CHAPTER 11

THE CHALLENGE TO FREE COLLECTIVE BARGAINING

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Two years ago, at the meeting of this august Academy at Santa Monica, I reported on some research in the area of combinations and permutations of the English language as revealed in the course of arbitration hearings I had attended.

You received that report—of the Odd Hawk Grievance, or Who Put the Liquor in Larry Little's Locker?—with what I found to be intoxicacious approbation.

So encouraged, I have carried forward this scholarly, if sly, pursuit.

I am now in a position to report, at the risk of undutible social and political exile, that arbitration's advocates are no more prone to metaphoric mutation than are United States Senators, Congressmen, Ambassadors, leaders of American labor and management, and Cabinet members (including both the previous Secretary of Labor and his successor).

I have exercised editorial licentiousness only to the extent of assembling these germs of wisdom—all of which can be authoritively authenticipated in terms of time, place, and propounder—in the form of an apocraphytic report of a recent meeting of a tri-party group of consultants in Washington.

The agendum item was Natural Emergency Disputes, or Around an Injunction in Eighty Days.

One of the public members opened the discussion. "I know," he said, "that this is an acamadician's point of view. But I've had

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it in the back of my craw a long time. When an unmovable force meets an irreducible minimum the only answer is fault finding under a statute or compulsive arbitration."

Everybody immediately picked up his ears.

There was some agreement. "A very infirmitive idea," one of his colleagues vouchsaid. And another: "You hit the nose right on the head."

But the general reaction was strongly negative:

"What are you trying to do, make us all sacrificial goats? I am unutterly opposed to it."

"You're talking through the skin of your teeth. Why that kind of idea would percolate like wildfire."

"You sure laid a lemon that time."

"The fat has really hit the fan now."

The Chairman tried to calm things down. "Wait a minute. There's no reason for getting into a high state of dungeon. There's a lot of semitics mixed up in this. Let's wipe the coast clear and start again. This thing has got to stand on its own bottom."

"Oh, no!" someone else insisted. "None of this balking and filling. Let's put our sholder to the bit. We've got to get our teeth into the guts of this."

Finally the original proponent got another turn. "All right. All right," he said: "You've really put me through the griddle. But don't you realize that a lot of water has gone over the bridge? This problem has a lot of faucets to it."

After another long go-around, the meeting finally broke up. There was one charitable word for the disconsultant heretic as he left the room. "You're all right, fellow. Keep a stiff upper chin."

And one note of sympathetic counsel: "You've got to stop being so forthrighteous about this. You're getting yourself right across a box."

But the ultimate comment was in a whispered conversation off in a corner of the room. "That man," one of the tri-party advisors said to another, "is way out on the end of a limbo."

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A letter last week from one of the nation's most respected citizens, Bernard M. Baruch, expresses a concern which is today

much in people's minds, and very close to the center of this Academy's interests.

Referring to what he identified—with the pleasantry of understatement—as a recent "succession of labor-management quarrels," Mr. Baruch observes that "while the rights and interests of labor and of business must be respected, the rights and interests of the public deserve at least equal consideration. . . . Both labor and business have sufficient power . . . to pursue courses which too often are at variance with the public interest. Too many of the struggles between these two are not only waged at the public's expense but are settled at it."

Recalling his recommendation after World War I that there be established a High Court of Commerce, which would "have jurisdiction over labor-management issues which the parties themselves could not resolve," Mr. Baruch concludes: "I think such a body — a Court of Labor-Management Relations — is even more necessary today."

In speaking of this proposal, I want first to set it entirely aside from that body of current reaction to what is typically identified—in a phrase which signals its predilection and prejudice—as "the labor problem."

That reaction fixes on the image of one notorious union official—despite the evidence from three and a half years now of active administration of the Labor-Management Reporting and Disclosure Act of 1959 that a high level of integrity and democracy obtains in organized labor as a whole.

That general reaction typically expresses a fear of excessive labor pressures in terms of alarm about inflation—despite the fact that this is the fourth year now of almost unprecedented price stability and that the rate of advance in wages has been steadily diminishing.

