THE COURTS AND COLLECTIVE BARGAINING

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INTRODUCTION

The combination of exclusivity and free collective bargaining has shaped and given special flavor to the American system of industrial relations. The impact upon labor relations has been a great and positive achievement, casting credit both upon those who designed the system and those who have made it work. Where it has not been defeated by union indifference or management intransigence, collective bargaining has helped employees to achieve greater power, wealth and dignity. The widespread use of seniority as a result of collective bargaining and the almost automatic limitation on the employer's right to discharge have helped to establish the idea that employees, through their work, develop a legally enforceable claim to their jobs and that most management decisions affecting significant employee interests must be based on legitimate objective standards. Through bargained for pensions and supplemental benefits, employees are provided protection for their old age and a cushion against unemployment.

Collective bargaining has given American unions a visible, significant presence on the shop floor. It has brought them great resources, political power and economic leverage. For many employers, this system, while limiting control and raising labor costs, has provided stability in industrial relations. It has reduced quit rates, encouraged the development of reasonable rules uniformly applied, helped to create a sense of common enterprise and has thereby often promoted greater productivity and efficiency.[1] Through collective bargaining, labor and management have developed a unique, broadly based private system of dispute resolution, culminating in arbitration, the success of which has been widely acknowledged and given impetus to private and public efforts to develop similar systems in different areas throughout society.

Despite this record of achievement and gradual social change, the

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1. *See generally* S. SLICHTER, J. HEALY & E. LIVERNASH, THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT (1960); C. Brown & J. Medoff, *Trade Unions: The Production Process*, 86 J. POL. ECON. 355 (1978).

judicial attitude toward collective bargaining has increasingly become one of suspicion and hostility. In the remainder of my comments, I will briefly discuss some of the cases which reflect this negative attitude and speculate about its causes. The cases demonstrating the law's diminishing commitment to collective bargaining cover a broad range. They include opinions broadening management's ability to retaliate against unionization, reducing the limitations on alternative schemes of industrial relations, eliminating groups of employees from coverage by the statutes, and limiting the language of § 8(a)(5) concerning the duty to bargain. I will start with those cases whose relation to CB is most peripheral and conclude with those in which the trend of which I speak is most apparent.

SECTION 8(A)(2) AND ALTERNATIVE SYSTEMS OF INDUSTRIAL RELATIONS

Section 8(a)(2) of the NLRA was intended to outlaw company unions which were seen as an effective way of preventing collective bargaining. The language of § 8(a)(2) is very broad, and early Supreme Court decisions gave it full scope. Thus, the Court in *NLRB v. Cabot-Carbon Co.*[2] held that a scheme of employee committees formed to discuss work related problems as a labor organization and that its formation by the employer constituted a violation. The program was ordered disestablished. The Court's reasoning seemed to rule out any employer's efforts to deal with his employees through groups, plans, teams or committees or anything short of collective bargaining with an independent union freely selected. The Board, for some time thereafter, dutifully followed *Cabot-Carbon* and literally applied the language of § 8(a)(2).[3] This rigid scheme was considered justified because of the need to protect collective bargaining from employer efforts to undermine it by persuading employees that their needs could be served adequately by other forms of employee organization. When the concepts of worker participation and job enrichment became fashionable, it was generally thought that their implementation in the U.S. would prove difficult because of § 8(a)(2) and its previous broad application. In recent years, however, under the pressure of worldwide interest in the concept of worker participation, the Board and the Courts have developed a series of techniques to reduce the impact of § 8(a)(2). These

2. 360 U.S. 203 (1959).

3. *See, e.g.*, Thompson Ramo Wooldridge, Inc., 132 N.L.R.B. 993 (1961), *enforced*, 305 F.2d 807 (7th Cir. 1962); Walton Mfg. Co., 126 N.L.R.B. 697 (1960), *enforced*, 289 F.2d 177 (5th Cir. 1961).

include a conceptually unpersuasive distinction between improper support and legitimate cooperation[4] and, contrary to *Cabot-Carbon*, a narrowing of the definition of labor organization. Most recently, in *NLRB v. Scott & Fetzer Co.*,[5] the Sixth Circuit upheld a scheme of employee committees virtually identical with that outlawed in *Cabot-Carbon*.

