionally superfluous, or that the introduction of machinery has reduced to some degree the employer’s labor needs. Some types of featherbedding are too difficult to regulate, or too difficult to distinguish from legitimate demands. For example, production limitations are frequently informal and commingled with difficulty of work and safety considerations; their existence is difficult to prove and they are often not caused by union policy but rather by tacit employee participation. Only when one manifestation of their existence, the punishment of a non-conforming employee, appears are these limitations covered by the draft section. Apparent make-work practices may result from jurisdictional disputes among unions. Even though the effect of a union demand that its members, and no one else, perform certain jobs is to create employment for its members, and the underlying motive is in some sense to protect or create jobs, these jurisdictional disputes nonetheless involve adversaries and policies different from featherbedding demands by one union against one employer.

The draft section proscribes only the types of union demands which are the clearest present-day instances of make-work practices, not an exhaustive list of featherbedding practices. The relative clarity of these practices permits the kind of narrow definition which is essential if anti-featherbedding legislation is successfully to avoid the pitfalls of previous attempts at regulation. There are some union make-work demands, principally in the “grey area” of work methods, which the draft section does not presently propose to regulate, but which may reveal themselves as susceptible of regulation over time. For example, some bricklayers’ unions require that their members stoop to pick up each brick to be laid, rather than placing the pile of bricks level with the height of the structure being built: the only motive for this demand is to

100. See note 77 supra and accompanying text.
101. See Mathewson, Restriction of Output Among Unorganized Workers 15-126 (1931), for examples of how such restrictions grow without union involvement. Frequently even job supervisors are not aware of the existence of these informal quotas. Id. at 146. See also Slichter, Union Policies and Industrial Management 166 (1941); Hearings on Bills to Amend and Repeal the National Labor Relations Act, Before the House Committee on Education and Labor, 80th Cong., 1st Sess. 545 (1947).
102. See §§ 8(b)(4)(D) and 10(k) of the Labor-Management Relations Act, 29 U.S.C. §§ 158(b)(4)(D), 160(k), which deal with jurisdictional disputes between unions over work assignments.
lengthen the time required to perform a job. This union practice is not pro-
scribed by the section, not because the union has legitimate motives inter-
mixed with make-work intent, but because any proscription would inevitably
be capable of extension to other kinds of union demands concerning work
methods where legitimate motives do exist. The existence of such feather-
bedding legislation would cast a vague inhibitory air around these legitimate
demands. Should the NLRB be able to develop sufficient expertise and fully
articulate guidelines in administering legislation applicable to the clear in-
stances of make-work designated in the draft section, it seems possible that
the difficulties of regulating this “grey area” would diminish and that such
practices could be proscribed without danger of repeating prior mistakes.

The draft section’s scheme of enforcement for an NLRB finding that a
union demand is an unfair labor practice is also designed to have minimal
inhibitory effect on other union demands, so that unions will not be prompted
to refrain from pressing for employee welfare. The normal enforcement proc-
esses under the act are themselves designed to have minimal inhibitory effect
on union activity. Criminal or civil sanctions do not follow inevitably upon
adjudication of improper union conduct, but sanctions are imposed only if the
union persists in the same conduct after the NLRB and the courts have
classified it as an unfair labor practice. But the designation of union conduct
as an unfair labor practice can have some immediate detrimental effect to the
union involved. Where a strike arises because of an employer unfair labor
practice, the Board has generally ordered that all striking employees be re-
instated, frequently with back pay.\textsuperscript{103} If, however, the strike arises wholly or
partially from union conduct later adjudged an unfair labor practice,\textsuperscript{104} the
employer might be permitted to refuse reinstatement to the strikers, at the
discretion of the Board, whether or not he has already hired replacements,
even though he would not normally be allowed to refuse such reemployment.
Under the draft section, the Board may not bring about this detrimental con-
sequence on the basis of a determination that a union demand was proscribed
featherbedding. If the featherbedding practice involved was established by a
term of a collective agreement, the union would be prohibited only from in-
sisting on that term in future collective bargaining sessions; if it involved

\textsuperscript{103} 29 U.S.C. § 160(c) (1958) states that upon a finding of an unfair labor practice,
the NLRB
\ldots shall issue and cause to be served on such person an order requiring such
person to cease and desist from such unfair labor practice, and to take such affirm-
tive action including reinstatement of employees with or without back pay, as will
effectuate the policies of this subchapter.\ldots
See NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938); NLRB v. Fansteel Metal-
lurgical Corp., 306 U.S. 240 (1939), which involve reinstatement under the NLRA.