Or there is professed outrage about labor's broad combinations—ignoring the implications of the illustrative fact that New York City's being virtually without newspapers today results from five publications being shut down by the publishers when four others were struck by the printers.

Even the concern about economy-crippling strikes—which underlies the current alarm—must be set in context.

Lost time—and production—from strikes has, during the past three years, represented a smaller percentage (about 1/7 of one percent) of total man hours worked than during any other years since the end of the last war.

It is an illuminating, if only partially valid, comparison, that more potential man hours of production were lost in 1962 as the result of involuntary unemployment than have been lost from all strikes in the past 35 years. The public reacts more vehemently to a kick in the shins than to an attack of economic arthritis.

A separately identifiable issue was nevertheless precipitated—not for the first time, but under new circumstances—when the steel industry, basic to the entire economy, was shut down for 116 days in 1959. That same issue arose again when seven airlines were closed down suddenly, if only briefly, in 1961; when all shipping was stopped on the East Coast for 18 days that same year; when all West Coast ports were closed three times during 1961 and 1962; when most building construction was stopped for substantial periods last year in New York City, Northern California and the Pacific Northwest; and when a railroad here in the Midwest didn't run for 30 days last fall.

This issue has emerged even more clearly in recent weeks, with the 38-day shutdown of all East Coast and Gulf ports because of the longshoremen's strike, two-month newspaper blackouts in two major cities, and the putting of production of the Polaris and Minute Man missiles under the last ditch protection of 80-day injunctions.

There have been comparable periods of crisis before — right after World War I, for example, during the sit-down strikes of the late '30's, and with the coincidence of coal, railroad and steel strikes in the late '40's. To be sensitive, however, to the dynamics of labor-management relations and to the relevance in this area of broader economic and political developments is to recognize significantly new elements in the present situation.

One such element is that most of these recent controversies have involved basic issues of manpower utilization and job security. This has been true in the 1959 steel case, the 1961-62 airlines cases, the maritime cases, the longshore case, the New York newspaper case, and to a lesser degree in most of the others. In some

instances this has been the result of technological developments. In others, the situation is that new competitive forces have pushed employers to manpower economies not previously considered necessary.

These developments have placed severe new strains on collective bargaining. It is one thing to bargain about terms and conditions of employment; and quite another to bargain about the terms of unemployment, about the conditions on which men are to yield their jobs to machines. To the extent, furthermore, that these problems of employee displacement can be met at all in private bargaining, it can be only by a process of accommodation and arrangement which is almost impossible in the countdown atmosphere of the 30 days before a strike deadline.

A second element in the present situation is that the public tolerance for strikes is diminishing rapidly.

This is partly a matter of economics. With the increasing specialization of functions in the economy, and with the increasing interdependence of its units, more non-participants are hurt harder and faster by a shutdown than used to be the case. We have always insisted that competition—which includes competition between employers and employees—is worth what it costs the rest of us; but the cost has been going up.

It is more frequently true now than it used to be that a shutdown will hurt the public badly before it hurts one party to it or the other enough that someone has to cry uncle. Strike benefit programs for striking employees and strike insurance programs for employers are intensifying this factor. It has been a significant fact in the New York newspaper case that during most of its first month the printers were receiving up to $90.00 a week in strike benefits and the publishers were sharing in a substantial strike insurance program.

This is also a matter of a changing national psychology. Strikes, regardless of who is responsible for them, are waste; and it is part of the cold war psychology that the nation's tolerance for waste is lowered. This is particularly relevant today in its relationship to strikes in the defense industries, at the missile sites and the aerospace plants; but the feeling is different only in degree when it

comes to stoppages in the maritime industry, on the docks, on the airlines and railroads, and in other basic industries.

What is developing here—with the hurt of major shutdowns increasing and the national tolerance for waste decreasing—is like the change which is going on in the attitude toward war: that what has historically been the ultimate motive force of agreement has become so destructive that it can no longer be risked, or at least relied on.