I do not suggest that the Board or Courts in deciding these cases were consciously reducing their support for collective bargaining. They were rather encouraging experimentation and flexibility on behalf of worker autonomy. Nor am I completely unsympathetic with these decisions; nevertheless, implicit in them is a conclusion that the potential gain to employees from such schemes is worth the risk to collective bargaining, an approach which the draftsmen of the statute explicitly rejected. It must be understood that the line between a company union and an enrichment program may be one of labeling, and that we have moved fairly quickly from a system in which all experiments with enrichment were condemned as company unions to one in which company unions are generally accepted in the name of enrichment. These decisions tacitly reject the conclusion, which I believe was accepted in the drafting of the Wagner Act and early cases, that collective bargaining is the only legitimate form of employee organization.

THE DOCTRINE OF MANAGERIAL EMPLOYEES

In several recent cases, the courts have limited the categories of employees who are entitled to bargaining by developing exemptions for confidential and managerial employees.[6] Both of these exemptions are an expression of the courts' concern with divided loyalty which is assumed to be inherent in the process of collective bargaining, not only for those who might be called upon to bargain in support of management but for those who play a significant role involving the exercise of discretion in articulating and achieving the organization's goal.

The potential reach of this approach is suggested by the Court's remarkable opinion in *NLRB v. Yeshiva University*,[7] in which the Court held that the Yeshiva's faculty were all excluded from the

4. This distinction was originated by the Seventh Circuit in its opinion in Chicago Rawhide Mfg. Corp. v. NLRB, 221 F.2d 165 (7th Cir. 1955) and has since been adopted by a number of other circuits. *See, e.g.*, NLRB v. Northeastern Univ., 601 F.2d 1208 (1st Cir. 1979); Hertzka & Knowles v. NLRB, 503 F.2d 625 (9th Cir. 1974); NLRB v. Keller Ladders Southern, Inc., 405 F. 2d 663 (5th Cir. 1968).

5. 691 F.2d 288 (6th Cir. 1982).

6. These exclusions were authoritatively enumerated in the Court's opinion in NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).

7. 444 U.S. 672 (1980).

NLRA's coverage as managers. There is no doubt from the Court's constant generalizing about the role of faculty historically, and at mature institutions like Yeshiva, that it intended its opinion to be broadly applicable to faculty members at significant educational institutions. The Labor Board has indeed taken this hint and has ruled that faculty members at a wide range of institutions are managers and hence not covered by the Act.[8] Several assumptions concerning collective bargaining are strikingly evident in the Court's *Yeshiva* opinion: primarily that it is a system of limited flexibility, appropriate in the industrial context but not useful where complex relations exist; secondly, that collective bargaining cannot easily coexist with other forms of governance; thirdly, that collective bargaining inevitabily creates a substantial risk of disloyalty to the employer not tolerable for those whose tasks are crucial to the enterprise; and finally, that collective bargaining has little to offer to those who already collectively possess voice in the enterprise. The Court in *Yeshiva* casually totalled the power of all faculty authority, attributing the discretionary responsibility of some to all, a technique with great implications for the future of § 8(a)(2).[9] The Board has subsequently taken the position that authority obtained through collective bargaining can make employees managerial and hence exclude them from the Act's coverage.[10] If this approach is followed in other areas, it will effect a limit through the concept of managerial employees on what unions may achieve through collective bargaining and remain under the Act. The assumptions that collective bargaining means divided loyalty creating unacceptable risk to the employer and that other forms of employee participation are more appropriate outside of the industrial context are of potentially enormous applicability, given the trend away from traditional industrial organization and toward more highly skilled employment. The dangers of disloyalty are great for many groups in a typical enterprise, not the least of whom are those who do its basic work. An employer in a new industry who utilizes the team concept, by which employee groups make basic decisions for themselves about the production process, may now argue with some chance of success that not only is § 8(a)(2) inapplicable but that

8. *See, e.g.*, Thiel College, 261 N.L.R.B. 84 (1982) (four year, liberal arts college); College of Osteopathic Medicine and Surgery, 265 N.L.R.B. 37 (1982) (medical school faculty); Duquesne Univ. of the Holy Ghost, 261 N.L.R.B. 85 (1982) (law school faculty).

9. Those implications are quickly beginning to exhibit themselves. For instance, in its recent decision in Florence Volunteer Fire Dept, Inc., 265 N.L.R.B. 134 (1982), the board relied in part on *Yeshiva* in ruling that full-time fire fighters constitute managerial employees, and hence are excluded from the Act's coverage.

10. College of Osteopathic Medicine and Surgery, 265 N.L.R.B. 37 (1982).

the team members are all managers outside the scope of the Act, a conclusion made necessary because of the great dangers posed by the possibility of divided loyalty which might result from collective bargaining.