\textsuperscript{104} Unless the labor-management contract is terminable at will or after short
notice, the draft section would not make union demands unfair labor practices during the
course of the negotiations. A cease and desist order would not affect a pre-existing
agreement, and therefore, would have no effect until the bargaining session following
the expiration of the current contract.
piecework quotas, or job basis make-work practices, it would be prohibited
only from engaging in such practices in the future. No other disability would
attach to the union. Thus, it would have nothing to lose in insisting on feather-
bedding demands until after Board adjudication, even where its demands were
clearly contrary to the draft section. The dangers of inhibiting legitimate
union demands are much greater than the benefits possibly gained from forc-
 ing unions to police their own featherbedding demands.

The policy that unions should not be discouraged from pressing even for
demands which will ultimately be proscribed is also dictated by the consid-
eration that featherbedding practices cannot, in fairness, be wholly uprooted
from the employment situation, but that employer and union should be en-
couraged to devise alternate benefits to care for displaced workers.105 If an
employer resists a union featherbedding demand by charging in collective
bargaining sessions that the demand is an unfair labor practice, but refuses to
discuss alternative benefits for the affected workers, then the union should
be free to hold to its featherbedding demands until actual adjudication by the
Board.106 The union should not be tempted to accept diminished alternate
benefits for fear of the draconian effects of an ultimate finding by the Board
that its demands constitute an unfair labor practice.

The consideration that alternate benefits must be devised through collective
bargaining where union featherbedding demands are proscribed underlies the
proviso in the draft section that the act’s remedies do not apply to an agree-
ment embodying a featherbedding term. By this proviso, the employer is fore-
closed from obtaining relief against the effect of any featherbedding demand
to which he has acquiesced by contract, even though such demand would have
been proscribed if the employer had refused to agree to it, and had instituted
a complaint. In the absence of the proviso, the section might be used to rob
the union of the rewards of the bargaining strength which it had exerted in
securing the featherbedding concession in the first instance, and would bar the
union from using that strength to obtain alternate benefits, at least during
the term of the agreement in question.107

105. It should be noted that many of these alternative benefits, upon economic analy-
sis might be thought to have much the same effect as featherbedding in limiting economic
growth. See notes 123, 129 and accompanying text infra.

106. The long time, occasionally up to 6 years, required for the final adjudication of
an unfair labor practice charge is not overly important in the case of featherbedding.
Continuation under the status quo does little irreparable harm, and a wait of even 6
years for a final end to featherbedding practices which may have continued for gener-
ations is relatively insignificant.

107. Collective bargaining is generally conducted on a realistic cost basis, and the
employers consider the actual cost to them of featherbedding and include this cost in
the “package” offered to the union. The unions have therefore consciously sacrificed
other benefits for artificially created employment which they consider more desirable.
See SLICHTER, UNION POLICIES AND INDUSTRIAL MANAGEMENT 197 (1941); SLICHTER,
THE CHALLENGE OF INDUSTRIAL RELATIONS 39 (1947); Note, Featherbedding and Taft-
Hartley, 52 COLUM. L. REV. 1020, 1033 (1952).
It follows that the employer and the union are free to enter binding agreements to continue featherbedding practices. Such continuation can be justified where it is economically or practically unfeasible to devise alternate benefits. Neither employer nor union need fear that the proscription of the draft section will operate in unexpected fashion to force them to surrender the solution which they might have devised to solve their unique featherbedding problems.

**Basic Issues in Featherbedding Regulation**

To show that featherbedding legislation can be drafted which avoids the major pitfalls identified in previous efforts to regulate make-work practices is hardly to settle the issue whether such legislation should be adopted. But the showing should make it possible to frame the real issues for decision in a manner not accomplished during the Taft-Hartley debates, when the general issue of regulating featherbedding was first discussed. The preceding sections have attempted to show how certain union practices, postulated to be undesirable, might be eliminated at a minimum sacrifice of permissible union activity and union bargaining power and ability to protect member interests, and at a minimum purchase of delegation to adjudicators of interpretative authority which would enable them to enforce against the unions their private economic morality. The question for discussion remains, what these minimum costs might be, and how they balance with the economic gains conceived of as the removal of a practice which directly misallocates a portion of the national manpower reserves. If a complete cataloging, let alone a

108. Compare the so-called "hot-cargo" provision, 73 Stat. 543-44 (1959), 29 U.S.C. § 158(e) (Supp. IV, 1959), which made "unenforceable [sic] and void" any contract by which the employer agreed not to handle the products of, or do business with, parties designated by the union.

