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Inflation, Labor and the Law

R. Heath Larry*

The practitioner with long experience in labor law will find the first pages of this article to be a review of familiar ground. For the law student, however, a recounting of the past, which he has not personally experienced, can be useful. This review will also serve as a necessary predicate for some later thoughts concerning future trends and choices relating to labor law. These choices, difficult as they may be, might well be unavoidable.

The basic issue confronting this nation is whether we genuinely want to maintain a political economy whose dominant characteristics will include those political, economic, social and religious freedoms which are lacking in economies where the state has become the overriding influence over every aspect of life. If it is our desire to maintain a free political economy, then certain choices will be imposed upon us by the economic and political tides which currently surround us.

That the ebb and flow of economic and political tides has always done much to influence the direction of the law is well illustrated by an analysis of how the right to strike has had various meanings at various times. The judicial and legislative branches of government have at times expanded and at other times contracted this right, as they have read the pressures of the times and circumstances. Since the right to strike has never been recognized as being

* Vice Chairman, United States Steel Corporation. The writer acknowledges with appreciation the assistance of V.L. Matera, Esq., and his staff in developing the legal documentation for points which the writer has sought to present. He also acknowledges the constructive criticism concerning subject matter provided by both J.B. Johnston, Esq., and Mr. Matera.
constitutionally protected in America,1 as it has in some other countries,2 the courts and the legislature have been free to act.

Even the executive branch has on occasions, very special occasions to be sure, deemed it necessary and proper to move into a critical bargaining situation in which a strike was either in progress or threatened.3 This interference has even been attempted in the absence of specific statutory authority.4 Whether the intervention favored the striker or the struck employer seemed to depend considerably upon the thrust of the then dominant economic and political trends.

The history of the United States is replete with judicial recognition that, in the early days of this nation, the right to form, organize and carry on a business was held in high esteem. On the other hand, the right of employees to form and organize a union out of concern over their working conditions was less highly regarded. Unionization was characterized as a form of conspiracy, a restraint of trade, an impediment to free competition and a threat to the liberty of individuals who chose to resist the imposition of unionization as a precondition to work.5

Throughout the nineteenth century, the courts leaned strongly against the union movement. They were liberal with the injunctive process,6 and the result was that unionization of employees made little progress. This was a period when our frontiers appeared to be unlimited, and capital growth was deemed more important, both economically and politically, than almost anything else.

But finally the Depression came and, with it, the New Deal. Suddenly, unions were no longer treated as a threat to society, but,

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3. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), where the Supreme Court invalidated a governmental effort to avoid a strike during wartime through seizure of the steel industry on the grounds that the President in the absence of statutory authorization did not have the power to seize an industry. For an exhaustive list of all governmental seizures of property—most of which were motivated by a desire to avoid labor strife see id. at 615-28 (Frankfurter, J., concurring).
4. Id.
5. State v. Glidden, 55 Conn. 46, 8 A. 890 (1887); Commonwealth v. Curren, 3 Pitts. 143 (Quar. Sess. Schuykill Co., Pa., 1869); Pittsburgh Cordwainers Case, Mayor’s Court of Pittsburgh (1815); 4 J. Commons, A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 15-87 (1910); C. Summers & H. Wellington, CASES AND MATERIALS IN LABOR LAW 2-11 (1968).
rather, as a potential political base to be carefully cultivated. The law reacted promptly. First came the Norris-LaGuardia Act, passed in 1932, the major purpose of which was to remove the federal judiciary from involvement in union organizational drives or in ensuing collective bargaining. This concept of government neutrality was not to last. The year 1935 brought passage of the Wagner Act, and the weight of government clearly shifted to the side of the unions. The right to use private property, the unfettered liberty to conduct a business and the freedom of choice of the individual worker would never again achieve the high place in the total scheme of things which they had been assigned by the judiciary during the preceding century.

The basic thrust of the nation’s economics and politics had undergone a sharp change, and the law had begun to reflect that change. The exercise of those rights, liberties and freedoms which had seemed vitally important to the growth of the nation’s economy in earlier years seemed to have failed society. Many people felt aggrieved and abused by their exercise; countervailing forces were then legislatively unleashed. The right to organize, the right to require the employer to engage in good faith collective bargaining and the right to strike in support of either, were the tools legislatively assured to the union movement for accomplishing the “countervailing.” Indeed, public opinion at that time was so strong that Congress did not place upon unions a reciprocal duty to bargain in good faith. That was to come later.

Today, it is almost inconceivable that the Wagner Act’s constitutionality could have been subject to serious challenge. But, it was

9. Good faith bargaining requires that the representatives of both company and union have the authority to conduct meaningful negotiations and to arrive at a bargain although in the course of such negotiations the representatives may have to obtain approval from other officials with respect to a position on a given matter or may have to obtain approval with respect to the overall package. Painters Local 850, 177 N.L.R.B. 155 (1969); Local 525, 171 N.L.R.B. 1607 (1968); Han-dee Spring & Mfg. Co., 132 N.L.R.B. 1642 (1961); Larkin Coils, Inc., 127 N.L.R.B. 1606 (1960). It would appear inconsistent with the requirements of good faith bargaining to permit unions to impose membership ratification requirements for approval of the fruit of the negotiations and thus allow the membership to reject a contract which had been agreed to. It appears, however, that such a restriction on authority of union negotiators—if announced in advance—is valid. NLRB v. Painters Local 1385, 334 F.2d 729, 731 (7th Cir. 1964).
10. This writer was midway through law school when the Wagner Act was passed and was
challenged, and, in fact, barely upheld by a five to four decision.\textsuperscript{11} It should be noted that at the time of this decision the courts were giving the phrase “interstate commerce” a narrow interpretation,\textsuperscript{12} and picketing had not yet been classified as free speech.\textsuperscript{13} In 1937, it would have been difficult to imagine how encompassing these terms would become.\textsuperscript{14}

Whatever constitutional qualms some people then had, they did not bother the President. The advent of the new law was noted in these words:

Without a constitutional quiver in his freckled right hand, Franklin Roosevelt last week signed the Labor Dispute Bill. Then, lighting a cigarette, he leaned back and dictated a statement to the public. “This act,” the President said, “defines as

assigned the task of developing a comment upon how the Supreme Court would rule on the constitutionality of the new law. See Comment, \textit{The National Labor Relations Act}, 3 U. Prtr. L. Rev. 33 (1936).