COLLECTIVE BARGAINING AND THE INDIVIDUAL

Collective bargaining may be seen either as a way by which individual workers achieve benefits, job stability and influence, or as a way in which the union as an institution comes to have power over the individual which may be exercised arbitrarily or malevolently. There is some aspect of reality to both images, and the courts have recognized that some combination of these concepts reflects the truest approximation of the impact of collective bargaining on the status of individual employees. But the statute and earlier precedents are based on the premise (accurate in my view) that the value of collective bargaining outweighs the dangers of divergence between the individual and the union. Recent Court opinions, however, reflect a significant shift in this balance. One example of this shift is *NLRB v. Detroit Edison Co.*[11] The case involved a Labor Board order requiring the employer to turn over individual test scores of employees to the union which sought this material in order to process grievances, a recognized aspect of collective bargaining. The Supreme Court refused to uphold the Board's order, holding that impairment of the union interest in processing grievances was "more than justified by the interests served . . . preserving employee confidence."[12] This was the first time the Court had overridden, in the interests of confidentiality, a Board determination that information was needed for collective bargaining.

A similar readjustment of values may be seen in the Court's recent decision in *Bowen v. U.S. Postal Service*,[13] holding that a union may be liable for back pay if its breach of the duty of fair representation was responsible for delaying the reinstatement of an improperly discharged employee. The decision means that the potential liability of unions which lose cases may be very great, greater indeed than that of the employer who committed the improper discharge. To take away funds from the union reduces its ability to serve its membership through bargaining and grievance handling. The willingness to divert funds which the union has available for collective bargaining to police the duty of

11. 440 U.S. 301 (1979).
12. *Id.* at 319.
13. 103 S. Ct. 588 (1983).

fair representation reflects both distrust of the union's devotion to the members' interests, and a diminished sense of the importance and value of the union's use of the funds.

EMPLOYER RESPONSE TO UNIONIZATION

In a series of cases dealing with the reach of § 8(a)(3)'s prohibition against retaliation for union activity, the courts have concluded that an employer's elimination, in advance of bargaining, of that portion of its operations that had recently been organized is lawful, even though the action had been taken partly in response to unionization, by concluding that the closing was not undertaken "to discourage union membership." Thus, in *NLRB v. Rapid Binder, Inc.*,[14] the court reversed the Board's finding of a violation when an employer moved his operation soon after a union was certified without bargaining with it. The court, although it acknowledged animosity between the employer and union, stated that there was "no basis for the inference that this was the preponderant motive for the move . . . The decided cases do not condemn an employer who considers his relationship with his plant's union as only one part of the broad economic picture. . . ."[15] In a similar case, the Sixth Circuit commented that "[i]t is completely unrealistic in the field of business to say that management is acting arbitrarily or unreasonably in changing its method of operations based on reasonably increased costs."[16] What is most interesting about this case is the court's easy acceptance of the employer's argument that he realistically assumed that collective bargaining would not lead to an acceptable accommodation between him and the union. By characterizing such motivations as legitimate business judgement, the courts have thereby rejected the argument that for an employer to assume, in advance of bargaining, that negotiations would be unreasonable and unproductive, and to premise actions on that assumption, at the cost of employees, constitutes the essence of anti-union animosity. The courts, in adopting this characterization, have assumed that bargaining is inevitably futile and economically disadvantageous from the employer's perspective.

14. 293 F.2d 170 (2d Cir. 1961).

15. *Id.* at 175.

16. NLRB v. J.M. Lassing, 284 F.2d 781, 783 (6th Cir. 1960), *cert. denied*, 366 U.S. 909 (1961). In more recent cases, the courts have frequently simply relied on "business reasons" as the rationale for employer's cessation of operations at a recently organized facility and ignored the role unionization played in the decision to close completely. *See, e.g.,* Weather Tamer Inc. v. NLRB, 676 F.2d 483 (11th Cir. 1982).