I conclude, even applying the necessary discount rate to trials and tribulations of the moment, that we stand today at what history will probably mark as a fairly clear fork in the development of labor-management relations in this country. Neither the traditional collective bargaining procedures nor the present labor dispute laws are working to the public's satisfaction, at least so far as major labor controversies are concerned. It doesn't matter any more, really, how much the hurt has been real, or has been exaggerated. A decision has been made, and that decision is that if collective bargaining can't produce peaceable settlements of these controversies, the public will.

I agree with that decision. I assert, however, along with the public interest in avoiding crippling shutdowns in critical industries, the at least equal public interest in preserving to the ultimate practicable extent the private decision-making process. And I am convinced that free, private collective bargaining can be made to work so that it will meet this demand upon it.

I see the present period as a holding period, during which this possibility is being given, in the lawyer's phrase, its last clear chance.

This is the real significance, as I see it, of the record of the Federal Government's unusual participation recently in a number of the major disputes which have developed. This is a record with which I profess some familiarity—the familiarity, roughly, an egg has with an egg-beater.

It is a record, essentially, of improvisation.

Settlement of the last round of contract disputes in the airline industry (not yet quite completed) took over two years, and involved the President of the United States, the Secretary of Labor, the Under Secretary of Labor, the National Mediation Board, a

Special Presidential Commission, nine Presidential Emergency Boards, and three Boards of Arbitration—a total of 39 public representatives. That this meant part-time employment to 24 members of this Academy will not, I think, commend it to many of you as a wholly satisfactory, or efficient, government procedure.

In the recent longshore case, the public participants, during its twelve-month course, were the President, the Secretary of Labor, an Assistant Secretary of Labor, the Director of the Federal Mediation and Conciliation Service, his Deputy, fifteen FMCS mediators, a Taft-Hartley Board of Inquiry, the Attorney General, the Federal District Court, the Mayors of numerous port cities, a Special Presidential Board which was appointed but never convened, and another Special Board under the chairmanship of a U. S. Senator.

There were times, in the course of these marathons of maneuver, when the only promise for parties and public participants alike seemed to be the reminder, from the Garden of Proserpine, of Swinburne's consoling thought:

> We thank with brief thanksgiving
> Whatever gods may be . . .
> That even the weariest river
> Winds somewhere safe to sea.

Such a program of improvisation clearly offers nothing for the long run future. As each new device or expedient is used, its utility diminishes; what may work in one case because it is spectacular loses its effectiveness when it becomes commonplace. Immunities are built up to procedures and pressures which depend in large measure on the evanescent virtue of novelty.

These measures have been resorted to both because of a public demand of much greater intensity than can be generally realized, and to prevent collective bargaining from committing suicide.

There has been a good deal of discussion of this experience in terms of the enervating influence upon collective bargaining, and upon more traditional forms of legislatively prescribed procedures, of any special form of "intervention." This question is properly raised. So is the question of whether, had these steps not been

taken, collective bargaining would by this time have been *replaced*, to a significant extent, by some form of statutory decision-making.

Neither question can ever be definitively answered. It is clear that in most of these cases collective bargaining, as well as the issue in the particular controversy, was on trial. The "public interest" involved was both the public interest in avoiding or ending a serious interruption of the economy *and* the public interest—as most of us here would see it—in preserving collective bargaining as an essentially free, private process.

I suggest, in all deference, that many of those closest to collective bargaining today—labor, management, and public representatives alike—seriously underestimate the strength of the public feeling about national emergency strikes, and the brinkmanship we have been playing in this field.

What then of the future?

There are, I think, two possibilities.

One is that another major crisis will develop, and that no sufficiently new and effective improvisation on the theme of Taft-Hartley can be devised. In that event, the very real likelihood is that there will be developments along the line of the Baruch proposal.

This suggestion is set out in somewhat more detail:

> What is needed is a Court of Labor-Management Relations which would have jurisdiction to settle strikes when, in the President's judgment, the national interest is jeopardized by their continuation and after the collective bargaining processes and the provisions of the Taft-Hartley Act have been exhausted. This Court, composed of representatives from Labor, Business and the Public should have the power after hearing evidence from the contesting parties to hand down decisions binding upon both.

It is implicit in what has already been said that such a development would seem to me exceedingly unfortunate.

Such arbitration is thought of, and recommended, as a substitute for strikes. The trouble is that it would become, if provided for by statute, a substitute for bargaining.