109. See note 129 infra, which discusses methods employers and unions have agreed upon to eliminate featherbedding. A program of voluntary retirement induced by high severance pay has worked well in some cases, particularly with the west coast longshoremen. N.Y. Times, May 27, 1963, p. 1, cols. 7, 8; Taylor, *Collective Bargaining*, in Automation and Technical Change 84, 90-91 (Dunlop ed. 1962).


resolution, of the elements of this balance is not possible, an outline of them seems a worthwhile goal.

One major cost, not assessable in its impact, is to be found in the exorcising effect such legislation would have upon labor fears of unemployment and other displacements arising from automation. Although there have been hopeful signs, American industry and government have yet to prove their capacity to cope with the changes wrought by rapid technological advance; any legislation which seems to lower the barriers to employer introduction of technological change into his assembly line will likely bring out the Luddite streak in American labor. This fear may also make congressional action on featherbedding regulation politically difficult, since legislative votes will be lost through unwillingness to further disturb the irrationality of a major constituency.

Another cost, more susceptible to rational analysis, is that of introducing the suggested form of regulation into the present labor-management relations establishment. Any proposal that the government regulate the substantive terms of the labor-management contract will run counter to the generally accepted role of government in collective bargaining. As this role is envisioned, the government regulates only the procedure of bargaining and not the actual economic negotiations: government regulation merely sets the stage for a clash of economic power between the representative of the employees and their employer, ensuring that this clash will indeed take place in orderly fashion. The government’s role under this hypothesis, therefore, ends once the parties enter the conference room where the clash is resolved into the labor-management contract.

It is true that this early viewpoint has proved somewhat exaggerated. The act requires that both unions and management enter into negotiations in good faith, with a sincere desire to reach an agreement. Since this state

112. President Kennedy stated in 1962 that “the major domestic challenge of the Sixties” is to “maintain full employment at a time when machines are replacing men.” AUTOMATION AND TECHNICAL CHANGE 1 (Dunlop ed. 1962). See also Heilbroner, THE IMPACT OF TECHNOLOGY: THE HISTORIC DEBATE, id. at 7-25.

113. [T]he early nineteenth century movement known as the Luddites organized night raids to burn and destroy machinery believed to be creating a serious hazard to future employment. YODER, MANPOWER ECONOMICS AND LABOR PROBLEMS 241 (1950).


115. Section 8(a) (5) of the Labor-Management Relations Act, 61 Stat. 141 (1947), 29 U.S.C. § 158(a) (5) (1958), makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees.” Section 8(b) (3), 61 Stat. 141 (1947), 29 U.S.C. § 158(b) (3) (1958), imposes the same burden on the union. The courts have read these sections as requiring bargaining with a good faith desire to reach agreement. See NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131 (1st Cir. 1953). There Judge Magruder stated

... the question is whether it is to be inferred from the totality of the employer's conduct that he went through the motions of negotiation as an elaborate pretense
of mind can only be inferred from conduct at the bargaining table, the offers and demands a party makes—i.e., the prospective substantive elements of a contract—have become primary evidence of good faith. In addition, the NLRB has restricted the possibility of bargaining to impasse regarding certain proposed substantive terms of a contract which it labels nonmandatory subjects for collective bargaining.\textsuperscript{116} A nonmandatory subject can only be proffered at contract negotiations—it may not be insisted upon by the offering party.\textsuperscript{117} Thus the designation of a proposal as a nonmandatory subject for bargaining removes the economic strength of the proposing party on this subject, and in all likelihood effectively prevents this substantive term from entering the ensuing contract. And Congress has not been too modest to admit the fact that its procedural regulation of labor relations necessarily involves substantive regulation. In 1959, Congress specifically regulated a substantive term of the collective bargaining contract by outlawing the so-called “hot cargo” clause\textsuperscript{118}—a contractual provision by which the employer had agreed to refrain from using or handling goods designated by the union as nonunion materials.