LIMITS ON COLLECTIVE BARGAINING IMPOSED THROUGH THE DOCTRINE OF MANDATORY AND PERMISSIVE BARGAINING TOPICS

In *NLRB v. Borg-Warner Corp.*,[17] the Court adopted the distinction between mandatory and permissive types of bargaining. Permissive topics are those which do not come within the statutory definition of "wages, hours and other terms and conditions of employment" but which are otherwise legal for inclusion in an agreement. The proposing side may not insist to impasse upon permissive topics, and the side within whose domain the matter comes is free to take unilateral action with respect to it. In *Chemical Workers, Local 1 v. Pittsburgh Plate Glass Corp.*,[18] the Supreme Court rejected the Board's conclusion that changing benefits for retired employees was a mandatory topic. The Court rested its conclusion on the grounds that retired employees are not in the bargaining unit and they are not employees for the purposes of the Act. Although the opinion purported to rest almost entirely on the plain meaning of the statutory language, the Court's disclaimer of responsibility for the result reached on the grounds that it was merely following the manifest of Congress rings hollow. The Court, with no violence to the statutory language, could have accepted the Board's position that the benefits of retired employees are a matter of significant and legitimate concern to current employees. In his opinion, Justice Brennan acknowledged that this approach was previously employed to hold that a union could bargain about the wages and working conditions of people to be hired in the future.[19]

The relationship between retirees and current employees might easily have been considered of vital interest to current employees. First, the type of pension benefits that is acceptable to existing employees, particularly older ones, might turn on the employees' perception of the union's willingness and ability to represent and protect them against unexpected change. Secondly, current workers typically know, care about, and identify with retirees. They feel that it is the union's role to continue to look after their interest when they have retired. Such feelings of continuing allegiance are central to the concept of worker solidarity, which is the basis of unionism. Justice Brennan, however, chose to treat the argument based on continuing interest as though it were an actuarial point about the advantages or disadvan-

17. 356 U.S. 342 (1958).
18. 404 U.S. 157 (1971).
19. *Id.* at 168.

tages of grouping and he dismissed the relationship as "speculative and insubstantial at best."[20] Although its language is technical, the Court's rejection of the Board's position must ultimately rest upon its conclusions, stated mainly in a footnote, that collective bargaining is not a good method for protecting the rights of retired employees and that unions cannot be trusted to live up to their rhetoric or their basic ideology.[21]

In *First Nat'l Maintenance Corp. v. NLRB*,[22] the Court held that management had the right to close down part of an enterprise without bargaining with the union. The Court's opinion has quickly become the focus of much legal writing, not only because of the importance of the issue, but because the opinion more openly sets forth the Court's assumptions about the proper role of unions and the limits of collective bargaining than any previous opinion. Justice Blackmun rests the Court's opinion on two interrelated concepts. First, bargaining about basic entreprenurial decisions would give too much power to unions. As he stated, "Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union members are employed . . . There is an undeniable limit to the subjects about which bargaining must take place[23] . . . in view of an employer's need for unencumbered decision-making."[24] Second, the concept that collective bargaining is normally required over mandatory topics of bargaining because it produces economically efficient results. "The concept of mandatory bargaining is premised on the belief that collective discussions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole."[25] The Court strongly suggested that whether management has to bargain over topics related to its investments or its relations with third parties could be determined by analyzing "if the benefit for labor-management relations and the collective-bargaining process outweighs the burden placed on the conduct of the business."[26] The Court therefore undertook, on its own, to weigh the costs and benefits to determine "if the benefit for labor-management relations and the collective-bargaining process outweighs the burden placed on the conduct of the business" with respect to costs.[27]

20. *Id.* at 180.
21. *See id.* at 173 and n.12.
22. 452 U.S. 666 (1981).
23. *Id.* at 676.
24. *Id.* at 679.
25. *Id.* at 678.
26. *Id.* at 679.
27. *Id.*

It considered that little benefit would accrue from requiring collective bargaining as to the basic decision, as opposed to the effects of the decision, because in those situations in which management did not voluntarily choose to bargain about its decision "[i]t is unlikely, however, that requiring bargaining over the decision itself, as well as its effects, will augment this flow of information and suggestions."[28] The Court further concluded that to require bargaining would "afford a union a powerful tool for achieving delay, a power that might be used to thwart management's intentions in a manner unrelated to any feasible solution."[29] All of these cases taken together represent an effort to limit collective bargaining to traditional areas and subjects, as well as an effort to protect the perceived interests of employers, employees and retirees from its dangers.