\textsuperscript{12} It has been well established by the Supreme Court that Congress has the exclusive authority to regulate interstate commerce under article I, section 8, clause 3 of the Constitution. Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960); Sligh v. Kirkwood, 237 U.S. 52 (1915). To constitute interstate commerce, early courts held, there must exist a commodity which is the subject of commerce destined to “flow” from one state to another. Sligh v. Kirkwood, 237 U.S. 52 (1915); Turner v. Maryland, 107 U.S. 38 (1883). The Supreme Court in \textit{The Steamer Daniel Ball v. United States}, 77 U.S. (10 Wall.) 557 (1871), adopted this “flow theory.” In that case the Daniel Ball, a vessel operating wholly within Michigan, failed to procure a federal license authorizing it to conduct interstate commerce. Holding the licensing act to be applicable, the Court stated:

So far as she was employed in transporting goods destined for other States, or goods brought from without the limits of Michigan and destined to places within that State, she was engaged in commerce between the States, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce; for whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced.

\textit{Id.} at 565. One may wonder whether the Supreme Court is having second thoughts on the extent to which the concept of interstate commerce has been stretched in view of the Court’s recent decision in \textit{American Radio Ass’n v. Mobile S.S. Ass’n}, 43 U.S.L.W. 4068 (U.S. Dec. 17, 1974) in which it was held that a state court was not preempted by the National Labor Relations Act from enjoining peaceful picketing of a foreign flag vessel.

\textsuperscript{13} In \textit{Thornhill v. Alabama}, 310 U.S. 88 (1940), the Supreme Court ruled that picketing in certain contexts was protected by the first and fourteenth amendments.

\textsuperscript{14} In earlier times it would have seemed unbelievable to find hospitals included within the ambit of federal legislation; yet, Congress has done so. See Act of July 29, 1974, 88 Stat. 395. Possibly the constitutionality of this legislation will be challenged but such challenge would probably be unsuccessful.
a part of our substantive law, the right of self-organization of employees in industry . . . . It may eventually eliminate a major cause of labor disputes, but it will not stop all labor disputes. Accepted by labor, management, and the public with a sense of sober responsibility and of willing cooperation, however, it should serve as an important step toward the achievement of just and peaceful labor relations in industry."

Later, one of the same magazine's writers wryly observed:

Either the President did not believe the virtually unanimous opinion of labor observers, or he did not care, that the enactment of the Labor Dispute Bill would be followed by a series of strikes as the AFL sets out to attempt to unionize the country."

The years following 1935 were turbulent, as union organizers swarmed into major industrial centers throughout the nation. The Wagner Act, on its face, purported to protect the voluntary and peaceful exercise of the employee's right to self-organization. What might have occurred had the labor movement manifested no more than a voluntary and peaceful exercise of these rights is as difficult to imagine today, as it is to guess what might have been, had the Act been declared unconstitutional.

What did happen was that twelve years later union membership had increased four-fold and reached a percentage of membership practically equal to the percentage of the work force which is unionized today. More importantly, unions had acquired a power which began to raise concerns as to whether the imbalance, earlier thought to be in favor of employers, had been redressed so far that not only employers, but employees as well, needed some legal protections against the forceable exercise of unionism. The result was the enactment of the Taft-Hartley amendments of 1947. But the concern continued to grow during the turbulent fifties, with the result that after yet another twelve years Congress again exhibited its concern by enacting the Landrum-Griffin Act.

15. TIME, July 15, 1935, at 17.
16. Id.
Thus, a combination of abuses by some unions, coupled with a recognition that the legislature had earlier gone overboard to help them, led to a withdrawal of the right to strike in some instances, and its procedural qualification in others. For example, it became unlawful to use the strike to compel employees or self-employed persons to join a union; to compel an employer to recognize or bargain with a particular union when another union had been certified as the bargaining representative by the NLRB; to compel an innocent and uninvolved person to cease doing business with another as a part of organizational efforts or jurisdictional squabbles; or to compel an employer to assign work to employees who were members of a particular union.

Third parties had made it clear, on the political front, that they were growing weary of the increasing economic injury to innocent bystanders. The 1947 amendments reflect Congress' realization that they had to establish legal procedures under which the rights of unions and employees, with respect to organizational and representational questions, could be resolved, without resorting to the actions which inevitably affected the rights of innocent third parties.

Another area in which the right to strike was being qualified was that of union efforts to impose on employers contract or working conditions which were deemed contrary to, or at least unsupported by, public policy. Thus, strikes attempting to force an employer to collect, or employees to pay, excessive union dues were made unlawful and enjoinable. Strikes attempting to force an employer to pay for services not performed, or to compel bargaining over matters not within the judicially defined realm of mandatory subjects of collective bargaining were similarly dealt with. But, neither the Congress nor the courts, either at the time of the Taft-Hartley or Landrum-Griffin Acts, or at any time since, have undertaken any general prohibition of strikes when the situation was uncomplicated

20. Id. § 158(b)(4)(C); id. § 158(b)(7)(C) limits the right to picket for organizational and recognitional purposes to thirty days without the filing of an election petition.
21. Id. § 158(b)(4)(B).
22. Id. § 158(b)(4)(D).
23. Id. § 158(b)(5).
24. Id. § 160(j).
25. Id. § 158(b)(6).
by aspects other than basic economic struggles, no matter what their dimensions.