Despite these governmental departures from mere procedural regulation, the dominant theme of labor policy has been noninterference with labor and management determination of wages, hours and conditions of employment. It must be recognized that, were legislation such as the draft section enacted, it would mark the first case in which the well-being of the public, rather than the functioning of the bargaining process, served as the explicit reason for barring a term from the labor-management contract.\textsuperscript{119} Legislative regulation of hot cargo clauses, “good faith,” and even union democracy can be viewed as an attempt to keep employer-union relations running smoothly and to assure that power imbalances, if they exist, are not used to destroy the assumptions of a bargaining relationship. On the other hand, legislation barring featherbedding is not justified by its relationship to the bargaining process; it seeks to enforce the public welfare upon parties, both of whom must be regarded as willing to disregard that welfare.\textsuperscript{120}

\textit{... or that it bargained in good faith but was unable to arrive at an acceptable agreement with the union.}

\textit{Id.} at 134.

\textit{116.} Section 9(a) of the Labor-Management Relations Act, 61 Stat. 143 (1947), 29 U.S.C. \textsuperscript{119}§ 159(a) (1958), limits the requirements to bargain, \textsuperscript{118}supra note 115, to “rates of pay, wages, hours of employment, or other conditions of employment.” Nonmandatory subjects are subjects held to be outside this limitation. See NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958).

\textit{117.} Each of the two controversial clauses is lawful in itself. Each would be enforceable if agreed to by the unions. But it does not follow that, because the company may propose these clauses, it can lawfully insist on them.\textit{...}

\textit{Id.} at 349.


\textit{119.} See Note, 39 \textsc{Cornell} L.Q. 128, 134 (1953) (regulation of featherbedding would be a departure from the theory of government non-interference in collective bargaining).

\textit{120.} At times, both labor and management have held back from the public, for reason of personal gain, the benefits which would otherwise have come from increased pro-
Normally when one considers substantive regulation of the bargaining agreement, one rejects such regulation almost automatically, refusing even to admit that a balance is being struck between the cost of regulation and the possible gains. Yet whenever governmental restrictions of any sort have been adopted to protect unions from employers, employers from unions, and union members from unions, the decision to regulate has in fact derived from a balancing of the cost of a limitation on the autonomy of these bodies—a cost which is envisioned as an inhibition on their effectiveness as adversaries—against the gain which is derived from the removal of an impediment to the realization of another aspect of governmental labor policy. The underlying reason most often invoked against regulation of the contract terms has been freedom of contract—the parties to the contract, it is said, best know their own needs and therefore best know what their contract should include. Governmental regulation of the collective agreement might be tolerable, as Professor Wellington states, only if there were reason to suppose that the government knows better than the parties what the substantive terms of the collective bargaining agreement should be. But all relevant experience suggests that this is not the case.

If, however, we accept the assumption that national economic policy is in opposition to featherbedding, no representative of this economic policy appears at the bargaining table. The employer, who might be expected to represent the anti-featherbedding forces, is in reality interested in eliminating the practice only to the extent that this elimination will represent a lowering in the total cost to him of the labor “package.” Since total labor cost is his concern, in general he is not overly concerned with the components of this cost. Therefore, if there were a coherent national policy against featherbedding, it seems that as to this one issue private and public decision-making capabilities and a judgment opting for the former.

As to featherbedding, the freedom of contract justification works in this way: the costs of featherbedding practices are known and considered by both parties, and are regarded as a fringe benefit, roughly analogous to unemployment insurance or severance pay. Instead of higher wages, shorter hours, or other fringe benefits, the union has consciously chosen to create or maintain employment. Where featherbedding practices continue, the reason is that the employer has offered nothing of equal value to the union. Thus the union and the employer have struck their bargain, and the whole scheme of labor relations requires nothing more. If, however, we accept the assumption that national economic policy is in opposition to featherbedding, no representative of this economic policy appears at the bargaining table. The employer, who might be expected to represent the anti-featherbedding forces, is in reality interested in eliminating the practice only to the extent that this elimination will represent a lowering in the total cost to him of the labor “package.” Since total labor cost is his concern, in general he is not overly concerned with the components of this cost. Therefore, if there were a coherent national policy against featherbedding, it seems that as to this one issue private and public decision-making capabilities and a judgment opting for the former.


121. See Wellington, *Union Democracy and Fair Representation*, 67 Yale L.J. 1327, 1358-59 (1958), for an analysis of this sort as to the relationship between the union and its members.

public capabilities are reversed. The government, if it chose directly to regulate the parties, would not be trying to play a role best played by the parties—that of representation of their own interests—but would be representing the hitherto unconsidered interests of the public. This suggests that proposed featherbedding regulation should not be condemned simply because it goes beyond procedural controls but should be subjected to the same type of cost analysis the more traditional type of government regulation undergoes.