Experience—particularly the War Labor Board experience during the '40's—shows that a statutory requirement that labor disputes be submitted to arbitration has a narcotic effect on private

bargainers, that they turn to it as an easy—and habit forming—release from the obligation of hard, responsible bargaining.

The difficulty is that in virtually every dispute one bargainer or the other feels that his chances are better, or that he can evade responsibility for a hard decision, if he lets the issue go to arbitration. No effective way has yet been devised or suggested of limiting the availability of such procedures to cases in which "the collective bargaining processes . . . have been exhausted." The record is that if arbitration is assured, the collective bargaining processes are never really used at all.

It is easy to agree that the public interest will be most fully served in a particular case by prohibiting a strike and requiring the parties to submit their dispute to a third party. But there is also the public interest in leaving as many decisions as possible to private processes.

To believe strongly and deeply, however, in the validity of free collective bargaining as an application of the basic principles of democracy and free enterprise, is to realize that it can no longer depend on the defense of a Maginot line argument that "compulsory arbitration" is evil. Nor does its protection lie in endless new administrative resourcefulness and maneuver.

The preservation of free collective bargaining depends on two necessary developments.

One of these, extraneous to collective bargaining as such, has to do with the health of the economy as a whole.

This involves, again, the fact that most of these recent emergency dispute cases have involved serious and difficult issues arising from the displacement, or threatened displacement, of men by machines or by new work methods. There is reason to question seriously whether large-scale problems of this kind can be satisfactorily dealt with in major industries by free collective bargaining *unless* the economy is developing at a rate which will give displaced employees reasonable assurance of an opportunity to find other jobs. If there is not that assurance they will probably deny their bargaining representatives the authority to negotiate for their discard.

The future of collective bargaining, free of additional legislative control, is probably linked closely to the future unemployment—or employment rate. I suspect that the future of free collective

bargaining may very well depend, right now and in this connection, on the adoption of the new tax program which President Kennedy has recommended to the Congress as essential to the invigoration and strengthening of the economy.

Beyond this, the future of collective bargaining—free of the weakening effects of statutory arbitration procedures — depends upon the development of *private* procedures which will permit and virtually assure the settlement of major disputes in critical industries without crippling shutdowns.

There is significant evidence that this development is taking place today in a highly meaningful degree and at a rapidly accelerating pace.

There has been one feature common to most of these recent emergency dispute cases which has received all too little notice. This is that the settlements in virtually all of them have included significant arrangements for meeting, and hopefully avoiding, another crisis. This was true of the 1959-60 steel settlement, of the settlement last year in the airlines cases, and of last week's settlement in the longshore case. Substantial agreement has already been reached in the New York newspaper case regarding a new procedure, involving the participation of all papers and unions, for the bargaining two years from now.

Active discussion is presently going on among responsible men on both sides of the bargaining tables in most of these industries, looking for a better way to meet their problems. In a number of cases, "public" representatives have been brought into these discussions. The recent announcement of the new incentive program adopted by Kaiser Steel Company and the United Steelworkers is only one illustration of the specific results which are already flowing from these programs. And the joint Human Relations Committee for the steel industry is meeting currently in Pittsburgh, working with an agenda of five or six issues that have emerged as potential trouble areas.

There have been similar developments in parts of the construction industry, in the meatpacking, coal, and plate glass industries, at the missile sites, between management and union representatives at U.S. Industries, and at numerous other companies.

What is developing here is much more than collective bargaining in the old sense of the term. This is Constructive Bargaining, or perhaps, even better, Creative Bargaining.

Although these programs vary in detail, most of them include three elements:

First, arrangements are being worked out to deal *during the contract period* with those problems—such as adjustment to "automation"—which are so involved that they cannot be dealt with during the count-down period at the end of the contract. This will provide the forums, and the time, to develop the new ideas which are so badly needed to meet the problems of a work force which is today in flux—ideas which will be the counterpart of such innovations, for example, as the cost-of-living and productivity increase which General Motors and the Automobile Workers developed a decade ago.