Certain requirements, which will be referred to as "procedural requirements," must be followed by parties seeking a change in the existing terms and conditions of employment. Failure to observe these procedural requirements has been held to make the exercise of the right to strike enjoinable.

The emergency provisions of the Taft-Hartley Act, and the "major dispute" provisions of the Railway Labor Act might also be considered procedural. Neither set of provisions attempts to outlaw economic strikes. Instead, they only affect the timing of the strike, and are, therefore, only prerequisites to be met in certain situations prior to an economic strike, no matter what its magnitude. Other than compulsory arbitration, no substitute for the

31. The emergency provisions of the Taft-Hartley Act are set in motion when there is a strike affecting an entire industry (or substantial part of an industry) engaged in interstate commerce which, if permitted to continue, will imperil the national health or safety. 29 U.S.C. § 176 (1970). If a dispute between a carrier and its employees threatens to substantially interrupt interstate commerce to a degree sufficient to deprive any section of the country of essential transportation services, the emergency provisions of the Railway Labor Act is set in motion. 45 U.S.C. § 160 (1970).
32. It should be noted that whether there exists a right to strike under the Railway Labor Act depends in large part on whether the dispute is "major" or "minor." The National Railroad Adjustment Board provides compulsory arbitration for resolving "minor disputes." Thus, courts have recognized comprehensive restrictions upon the right to strike over "minor disputes." See, e.g., Brotherhood of Trainmen v. Chicago River & Ind. R.R., 353 U.S. 30 (1957).

As exemplified in Brotherhood of Locomotive Eng'rs v. Baltimore & O.R.R., 372 U.S. 284 (1963), courts have similarly barred strikes in "major disputes" prior to the exhaustion of the formal steps of the Railway Labor Act. In Brotherhood of Locomotive Eng'rs, the union attempted to block the carrier's proposed unilateral changes. The district court found that both parties, having exhausted all steps called for by the Railway Labor Act, were free to resort to self help restricted only by the possibility of the appointment of the Emergency Board. Affirming, the Supreme Court stated:

What is clear, rather, is that both parties, having exhausted all of the statutory procedures, are relegated to self-help in adjusting this dispute, subject only to the invocation of the provisions of Section 10 providing for the creation of an Emergency Board. Id. at 291. Thus, the Railway Labor Act restricts in varying degree the right of a union to strike during both "major" and "minor" disputes.

An interesting question arises as to whether the district court may issue injunctive relief if the union fails to complete the procedures of the Railway Labor Act prior to strike. Section 2 of the Railway Labor Act provides in relevant part:

It shall be the duty of all carriers, their officers, agents, and employees to exert every
economic strike has been devised, and that device, at least to this point in history, has been viewed as an anathema not only by the parties to collective bargaining, but by the government as well. Enjoining economic strikes in situations deemed critical to the national interest was indeed provided for, but only while certain delaying, cooling off or mediating procedures were being indulged. Congress, however, has been unable to bring itself to the point of prescribing standing procedures for the formulation of terms and conditions of employment to be imposed on the parties when the parties have been unable to reach their own agreement.

reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier . . . .

45 U.S.C. § 152 (1970). On its face § 2 appears to empower a court to enjoin from disrupting commerce any party failing to make such an effort. However, the Norris-LaGuardia Act of 1932, 29 U.S.C. § 104 (1970), prohibits federal courts from issuing injunctions against certain non-violent acts growing out of a labor dispute.

At first blush, the injunctive relief provided under the Railway Labor Act seems to conflict with the Norris-LaGuardia Act. When an injunction is issued against a strike during a labor dispute the language of the Norris-LaGuardia Act is violated. On the other hand, since the Railway Labor Act does not provide any machinery for compelling the parties to bargain collectively, injunctive relief is a necessary mechanism to protect the substantive rights and duties created by it.

The Supreme Court of the United States recently resolved this apparent conflict in Chicago & N.W. Ry. v. Transportation Union, 402 U.S. 570 (1971). In that case plaintiff railway sought an injunction in federal court barring a threatened strike by the defendant union. Plaintiff alleged that, while the parties had complied with the formal mediating procedures required by the "major" disputes provision of the Railway Labor Act, the union had failed to meet its obligation under § 2 by not bargaining in good faith. Thus, the union had not fulfilled its obligation under the Act and consequently could not resort to self help. In contrast, defendant contended that § 2 was merely a declaration of policy and, therefore, nonjusticiable. Finding for plaintiff the Court held that the good faith provision of § 2 is enforceable through the issuance of a judicial strike injunction, notwithstanding the anti-strike injunction provision of the Norris-LaGuardia Act. Thus, the Court adopted the changing labor policy of the nation toward restraint and arbitration as opposed to economic warfare and compromise.

It should be noted that the holding of the Court in Chicago & N.W. could have far reaching effects. As a result of the existing time-consuming formal steps of bargaining required under the Railway Labor Act the right to strike may be delayed for a year or more. If, under the holding of the Court in Chicago & N.W., a party may challenge his opponent's good faith at the end of the formal Railway Labor Act steps, the right to strike may be delayed even longer.