There is no inconsistency between the assertion that the government's interest in preventing misallocation of resources is not represented at the bargaining table by employers' opposition to featherbedding and the provision in the draft section for employer initiative in enforcing featherbedding regulation. Union power is always at its strongest when a change in working conditions is threatened, and the monetary cost to the employer of uprooting featherbedding from its historical ties is, in general, in excess of any savings he could derive from less expensive alternative concessions; but, if offered federal help which would, following adjudication, foreclose a strike over featherbedding demands, even high short-term alternative concessions, such as severance pay, may look quite attractive when contrasted to the perpetual cost of unneeded labor.

The suggested rationale for regulation—the need to protect the national economy in a matter in which such protection is not likely to be accomplished by the primary parties—suggests what may be another distinct cost of regulating featherbedding. Even if it can be decided that featherbedding causes misallocation and waste of manpower resources, and shown that regulation of the most blatant practices can be accomplished without substantial impediment to union bargaining power, the questions remain whether regulation of featherbedding would eliminate any misallocation and whether use of "national economic policy" as a rationale for regulation does not undercut too deeply the foundation on which regulatory restraint has been built. Many of the benefits which unions might choose as alternatives to featherbedding seem, upon economic analysis, to have the same effect as featherbedding in limiting economic growth. If featherbedding leads to economic harm through waste, the same kind of economic harm can be seen to arise from a thirty-hour work week, or two month paid vacation, or two-hour lunch break. Thus, a decision to regulate make-work practices, based on the harm such practices cause the economy, could be attacked as dependent upon a tenuous distinction between make-work and other benefits and in ultimate analysis based on a mere value judgment.\footnote{123. See note 129 infra.}

Moreover, no one seriously advocates governmental regulation of these arguably wasteful allocations of manpower, and here, too, regulation would abridge notions of government restraint in regulating the substantive terms of the employment contract. The questions, then, are whether featherbedding practices are sufficiently distinguishable from other non-productive labor use in their effect that elimination of misallocation can be expected if
featherbedding is controlled, and whether featherbedding practices are sufficiently distinguishable from other practices in definitional terms that regulation of featherbedding will not create both a precedent and social pressure for regulation of all aspects of the labor contract.\textsuperscript{124}

As to the latter issue, the distinction need not be drawn if one rejects \textit{ab initio} the premise that extensive governmental interference in substantive terms is undesirable. But the values of free enterprise and decentralization of authority support the premise. Moreover, continued attachment to this principle, that government should interfere only minimally, underwrites the presumption that the parties know their own best interests better than the government, and thus restrains the government from interfering in substantive terms unless it is unshakably convinced that it knows the public interest better than the individual parties. If featherbedding practices were to be regulated, yet were virtually indistinguishable from other species of labor waste, then it may be that we will have sacrificed the premise that government regulation of substantive terms of the labor contract is in itself undesirable. And this possibility could serve as a cogent argument against regulation of featherbedding.

If a distinction between featherbedding and other non-productive uses of manpower—such as the shorter work week—is to be found, it most likely comes from two sources. The first, hard to define and perhaps ephemeral, arises from political reaction to the blatancy of featherbedding practices.\textsuperscript{125} Congress in 1947 evidenced a desire to regulate featherbedding, and appears to have limited this regulation because it felt the drafting of a statute was impossible.\textsuperscript{126} Public reaction has periodically called forth ill-considered statutes.

\textsuperscript{124} The fear exists that congressional dictation of compulsory arbitration in the railroad featherbed dispute will have a precedential effect in paving the way for other government interference with collective bargaining. Labor Secretary Willard Wirtz stated that the legislative intrusion was done in a manner "having the narrowest conceivable precedential effects. Congress made it very clear it has no stomach for this kind of thing." \textit{N.Y. Times}, Sept. 29, 1963, § 1, p. 45, cols. 1 & 2.

\textsuperscript{125} Even most labor leaders disapprove of featherbedding in theory. This reaction was expressed in a study based on questions asked of high union officers with assurance that they would remain anonymous. \textit{Wovinsky, Labor and Management Look at Collective Bargaining} 178-80, 187 (1949).