Second, most of these programs involve the use in one form or another of "neutral" or "third" parties—as advisors or consultants or factfinders. It is in part an illusion that there exists a "public interest" which is separate and distinct from the interests involved in the honest interplay within most private employer-employee relationships. The participation in these private negotiations of third persons who are "independent" in the full sense of the term offers a considerable measure of protection of the "public interest" and more than the actually effective public interest; in most cases—which is only in wanting a settlement, any settlement, to be reached peacefully.

The third element in most of these programs is one form or another of special arrangement for approaching as constructively as possible the crucial bargaining which will move the parties from one contract period to the next. Some of these arrangements provide for arbitration—voluntary arbitration, adjusted to the particular circumstances. Others meet the pressing need for more orderly and responsible arrangements between the several employer units which are involved, or within the union group. Part of our problem is that we have been moving into "unity" bargaining of one kind or another without working out the stresses and strains within one group or the other, or both.

In addition to these significant indications of private interest

in new and healthier forms of bargaining there are encouraging signs of the responsive adjustment of government programs to facilitate this development.

Both the Federal Mediation and Conciliation Service and the National Mediation Board are working with the parties in many instances now long before the contract expiration crisis arises.

We are exploring in the Department of Labor, in the Bureau of Labor Statistics and in the Office of Manpower, Automation, and Training, possible ways of applying more directly to particular industry and company situations what has previously been for the most part general research. Perhaps there should be developed an extension service in this area, supplying assistance comparable to that which the Department of Agriculture gives to farmers. Charged now by agreement of the longshoring companies and the ILA with making a study of their manpower utilization and job security problems—to facilitate their working these problems out before the next contract showdown—we realize that if this had been done two years ago, last month's debacle might have been avoided.

Perhaps it should be considered whether government procurement contracts should require that suppliers have taken maximum steps to assure against interruptions of production—just as the equal employment opportunities program establishes norms in these procurement contracts for non-discriminatory hiring practices.

The Missile Sites Labor Commission illustrates another kind of government assistance in what is essentially a private program of no-strike, no-lockout bargaining.

It would be impossible to exaggerate the significance of this "constructive bargaining" or "creative bargaining" development. It *has* to come—if free collective bargaining is to meet its obligations, if it is to survive. I am convinced that we are at a point in the development of collective bargaining perhaps even more significant than that period in the middle or later '40's when the submission of grievances to final and binding determination was accepted, almost suddenly, as the dictate not only of good sense but of practical necessity.

If this is true it thrusts a dual responsibility upon the members of this Academy.

These emerging programs demand, if they are to be successful, the services of experienced "third parties" with resourcefulness, expertness, patience, and independence, surpassing even what is required of an arbitrator. Interpreting a contract is an artisan's job compared with the demand in new contract development for architects. The difference is between taking things as you find them, and building something new; between being called upon for answers, and for ideas.

Finally, and beyond this:

I have meant no pretense here that whatever this is that can be called "constructive" or "creative" bargaining is something clearly identifiable. It is not. The suggestion may derive as much from the realization of new and critical need as from the recognition of actual experience. It may well be an entirely different formulation or suggestion which will eventually meet this need. There is an infinite responsibility on the members of this Academy, leaders in this field, to provide that formulation or suggestion.

The established institution of free collective bargaining faces a challenge today which arises in significant part from the advances of science, the new discoveries of the technologists. It is time to wonder once again why it is that there is an apparent, in some ways ominous, preponderance today of scientific over institutional invention.

It is not, surely, that the physical scientist is wiser than his political counterpart. Is it that he is freer, less afraid to question, to probe, to propound ideas that are different? Is it that the centuries have reversed the roles, since that time when scientists were condemned as heretics for their innovations while politicians —in the higher sense—were saluted for working out democracy's beginnings? May this be democracy's ultimate testing against an alien society where the dictator's decree has no constraint upon it?

Ten days ago, Ambassador Adlai Stevenson said in New York: "We have learned that modern technology can strengthen the despot's hand and the dictator's grasp—and for that reason, if no

other, we know that democracy is more necessary now than it ever was. But democracy is not self-executing. We have to make it work."

Collective bargaining is industrial democracy. We have to make it work.