The courts, meanwhile, were conducting some experimentation of their own. The nation was going through a period of post-war growth, and there was a strong yearning for labor peace, at least during the term of labor agreements freely arrived at. It was, therefore, predictable that the courts might come to feel that encouraging private parties to abide by their own agreements would be a desirable policy. Employers and unions, however, were each to have occasion to be surprised by some of the related extensions of such a policy. First came the cases enforcing a duty to arbitrate even the question of whether a particular issue was arbitrable when the terms of a particular agreement empowered the arbitrator to decide the arbitrability of an issue. At the outset of this trend, employers felt the courts were being quite liberal in inferring the possibility of implied restrictions and obligations on management—restrictions and obligations which management felt had not been specifically envisioned by the parties at the time of the agreement. But then the other side of the coin appeared. Unions found that the implied availability of arbitration was matched by an implied duty not to strike over any issue which could be deemed subject to resolution by arbitration—a duty which the courts found to be as fully enforceable by injunction as if explicitly assumed. Legislative and judicial expressions of public policy thus became quite clear in connection with a growing number of aspects of collective bargaining. However, in terms of the basic competitive struggle between employers and unions over "how much," and the establishment of


37. *Boys Market Inc. v. Retail Clerks Local 770*, 398 U.S. 235 (1970), in which the Supreme Court, reversing a contrary decision in *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195 (1962) on policy grounds, ruled that strikes could be enjoined when conducted during the term of a collective bargaining agreement containing a grievance, arbitration and no-strike clause. (In *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962), the Supreme Court had ruled that a collective bargaining agreement containing a grievance and arbitration clause contained, by implication, a no-strike clause.) In *Gateway Coal Co. v. UMW*, 414 U.S. 368 (1974) the Supreme Court ruled that a court could enjoin a strike over alleged "unsafe" conditions if the strikers were covered by a collective bargaining agreement containing a grievance and arbitration clause and an implied "no-strike" clause. In light of these developments which reflect a public yearning for labor peace, at least during the life of a labor agreement, one cannot help being bemused when reflecting retrospectively upon the earlier attitude of the courts, when they were sufficiently jealous of their prerogatives that they were inclined to decline enforcement of agreements to arbitrate disputes which had not yet arisen, as being executory. *E.g.*, *Reuda v. Union Pac. R.R.*, 175 P.2d 778 (Ore. 1946); 11 WILLISTON, CONTRACTS & 1420A (3d ed. 1968).
a balance of power consistent with the nation’s need to alleviate a growing inflationary bias in our economy, the law relating to these central aspects of the bargaining process is both ambivalent and contradictory.

These characterizations are evidenced in several ways. In the first place, at the very time that the public and the Congress first became concerned about the abuses of labor power, and were translating that concern into the provisions of the Taft-Hartley Act, Congress had just taken action which was destined to add immeasurably to the power of unions in their pursuit of higher wages. Just months before it acted on the Taft-Hartley Act, Congress adopted the Employment Act of 1946. This Act committed the government to the pursuit of full employment without a corollary commitment to currency and price stability. The increasing practice of the Keynesian concepts of looser fiscal and monetary policies to support high demand began to erode the earlier potential for periodically rising unemployment which acted as an economic brake upon employees’ aspirations and union power. One cannot philosophically be against full employment. But, so long as this Act continues to reflect the economic and social policy of the United States, the economic scenario which was the justification for the Wagner Act’s change in the power balance will never again return.

Secondly, the public seems to support the continued existence of a number of conditions which virtually equate the right to strike with the right to win the strike. These conditions accord strikers such a degree of economic amnesty from the consequences of their strike so as to virtually insure an uneven contest. Inevitably these

39. While John Maynard Keynes was primarily an economic theoretician rather than an economic advocate, his writings have often been cited as the rationale for using fiscal and monetary policies to achieve a continued high level of employment. He outlined his theories in a book entitled, The General Theory of Employment, Interest and Money, published in 1936. Keynes’ theories are often contrasted with those of earlier laissez-faire or classical economists such as Adam Smith and David Ricardo.
40. So long as the government is committed to maintaining full employment, the vast unemployment, with the corresponding decrease in the price that labor can demand for its services, that occurred during the depression will probably never be approached again.
41. Under the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), (a)(3) (1970), an employer is prohibited from discharging an employee who engages in a strike. In NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938), the Supreme Court ruled that an employer may “replace” a striker with another employee and refuse to discharge the replacement at the end of the strike to make room for the striker. The employer’s replacement right has been increasingly restricted. E.g., NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967); NLRB v.
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conditions support an inflationary bias. Yet the public occasionally becomes so concerned with the impact of bargaining upon employment costs and prices that our lawmakers claim to find broad support for price and wage controls, even despite the fact that such controls are invariably pronounced disastrous in terms of the distortions which they impose upon the economy.

Thirdly, when some of our lawmakers are not busy thinking about impaling the competitive market system upon a reconstituted fence of wage and price controls, they speculate about the potential for lower prices through increased market competition, something they apparently believe can come about by breaking up "large" corporations. Yet, they address little attention to the other side of the equation where the principal cost pressures arise. "Big" unions, permitted by law to span entire industries, whose avowed purpose is to keep the wages and working conditions of employees out of competition, and whose power enables them to ratchet nominal wages ever higher, regardless of competition and regardless of what happens to productivity trends, are rarely considered for such drastic action.

The need to resolve this ambivalence is becoming critical. The nation can no longer continue to absorb the impact of major settlements which embody a significant inflationary bias. Nor can it continue to absorb the impact of strikes which enforce inflationary demands and which interrupt the operations of a major segment of our interrelated economy for any period of time, thereby limiting the supply of goods while attempting to increase the supply of consumer money chasing these goods.

As the President has emphasized, we are at a point in time where something must be done about inflation, and about the capacity of our nation to maintain its position of leadership within the world's


44. On August 12, 1974, President Ford addressed Congress:

My first priority is to work with you to bring inflation under control. Inflation is our domestic enemy number one. To restore economic confidence, the Government in Washington must provide some leadership. It does no good to blame the public for spending too much when the Government is spending too much.

political economy. Possibly, some would call it an exaggeration to say that we face an economic "emergency," but it is not much of an exaggeration.