\textsuperscript{126} Section 8(b) (6) of the conference agreement covers a matter with which the House bill dealt extensively under the topic of featherbedding practices. \ldots While the Senate conferees were in sympathy with the objectives of this portion of the House bill, it seemed to them that it was almost impossible for courts to determine the exact number of men required in hundreds of industries and all kinds of functions. The provisions in the Lea Act from which the House language was taken are now awaiting determination by the Supreme Court, partly because of the problem arising from the term "in excess of the number of employees reasonably required."

tory reactions to specific practices. On the other hand, despite the fact that economic policy makers inveigh against the thirty-five-hour week, no one has ever suggested that the subject is a proper one for government intervention. There is then a felt distinction between featherbedding and other kinds of non-productivity. It may be based in part on the second source of the distinction, which is speculative but more susceptible of analysis. It lies in a conception of our economic goals not merely as the maximum possible production and consumption of goods, but as some optimum combination of production and leisure, with the makeup of this combination a matter for private decision. Unlike other union policies, featherbedding does not represent an exchange of production capabilities for leisure. Time which workers might otherwise have committed to productive or leisure use is irrevocably committed to waste. A desire to safeguard from federal regulation decisions by labor or management to increase leisure need not dictate that featherbedding be left unregulated. To those convinced by this distinction that a concursus horribilium is not upon the doorstep, regulation of featherbedding may appear a far more acceptable move.

Of course, however low the cost of regulation, it is unlikely to be essayed without the prospect of affirmative gain, and rightly so. Government regulation always involves some expense to an economy postulated to be free, so that there exists a presumption against extensions of regulatory compass. And it must be admitted, the possibility of gain will appear to some to be slight. The foregoing discussion has assumed the existence of a governmental decision that featherbedding practices are contrary to national welfare—an assumption which suggested that, since national concern is not strongly represented at the bargaining table by either of the private parties, the reasoning generally applicable to granting sanctity to the substantive terms of collective bargaining agreements does not dictate government inaction. The validity of our assumption about national welfare must now be examined; its accuracy will be found to depend upon the potential efficacy of the proposed regulation and, more fundamentally, upon acceptance of a particular economic perspective.

One possible gain to be derived from the statute is the maintenance of labor peace. The two major labor disturbances of the past year, the New York newspaper printers’ strike and the railroad work rules controversy, centered about featherbedding demands. In the railroad dispute, Congress, long involved in railroad labor problems, prevented a nationwide rail strike primarily over the featherbedding issue by an unprecedented order of compulsory arbitration, which, despite disclaimers, promises a continual and significant federal involvement in railroad collective bargaining. The Secretary of Labor’s recently increased services as a labor dispute arbitrator have been focused on make-work disputes. National concern about the disruptive effects

128. See notes 11, 12 supra.
of featherbedding practices seem at least as strong now as during the immediate post-war years, when these effects were the stated basis of a congressional desire to legislate against featherbedding. Yet government regulation based solely on a conception of featherbedding as a disruptive force in labor relations would hardly seem to escape the general labor policy against interference with the terms of the bargaining agreement. If such interference is justified only if the government proves more competent than the parties about a possible component of their terms of employment, mere concern about the economic clash over these terms will not denote the necessary superior competency. A contrary view, carried to its logical extreme, would justify government determination of any issue which was the basis of strikes. The theory of labor relations policy in minimizing strife is to ensure that the parties meet and bargain, and not to dictate, absent other justification, the terms of the bargain.

If featherbedding is to be regulated, then, the reason for regulation must be that artificially created employment works harm to national economic welfare—a misallocation and waste of available manpower, one of the basic productive resources—and that this harm can be reduced or avoided by regulation. That, in economic perspective, featherbedding is harmful does not seem open to doubt. The employment of five men when four could do the job is the total and continual economic waste of one human being. The more substantial question is whether the regulation proposed could eliminate this waste, or the national economy take advantage of its elimination.

It has been assumed throughout that elimination of featherbedding will not necessarily work a reduction, or at least an immediate reduction, in an employer's labor costs. Union bargaining power has been intentionally safeguarded from weakening which might occur as a result of a ban on make-work practices. Yet even if the union is able to fully transfer the labor costs of featherbedding to other plans, such as paid three month vacations, it cannot be concluded that no gain has been achieved. It was suggested above that a distinction between leisure-producing and make-work conditions might serve as a dam against regulatory inundation of the substantive terms of the collective agreement. The same distinction suggests that even if labor costs for a particular industry are unchanged by the elimination of featherbedding—as seems unlikely, at least in the long run—the economy as a whole could gain. If the benefits unions and management have already agreed upon in those instances when featherbedding has been eliminated through collective bargaining are any indication, union efforts toward alternative benefits if featherbedding is regulated are more likely to be in the direction of long-term severance pay, supplementary unemployment benefits, pension plans, wage increases, or incentive pay bonuses.\textsuperscript{129} Time which would have been unavail-