How can we explain the paradox of a successful system viewed with increasing suspicion and even hostility by the courts? We must start with the recognition that the problems dealt with, as well as the techniques and methods of collective bargaining, are all foreign to the experience of most judges. They have little personal knowledge of industrial relations to fall back on. It is the reflection of collective bargaining derived from cases, scholarly writings and media depictions which furnish the court's conception of the process. There are a variety of reasons why all of these are currently portraying a distorted sense of collective bargaining. When the system works well, there is no need or purpose for legal action. Indeed, one of the goals of collective bargaining is that it should take place largely unsupervised by the government and outside of the courts. Cases are likely to arise when three factors are present: when collective bargaining does not work well, when the law is uncertain and when it provides the possibility of a significant remedy. Thus, one might expect that currently the duty of fair representation cases will be a much higher percentage of the Court's labor business than questions arising out of the arbitration or bargaining processes, just as misuse of pensions, plant closings, violence and corruption are all likely to provide more than their fair share of litigation. Reporters and newscasters, too, are trained to focus on the newsworthy, which usually means disruptions, conflicts, betrayal and calamity. Scholarly studies and analyses offer the best hope of providing a balanced picture which will correct the inevitable misconceptions derived from cases and media, and there is much valuable information about

28. *Id.* at 681.
29. *Id.* at 683.

collective bargaining to be derived from scholarly journals, particularly in the area of industrial relations. But these are rarely looked to. The Court in *Yeshiva*, for example, did not seem to be aware of studies of professional unions which indicate that their impact on employee work behavior is minimal. The behavior of professional employees, according to such studies, is primarily shaped by professional standards[30] and it is by consistency with their professional commitment that such employees best serve the employer.

The Court has often looked to legal scholarship but such work has not always been noteworthy, for legal scholarship has its own biases, fashions and temptations, many of which are currently unfavorable to collective bargaining. This is a particularly poor time to expect legal scholarship to correct the Court's misperceptions. The current emphasis is on theory, elegance, paradigms and mathematical models. Behind these sophisticated paraphernalia the face of human labor is often hidden and ignored. Collective bargaining has been evaluated in terms of its conformity with the postulates of economic analysis and critical legal thinking and it has been found wanting by both; by one as a distortion of the market, by the other because it appears as a misleading image of social change.

The law and economics movements may yet provide valuable insights about labor law. Thus far, the writing has been simplistic, evaluating existing institutions from the perspective of *laissez faire* analysis, making the same arguments which the opponents of the Wagner Act made and which the framers of most modern labor legislation rejected. Thus, Professor Richard Epstein of the University of Chicago, in evaluating the New Deal labor legislation,[31] attacks both the Norris-Laguardia and the National Labor Relations Acts on the grounds that they interfere with freedom of contract and free use of property. The same method of analysis was also employed by the UCLA Law Review which concluded, in a note cited by the Supreme Court in *First National Maintenance*,[32] that bargaining about plant closings was inefficient and deprived the employer of the free use of his property.[33]

In the name of individual rights, worker solidarity and class con-

30. *See, e.g.,* A. KORNHAUSER, SCIENTISTS IN INDUSTRY, (1963); M. HAUG & M. SUSSMAN, PROFESSIONALIZATION AND UNIONISM IN THE PROFESSIONS AND THEIR PROSPECTS (E. Friedson, ed. 1973).

31. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, — YALE L.J. — (1983).

32. 452 U.S. 666 (1981).

33. Comment, *"Partial Terminations"—A Choice Between Bargaining Equality and Economic Efficiency*, 14 UCLA L. REV. 1089 (1967).

sciousness, collective bargaining, exclusivity and labor arbitration have all been attacked from the left by critical legal thinkers on the ground that they diminish radicalization, class consciousness, worker militancy and provide employees only with limited power. There is about these writings a strong although unconscious class bias. They reflect annoyance with the labor movement for its lack of political ideology and a consequent denial of its achievements. The reflections of the public and scholarly images of collective bargaining are everywhere in the cases. Thus, the *Pittsburgh Plate Glass* decision may be most understandable as a response to well publicized instances of misuse of pension funds by the Teamsters. The *Bowen* and *Detroit Edison* cases show deep suspicion about unions as political institutions, and *Yeshiva* reflects an idealized image of universities and a stereotyped view of unions.

CONCLUSION

Fortunately, the power of labor and its ability to represent its members is not easily affected by changes in the law. *First National Maintenance, Pittsburgh Plate Glass* and the § 8(a)(2) cases are all, for different reasons, unlikely to be very significant, but *Yeshiva* and the duty of fair representation cases represent serious although not fatal blows to the development of collective bargaining. Unless legal scholarship becomes more accurate and connected with the realities of labor relations, one may expect the Court's current anti-labor, anti-collective bargaining positions to harden and expand, thereby furthering the distrust workers often feel toward intellectuals, lawyers and courts and diminishing the capacity of organized labor to serve its members.