As outlined above, the shape of our law does not now point the way to viable solutions for this problem. Possibly, this is because we have previously conceived of national emergencies in quite a different context. When the "emergency" provisions of the Taft-Hartley Act\textsuperscript{45} were enacted, World War II was still fresh in our minds. Our lawmakers were probably thinking only in terms of strikes which impaired the ability of the nation to support a war or defense effort deemed vital to its security, and which did so in physical terms. Some courts have so held. As late as 1971, a federal district court in Illinois found itself unable to "permit an interpretation... that would include economic injury [as opposed to physical injury] as a controlling part of the national health or safety.'"\textsuperscript{46} A dozen years earlier, such an interpretation had been argued to the Supreme Court, but it chose then to reserve judgment on the issue.\textsuperscript{47}

Recent trends in international and domestic economic events may now call for a different approach, because our national "security" is threatened in ways which were only dimly perceived, if at all, during the forties and fifties. The sixties and the early seventies have seen a movement away from armed conflict between major nations in the traditional sense. Armies and armadas now are weapons mainly for small-nation, area-type conflicts. The presence of nuclear weapons in the hands of the major powers has forced the search for "detente."\textsuperscript{48}

But that is in a military sense. The contest still goes on. The principal socialist economy still boasts that it will bury us. Though pressing for detente, it still clings to its stated mission of outdoing and destroying our "capitalist bourgeois economy," by winning, not

\textsuperscript{46} United States v. ILA, 335 F. Supp. 501, 507 (N.D. Ill.), aff'd, 40 U.S.L.W. 2330 (7th Cir. 1971).
\textsuperscript{47} In a case involving a historic dispute between the United Steelworkers and the major steel companies in 1959—a dispute in which the writer was deeply and personally involved—the government, in seeking the Taft-Hartley injunction, insisted to the Court that the term "national health" as embodied in the Act encompassed "the country's general well-being; its economic health." The Court concluded at that time that it need not resolve the question because it felt the judgments below to be "amply supported on the ground that the strike imperils the national safety." USW v. United States, 361 U.S. 39, 42 (1959).
\textsuperscript{48} This is roughly analogous to the manner in which reciprocal economic weapons forced the steel industry and the USW to devise the Experimental Negotiating Agreement (ENA) which will be commented on later.
on the battlefield, but on the field of contest over economic and social progress.\textsuperscript{49}

National survival, however, is no less at stake than during an armed conflict. It is simply being risked on a different playing field involving the use of political and economic weapons. More importantly, this kind of contest will be continuous, rather than intermittent, as were "traditional" forms of battle. Thus, a sound economy, with minimal inflation, has become an ultimate necessity from the standpoint of national security.

This is of enormous importance to the institution of collective bargaining—an importance which partakes of two dimensions. Major strikes during what we used to think of as "peacetime" take on new significance. Secondly, additional significance is attached to the economic contents of contract settlements.

\textsuperscript{49} In a publication authorized by the Soviet hierarchy, one reads the following:

The Soviet Union consistently upholds the Leninist principle of peaceful co-existence of states with differing social systems, which facilitates the relaxation of tension, safeguarding of peace and international security.

\textsc{Novosti Press Agency, U.S.S.R.-73 Yearbook} 93 (1973). Yet just 9 pages earlier the message was as follows:

The experience of setting up a multinational state of a new type shows that only a socialist revolution secures a close unification of all the people's forces, led by the working class with the aim of liquidating the capitalist system of exploitation and with it the system of national oppression. The establishment of the dictatorship of the proletariat was the decisive political precondition for carrying out this historic task, for the moulding of the socialist way of life of the nations and nationalities inhabiting the country, and the establishment of public ownership of the means of production was its main economic prerequisite.

\textit{Id.} at 84.

Moreover, whenever there appears to be a wavering in the process of bolstering the people's views concerning the superiority of their own social and economic process, prompt steps are taken. Note, for example, the following which appeared in the Moscow News while the author was then on a business trip in Russia in the summer of 1974:

\textit{THE USSR OVER THE WEEK}

The CRSU Central Committee obligated the Party committees and the Rectorates of the Moscow Higher Technical School and Saratov State University to eliminate the existing shortcomings in teaching and research activities. The Resolution says in particular: "To work persistently so that every graduate from a higher school should creatively master the Marxist-Leninist theory, should consistently strive to add to and improve his knowledge and apply it in life; that he should possess communist convictions and high moral qualities, and be an ardent patriot and internationalist, a consistent fighter against bourgeois ideology and for the fulfillment of the Communist Party's policy." The Ministries of Higher and Specialized Secondary Education of the USSR and the RSFSR have been tasked with the elaboration and implementation of the measures for the further improvement of the work done by the departments of social sciences.

\textit{Moscow News} No. 26 (1225), July 6-13, 1974, at 3, col. 3-4.
At this point, some union adherents will be protesting that this writer is trying to lay the full responsibility for the current inflation on the backs of the unions' pressures for higher wages. Therefore, a brief comment on the implied linkage is appropriate.

There can be no question that during our current surge of inflation we have suffered from many other pressures which have simultaneously flooded us—the delayed impact of having failed to tax during the Vietnam period as if we were really at war; the delayed impact of the years during which our exchange rates vis-à-vis Europe and Japan were misaligned; the delayed impact of too many years in which emphasis had been placed upon consumer incomes and spending at the expense of savings and capital expansion; the impact of the decisions of some less-developed countries to change the relative values between their energy and other raw materials and our finished goods; the impact of certain misconceived grain transactions upon the whole gambit of food prices, and so on. Nevertheless, it must be recognized that as the shock waves of these rising prices become integrated into the permanent cost structure of our economy through their reflection in wage costs, those wage costs cannot escape accepting a certain portion of the responsibility for even today's multifaceted inflation.