\textsuperscript{129} In 1936 the railroads, in the so-called Washington Agreement, eliminated some forms of featherbedding by setting up a dismissal wage of 60\% of the displaced worker's normal salary, which would continue for 6 to 60 months, depending upon the length of service. Professor Cox has advocated severance pay as an excellent means of avoiding hardships due to technological change. Cox, \textit{Some Aspects of the Labor-Management
able, because taken up with make-work practices, will be made available for other activity.

The ultimate question is whether our economy has need of these man-hours. That undesirable effects result from their waste would follow without question from the conclusion that featherbedding creates a misallocation of manpower resources, unless the growth in available manpower resources does not relate to the potential for growth in production, unless the economy has no need for its full manpower potential—unless, in other words, our automated economy is, and will remain, an unemployment economy. In the past, the combination of technological innovation and increased manpower efficiency, although eliminating some jobs, has created many more and has been the impetus for an expanding economy. Any artificial restraints placed upon technology during this period were not only a disservice to the overall economic welfare but a disservice to labor itself. However, as productivity per man hour continues to multiply, so do the fears of unemployment. Professor Heilbroner has said:

Adrift on a furious current of technology, we allow ourselves to be swept along, trusting to the blind forces at work to bring us safely to some unknown but unquestioned destination. . . . [T]his belief in the benign social impact of technology may turn out to have been the most tragic of all contemporary faiths. Economists disagree as to whether the current high rate of unemployment is indeed a continual state arising from automation or whether, on the other hand, it merely represents a short term period of transition towards fuller automation. The late Professor Slichter, for example, felt that the equili-


The west coast longshoremen allowed the shippers to automate, and received a program consisting of voluntary retirement with high severance pay, non-replacement of all workers who retired, and a large employer contribution to their automation unemployment fund. Taylor, Collective Bargaining, in Automation and Technical Change 90-91 (Dunlop ed. 1962); N.Y. Times, May 27, 1963, p. 1, col. 7 & 8.

The Kaiser steel plan involved management guarantees of no layoffs and no pay reductions coupled with an incentive pay plan in exchange for union permission to fully automate. N.Y. Times, Nov. 3, 1963, § 6, p. 20.


132. See Joint Economic Committee Staff Report on Employment, Growth and Price Levels 86th Cong., 1st Sess. 170 (1959) (evidence that unemployment is a growing rather than a decreasing problem).

133. Economists have written much on the general subject of technological change and employment. The most commonly-held opinion appears to be that technological displacement is only a transitional problem; improved productivity in one sector of the economy results in compensating increases in demand, possibly in the affected sector, and if not there surely in other sectors.

Killingsworth, Automation in Manufacturing, reprinted by Staff of Special Senate Committee on Unemployment Problems 86th Cong., 2d Sess., Readings on Unemployment 578, 583-84 (Comm. Print 1960). See also Hearings Before the Joint
brium position of our automated economy is full employment. The jobs generated by this economy will frequently be in entirely new industries, in entirely new services. Union efforts to perpetuate unnecessary jobs will, under this outlook, have an inhibiting effect on the economy which will act to the detriment of the nation as a whole and, in the long run, as with restrictions on technology in the past, to the overall detriment of the working man as a class.

But even assuming high levels of unemployment will continue, it does not necessarily follow that the misallocation of manpower resources caused by featherbedding should not be regulated. The pool of available manpower does not lose all importance as a determinant of economic growth. Our economy tends to run in cycles, with cycles of high demand, high production, and high levels of employment balanced in other periods by their negative counterparts.

No decade has passed without severe unemployment—over 7 percent of the labor force—occurring at least once, and none, except for that in the 1930’s, has passed without seeing at least 1 year of what we may call minimum unemployment, 3 percent or less.

When the economy is in a cycle of high production and high demand, featherbedding deprives the labor market of possible manpower resources. Featherbedding acted as a drain on our manpower reserve even in situations of extraordinary production demand, such as during World War II or the Korean conflict, and during normal cyclical upturns of production demand. Labor is unwilling to part with practices which create work even during periods of high employment because they feel they need this artificial employment as a hedge against future years with probable lower levels of employment. During periods of high employment, available manpower operates as a limiting factor on potential total production, and featherbedding practices have the effect of lowering this potential.