Cost-of-living clauses applicable to employees' wages and benefits may be politically understandable but they are economically insidious. Unless they are applied to virtually all other income accounts, including rents, interests, dividends, etc., the capital foundation of the economy can become seriously weakened. Shortages will emerge, and prices will be further driven up by demand exceeding supply. The point is this: whenever hourly employment costs rise faster than output per man-hour, no matter what the reason, they add to unit labor costs and hence to rising pressures on prices. They have done so in all but two of the last twenty-two years, with an inescapable inflationary impact. We must not forget that employment costs constitute seventy-five to eighty per cent of all costs for

50. The practice of inserting cost-of-living clauses into a collective bargaining agreement is generally referred to as "indexing," and denotes a type of inflation accounting by which the "real" value of all types of income is readjusted and realigned in relation to some specific index, such as the cost-of-living, wholesale price or some other index chosen by the government.

finished goods and services in our economy.52

Therefore, the present agitation over a number of new factors, at least some of which we hope to be temporary, should not be permitted to screen out the fact that our current problems have been long on the way, and the relevance of labor to these problems has long been recognized.53 For example, just before the death of Dr. Sumner Slichter in 1959, there was a good deal of concern about the inflation of the mid-fifties and much controversy about who or what was responsible. In one of his widely read publications,54 dealing with the question of "whether wages were pushing prices up or were chasing prices up,"55 he stated that "the evidence made it preposterous to argue that wages were chasing prices up."56 He went on to say, "If prices were not adjusted upward, much productive capacity could not be profitably operated and would be idle."57 And he concluded, "Inflation is a method by which the price level is adjusted to rising labor costs that actually accompanies strong trade unionism and decentralized bargaining."58

At approximately the same time, the Council for the Organization for European Economic Competition requested a group of independent experts to study the problem of rising prices in Europe and to report on their findings. They did so in 1961 in the form of a report entitled, The Problem of Rising Prices. It contained this finding: "All members of the group were agreed that excessive wage increases secured through negotiations have been a significant factor in the upward move of prices . . . ."59

This emphasis upon the impact of labor is never very popular politically, and this is a political world. There is, therefore, a natural tendency to reach for remedies which do not confront labor's impact head on. Yet, given the multiple contributing causes and deep roots

53. This writer noted that we would be arriving at this point in the course of an article he wrote ten years ago. Larry, Labor-Management Problems—A Management Viewpoint, 50 U. Va. L. Rev. 266 (1964).
55. Id. at 6.
56. Id.
57. Id. at 7.
58. Id.
of today's inflation, treating it mainly by use of the traditional monetary and fiscal tools will simply hasten a recession or depression of sufficient magnitude to risk a complete political and social upheaval. Certain other institutions, including particularly collective bargaining, simply must produce less in the way of upward cost pressures than they have in the past. The motivation to find answers may lie in the fact that our failure to deal with inflation will produce the same risk of political and social upheaval, but for different reasons. We are, therefore, driven to ask whether a sufficient showing of responsibility can reasonably be expected of the parties under the law as it now exists; and, if not, what changes in the law could be effective in dealing with either the problem of strikes, or inflation.

Intelligence and fear can, for a time, possibly deter unwise use of an improper power potential. History is not, however, generally comforting in this regard, although there have been specific instances which give some encouragement. The most recent instance occurred in the steel industry earlier this year. The parties worked out their Experimental Negotiating Agreement, which bound them to use arbitration as an alternative to strike or lockout when negotiating for a successor labor agreement. The parties worked out their Experimental Negotiating Agreement, which bound them to use arbitration as an alternative to strike or lockout when negotiating for a successor labor agreement. The parties believed that it represented an intelligent response to a very justified fear concerning the future of this industry which is the economic lifeblood for both of them. The basis for that fear is detailed in a footnote, but

60. Many influential persons from South America, including Pedro Beltrans, former editor of La Prensa, pled with the United States to realize, before it is too late, the insidious problems which go with a long-continued inflation. We have, of course, seen government after government fall, throughout South America, because of the problem. 61. United Steel Workers of America and the major steel producers. 62. Prior to the steel talks this past spring the parties had agreed to subject any impasse to binding arbitration. When the new contract was agreed upon upon the parties also extended the arbitration agreement to cover the 1977 negotiations. See notes 63 & 64 infra and accompanying text. 63. Not since 1959 had there been a general strike in the steel industry. Yet as each succeeding contract expiration date approached, a crescendo of hedge buying by domestic customers—both from foreign and domestic sources—would take place. One traumatic result was more and more steel was imported from abroad even in the intervals between negotiations. Another was that preceding each negotiation, the industry and its employees sought frantically to meet the inventory desires of customers which were not being satisfied abroad, with the result that, before others would be called back for a short burst of employment, inefficient facilities would be brought into use, and other wasteful practices pursued, only to find, following a peaceful settlement, that the steel companies and thousands of their employees were practically without work. The parties suffered much of the injury of a strike even though each negotiation since 1959 had been strike-free. The process was cutting both the companies and their employees to shreds. In the interest of self-preservation, they had to find a workable alternative.
the nature of their response merits full discussion in the text so that its difference from compulsory arbitration imposed by law may be more broadly understood.

This requires reemphasis of what the parties chose to do. They arrived at the agreement of their own free will, because they viewed it as being completely in their own self-interest. There was no legal compulsion seeking to impress upon them an overriding public interest in constraint of the pursuit of their private interests. Fortunately, their self-interest happened to coincide with the public interest in avoiding the impact of nationwide steel strikes. Since they did what they did of their own free will, they were not locked in, as they would have been by legally imposed compulsory arbitration. They could choose either to follow or not to follow the same course, another time around. Each party, however, knew the pains of returning to earlier patterns; each knew that the other could force that return if the negotiations were not sufficiently meaningful. The emphasis was on negotiations, and not on arbitration. In exchange for certain precommitments, the parties substituted the right to resort to arbitration for the right to resort to strike or lockout. They did not agree to call on arbitrators to make their bargain for them, any more than an agreement which allows strikes or lockouts if negotiations fail is an agreement to have a strike or lockout.

The agreement involved real risks to the interests of both parties, and it was this fact that they relied upon to prod them into reaching agreement by collective bargaining on their own. The right to force arbitration presents different risks from the right to force a strike or lockout, but, nevertheless, very real risks. This was, after all, what is called “interest” arbitration, rather than “contract” arbitration, and there were no explicit guidelines. Neither party could be comfortable about what the arbitrators might do. It is now a matter of historic fact that the parties reached agreement on their own, just before the deadline date on which either could have taken the other to arbitration. And I can personally testify that the last three nights were as sleepless as if the parties had been racing a deadline for strike or lockout.

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64. Arbitrators might adopt the criterion of generally trying to figure out what the parties might have done had they been facing a strike or lockout; on the other hand, they might have stepped up to become martyrs as to the cause of subduing inflation; or they might have cast discretion to the winds to make certain that whatever they decided, they would have enjoyed the absolute certainty of satisfaction from all of the union constituents.
The excellent arbitrators we had chosen may not consider our mutual distaste for turning our problems over to them to be flattering, but we, the parties, were genuinely relieved in not having to do so. Our bargaining had not been frustrated by the Experimental Negotiating Agreement; it had been given new life, and we were satisfied that the results closely enough resembled what might have emerged from bargaining in the face of the threat of strike or lockout that we elected to include it for use again in 1977, thus, hopefully assuring the nation of no national steel strike until 1980. There are those who opposed the implementation of the agreement, even to the point of challenging it in the courts. Fortunately, the courts upheld the legality and propriety of the agreement, thus permitting it to be tested by the parties this past summer.

Despite some tentative expressions of approval by a few important labor leaders, there has been no rush by the parties in other bargaining situations to embrace a similar concept. Perhaps others have not yet identified such an arrangement with their own self-interest to the same degree as the parties in the steel industry. Perhaps conditions within our economy simply have to get a little

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65. The parties had agreed that either Robert Fleming, President of the University of Michigan, industrial arbitrator and former law professor, or Benjamin Aaron, educator-arbitrator, would be the chairman and Sylvester Garrett and Ralph Seward, both long-time arbitrators in the steel industry, would fill out the panel, if needed.


67. A little over a year ago, Paul Hall, the president of the powerful Seafarers International Union, joined those who have spoken up in favor of the concept; he prefaced his recommendation with these words:

We in the maritime unions know we have the guts and the muscle to fight if we have to. But maritime strikes have outlived their purposes. One maritime strike is too many, for whatever the stated reason. If the maritime industry is to be rejuvenated, there must be no strikes, no work stoppages, no interference with the flow of ships and their cargo.

BNA DAILY LAB. REP., June 11, 1973, at 112.

In the course of giving support to the concept, David Cole, distinguished lawyer and arbitrator has written,

Saying that without the strike, it isn't possible to have collective bargaining . . . is like saying in international affairs, if we renounce war, we cannot have diplomacy.

Id.

One thing is certain—and that is that the collective bargaining process—with the right to strike and/or lockout as the motive power for achieving agreement—has not been contributing to the economic stability which our nation so badly needs. Moreover, as we reported in recommendations of the National Commission for Industrial Peace published by the Executive Office of the President this past summer, George Meany, President of the AFL-CIO, has urged that the time had arrived for both sides to seriously consider abandoning the strike in contract negotiations in favor of voluntary arbitration.
more serious before more people will be willing to attack the mythol-
ogy which has surrounded the "right to strike" for so long. We may
not have to wait long.

Although the steel industry approach addressed the problem of
the impact of major strikes upon the parties, their industry and the
nation, it did not reflect any real recognition of the importance of
reducing the contribution of employment costs to inflation. Except,
of course, for the commitment of the parties to joint efforts to im-
prove productivity, their economic settlement simply went along
with the trend of the times. The importance of their productivity
effort should not be under-estimated, but neither should it be over-
estimated. Improving the steel industry's long-term trend rate in
output per man-hour of roughly three per cent, by as much as fifty
per cent (which would be quite an accomplishment) could not do
much to alleviate inflationary cost pressures of employment cost
increases well in excess of ten per cent.

Meanwhile, we must again turn our attention to the question of
what, if anything, might be expected of the law. I feel certain that
the solution does not lie in a law which would outlaw strikes and
provide for the determination of wages and other conditions of em-
ployment either by compulsory arbitration or some other form of
government fiat such as a total system of wage and price controls.68
That kind of thing simply will not work unless we are willing to
enforce the surrender of our freedom to engage in collective bargain-
ing by means akin to those used by socialist countries, like Soviet
Russia, in order to achieve adherence to governmental decisions.
Such a concept is unacceptable to us. It is an alternative to be
considered only as a means of rescue from anarchy. We are not
there. And our purpose is not to get there. What alternatives are
there? Certainly, there are no easy choices.