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134. SLICHTER, Economic Growth in the United States 113-14 (1961). Professor Slichter felt that this is “the most important book that I have published.” Id. at v.


137. Joint Economic Committee Staff Report supra note 132, at 162 (quoting testimony of Stanley Lebergott before the Joint Economic Comm.). See also id. at 183-84.

138. Joint Economic Comm. Hearings supra note 135, at 2384, 2385-86, 2419-20. Professor Power of Williams College notes that since unemployment runs in cycles, the amount of available manpower at full employment operates as a ceiling on economic growth.

Each cyclical peak, with the exception of 1936, in the past 60 years has been characterized by approximate full employment.... Typically, growth is retarded just at the point where labor begins to become relatively scarce.

Id. at 2419-20.
This artificially created employment inhibits governmental attempts to salvage something from the total economic waste it represents. The artificial employment created by featherbedding practices is "disguised unemployment,"139 since, from an economic point of view, the contributions of those so employed, and of the unemployed, are both zero. But this disguised unemployment actually has a worse effect on economic growth than normal unemployment since it is a rigid and continual state. In addition to the fact that it continues, unlike unemployment, through periods of high production, and thus isolates the artificially employed from useful and available jobs, it removes such persons from the effectiveness of direct government attacks on employment. These programs, designed to help those seeking work, as opposed to other programs helping students who will be future entrants in the labor market, fall into two categories—job retraining and job mobility.140 Both have been given high priority in the forthcoming budget.141 The principal problem with job retraining has been in finding among the unemployed people competent enough to absorb the skills to be taught. The hard-core unemployed constitute the bottom of the labor barrel, while a large percentage of featherbedding occurs in industries requiring skills and employing people capable of learning these skills. Similarly, it is obvious that people artificially employed will not accept government offers to relocate them in areas where jobs are available.

CONCLUSION

It has been the purpose of this Comment to free discussion about the regulation of featherbedding from the shackles of a legislative and statutory history.

139. The economic concept of disguised unemployment is generally used to explain the lack of economic contribution to the economy as a whole of a seemingly employed labor force in underdeveloped countries. The same considerations seem to explain the lack of economic contributions of those holding artificially created jobs. For readings on disguised unemployment, see Joint Economic Comm. Print, supra note 133, at 170, 320-21, 409-28, 453-61; Mazumdar, The Marginal Productivity Theory of Wages and Disguised Unemployment, 26 Review of Econ. Studies 190 (1959); Viner, Some Reflections on the Concept of "Disguised Unemployment," 38 Indian Journal of Economics 17 (1957).

140. See Manpower Development and Training Act of 1962, 76 Stat. 23 (1962); Area Redevelopment Act, 75 Stat. 47 (1961). On job retraining, see Joint Economic Comm. Staff Report, supra note 132, at 184; Joint Economic Committee Print, supra note 133, at 1135. On job mobility, see id. at 1199; Report of the Subcommittee on Economic Statistics to the Joint Economic Comm. on Employment and Unemployment 87th Cong., 2d Sess. 6-7 (1962); Joint Economic Comm. Staff Report, supra at 184; Joint Economic Comm. Print, supra at 1199. It has been observed that even during peak unemployment periods considerable numbers of job vacancies exist because those seeking work . . . do not possess the requisite skills, or live long distances away . . . . Report of Subcommittee on Economic Statistics, supra at 18.

141. The President's budget message of January, 1964 notes that 1964 expenditures under a broadened and strengthened Manpower Development and Training Act will be $165 million and will affect 135,000 people; 1965 expenditures will be $411 million and will involve 275,000 people. N.Y. Times, Jan. 22, 1964, § 1, p. 20, 25.
tory which indicated that the subject could not be regulated by statute, and to allow a discussion on the merits of the national policies which would be affected by such regulation. The costs of regulation, both in relation to immediate and precedential effects on the bargaining process, previously believed prohibitive, have been shown to be within reason. It is on the subject of the gain to be derived that a regulatory decision must turn, and a legislator's decision to opt for regulation must be based on a favorable outlook as to the viability of the economy, as to the ability of the economy to limit unemployment with or without governmental aid, and as to the ability of the government to salvage significant portions of the waste of men without jobs. A pessimistic economic outlook in these areas is inconsistent with a desire to regulate.