There is, of course, the possibility, perhaps even the need, of
addressing an old and emotionally charged subject, namely, the
monopoly power of unions. After all, if we are concerned about a
drift toward state control of our economy, we must be concerned
about how to make our free and competitive economy work more as

68. The experience with respect to public employees in terms of outlawing strikes and
enforcing the results in compulsory arbitration do not suggest that such actions could be the
answer for the normal industrial situation. They have not been entirely successful in the
public domain. Bernstein, Alternatives to the Strike in Public Labor Relation, 85 HARV. L.
REV. 459, 466-69 (1971); Note, Public Employees—The Right to Organize, Bargain and
it was intended to since its inception. Yet, for years we have seen a legal tolerance for the capacity of unions to withdraw the entire product of an industry from the market, a power which would never be tolerated in a business enterprise, and which would only grudgingly be allowed the government in times of total national peril. In short, what the law has permitted on the labor side is the antithesis of what the law requires on the industry side. We seem, on the surface, at least, to have a political consensus in support of a free competitive market system, but we still seem to lack a consensus in support of the kind of adjustments in the labor laws which would be necessary in order to remove this systematic disharmony.

Moreover, it must be acknowledged that any effort to deal with the monopoly problem might be quite ineffective in dealing with the problem of inflation unless there were a political consensus to deal with a number of other factors which tilt the scales in labor's direction. Such factors include the availability of welfare benefits for strikers, lenient judicial attitudes toward picketing and strike violence, and the impact of full employment policies. The political choices would be hard indeed. Although the consumer contends he is fed up with the waste and inconvenience of strikes and their economic consequences, legislators, while eschewing state socialism, still contend that they cannot find enough support to enable their making these hard choices. Public discontent is one thing, but its eruption with enough force to press toward needed changes is something else. The fact is that there was much pre-election discussion of various legislative approaches in the opposite direction, i.e., approaches which would move the economy ever closer to the socialist pattern of state planning and controls.69

The sum of all of this is that if we are to expect changes in performance from the institution of collective bargaining, we may have to expect it to arise from the voluntary efforts of the parties themselves.70 That may be a blessing, because, if there is still hope


70. J. Hodgson, former Secretary of Labor, has written:

Sherlock Holmes used to say that when you eliminate all probable causes for crimes,
for preserving a political economy in which the parties continue to have an opportunity to exercise their freedoms with responsibility, then perhaps we must even now seek our economic solutions through the voluntary exercise of responsibility. Pursuit of any significant structural changes in the law could always result in limiting the available channels for that exercise in some undesirable way.

Thirty years ago, Philip Murray, the astute and powerful first president of the United Steel Workers, acknowledged that the use of raw power of unions in pursuit of the chase was really futile, because the setting of wages was really an economic function; i.e., that the value of wages would be inseparable from the country's rate of productivity growth. Somehow over the years we have lost the message. Yet the data accumulated over the decades since he wrote have continued to bear him out. Whether wages in nominal dollars have increased much or little, the line tracing output per man-hour has almost exactly paralleled the line tracing real compensation per man-hour in the total private economy.

then whatever remains, no matter how improbable, must be the answer. And when we eliminate all probable substitutes for collective bargaining, then what remains must be the answer. And what remains is retaining collective bargaining and improving it.


71. Over two decades ago, Philip Murray participated in the writing of a book in which the following enlightened statements appear:

The employees and their union representatives must realize that the determination of wages and conditions of work is an economic function and not an arbitrary process dependent upon the exercise of sheer power.


72.

INDEX 1950 = 100
(RATIO SCALE)

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U.S. Dept. of Labor
Bureau of Labor Statistics
The lesson is simple, yet hard to learn. We can only pay ourselves what we produce. An effort to do more turns out in the long run to be illusory and inflationary. And worse, when the productivity curve falls flat, as it has recently, while the number of people keeps growing, there is no way we can avoid a relative decline in living standards. Likewise, when the scarcity of goods drives prices up, there is no way by which adding to consumer incomes (wages) can maintain purchasing power or help to bring forth more goods at lower prices.

These concluding pages have smacked more of economics than of law, but I believe that history shows that the law is bound to follow economic conditions and accompanying political pressure sooner or later, and not always in comfortable ways. The point is that unless the parties voluntarily can learn, and learn soon at that, to cause their collective bargaining to be supportive of the needs of the nation to constrain inflation, then, because there is no alternative, the law will do one of several things: It will finally address the problem of the relative imbalance of power; it will adopt the concept of a "plague on both your houses" by embracing controls of much greater stringency and comprehensiveness than any we have yet seen; or our constitutional concepts will be lost to anarchy or surrendered to dictatorship, either left or right.

As earlier noted, the pages of history recount that when the political will is lacking to face the discomforts of morning-after economics, the social and political unrest becomes so strong that a governmental upheaval is unavoidable. Britain, apparently unable to handle a labor-backed challenge to its government, may be about to provide us a lesson more telling than those we have seen repeatedly in South America; a lesson we may learn just in time; and a lesson which could bring self-interest and public interest in solving inflation much closer together than they have appeared to be for the last crucial decade.

Ours is a tolerant nation. We are inclined to feel that "it can't happen here." But there are those who would love nothing better than to bring it about. Our hope must be in the belief that there are millions who will want to stand up and be counted in order to see that it does not happen.

Lawyers have long been a bulwark for finding rational means for solution of abrasions which arise in society. We need their help today. Their ingenuity, their intelligence, and their perception of the sweep of history are sorely needed in the task of helping to find
and encourage more responsible use of freedom, and the development of new voluntary mechanics for constructively harnessing the inevitable competition between the various segments of society of which Holmes spoke many years ago. Our constitutional democracy is close, I feel, to being put to the final test as to whether the very populist pressures which exist because of its freedoms may soon force its demise. The nation's lawyers helped it to meet such a challenge two centuries ago; we need their help again.

73. Justice Holmes offered a sentence which has often been quoted:

One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services and that of society, disguised under the name of capital, to get his services for the least possible return.
