CHAPTER VIII

THE PUBLIC INTEREST: VARIATIONS ON AN OLD THEME

GEORGE W. TAYLOR*

The opportunity to express one's views about labor-management relationships before his peers at this assembly accords a great privilege. It also carries a considerable responsibility. I found this out some fifteen years ago when some remarks of mine before this Academy, about the usefulness of mediation in arbitration, which seemed so obvious in the preparation, stirred up the countervailing powers to take strong remedial action. That opposition has continued from time to time up to this very morning. Over the years, a number of persons have contrived to carve careers for themselves out of criticizing that speech. I had a wonderful and wise grandmother. One bit of her wisdom which I have never forgotten is: "Always remember, no sensible man ever whips a dead horse."

I could avoid creating another controversial situation by resort to those witticisms for which arbitrators have become famous. We do meet such interesting people. But, after that magnificent and dazzling performance after luncheon today, I gave up any lingering ideas of getting into that competition. So, once again—but with apologies—I feel that urge to generalize about the essentially isolated and somewhat haphazard events which we call collective bargaining, including arbitration. Labor arbitrators do have a unique opportunity to observe "togetherness" in the raw. They are close observers of the often inspiring, and sometimes distressing, experiences of men living and working together to achieve the fullness of the meeting-of-minds society to which we aspire.

* Harwell Professor of Industry, University of Pennsylvania, Philadelphia.

A consideration of the question—how is collective bargaining doing?—is thus a part of the broader question—how is democracy doing?

You may have already noted that I am about to assume the self-appointed role of a "so-called public representative." The obvious implications of "so-called" as a modifier are: "this guy speaks only for himself" and "how does he get in the act anyway?"

The lack of a constituency has some advantages. Constituencies may back up words with power but they can also inhibit expression, at least in public if not in private discussions. Arbitrators who want to be selected to decide cases have to be wary about their expressions not only in public but in many private discussions as well. There is some obvious difficulty in getting to the public a complete and objective phrasing of industrial relations issues by those directly involved in them. Certainly, the sloganizing by private public relations experts, who are not supposed to be objective, does not suffice. For example, I don't believe the "right-to-work" slogan contributes to a profound understanding of problems concerning an individual employee's responsibility, or lack of it, to the union which is legally responsible to act for him and all his fellows as an exclusive bargaining representative. The slogan does not clarify this problem any more than cigarette advertising assists in solution of our personal health problems. It only confuses the issues. And, "featherbedding," which once upon a time had such happy connotations, has been remade into a general call to arms not simply against preferred treatment but for denial to "labor" of some kinds of leisure and job security which are treasured by so many of us in management and the professions. It's not easy for the public to become informed concerning the various dimensions of many of the real issues. Of the vast territories left for exploration by the so-called public representatives, none is more important than a balanced phrasing of the problems of labor-management relations.

In talking about so-called public representatives, something might also be said about college professors getting into the act. Adequately performed, their work requires them to utilize the lessons of the past, to discern the present in its historical context and hopefully even to espy a glimpse of the future. Historical phases of the labor movement, and of industrial relations, have

been conceded, by lack of interest elsewhere, to Academe. Some tolerance is due to those who make even feeble efforts to appraise the current scene in the long perspective of a so-far unsuccessful search over the centuries for an ever-renewing society. I assume that this is the kind of analysis deemed essential by those who nowadays so loudly proclaim the need for a liberal education as an essential preparation for leadership in our society.

Not for a moment would I disparage the pragmatic wisdom of those who are able successfully to meet ever-more costly payrolls in a competitive society or who can get elected to union office by an ever-more demanding membership. Their achievements speak for themselves and they are appropriately recognized. It is the other factor in the equation—the long-term public interest which may be more realistically talked about by one who needs not meet the weekly payroll or get elected to office.

A public interest in and concern about labor-management relations in the private sector of the economy has existed ever since those relationships came into being. There has always been a governmental policy on collective bargaining. It is the extremely wide variation in this policy over the years which is so notable. This makes one wonder: what next?

The first national labor policy was stated by the courts early in the nineteenth century in the so-called conspiracy cases. These cases related, you will recall, not only to employee demands for collective determination of employment terms but also for the union shop. The courts decided, beginning in 1806, that the public interest required strong governmental support of individual bargaining and a suppression of unions. However, the country was changing from an agricultural to an industrial economy and, by 1842, the labor policy was soon changed. Then, within less than a century, Congress passed the Wagner Act and, in effect, asserted that as a matter of public interest collective bargaining was preferable to individual bargaining. A complete reversal of public policy regarding collective bargaining had come about over a very short historical span. Support was given to the organizational efforts of employees and collective bargaining could be legally required of employers. You may recall that one rationale advanced to justify this "one-sided" policy was that governmental assistance had already been provided to business organi-

zational efforts through the corporation laws. The creation of a countervailing employee force evidently seemed to Congress in 1935 to be essential for the public interest in the search for an ever-renewing society.

My own direct experiences in the field of labor-management relations began during the latter days of that national labor policy which prevailed for so many years in between the conspiracy case doctrine and the passage of the Wagner Act. Employees were accorded the right to form unions as long as their activities in doing so were not adjudged to be illegal. Employers were accorded the right to thwart that employee undertaking with the assistance of the judicial rules covering picketing, private injunction, and the contract of individual employment (the so-called yellow-dog contract). For years under that policy, the labor history of the United States was virtually the record of organizational strikes. The national policy was basically that the issue over union recognition was exclusively a private dispute to be resolved by the relative power of the contestants directly involved. It was immaterial, as a matter of public interest, whether one party or the other prevailed; i.e., there was no expressed official public preference for either individual bargaining or collective bargaining.

This period, when the union recognition issue was resolved exclusively by relative power, not only economic power, has given us the most chaotic and distressing part of our labor history. Whether or not union recognition should be dependent upon the economic power of employees to achieve it—e.g., whether recognition should ebb and flow with the business cycle—became a subject of hot discussion. So did the question of the impact upon third parties of the industrial warfare. The situation had some similarity to the instability associated with the succession of governments by coup d'etat in what we used to call the underdeveloped countries.

The limitations of the organizational strike as a means of resolving the recognition issue became increasingly apparent. Experimentation with the employee election as an alternate arbitrament began during World War I and continued under the Railway Labor Acts and by the National Industrial Recovery Act. Finally, through passage of the Wagner Act, the representation election became an integral part of national labor policy. By a

majority vote of employees, a union could be accorded the legal right to act as the exclusive representative of all employees in an appropriate unit. But, it may also thereafter lack the economic power to secure terms of employment in collective bargaining which will meet even the minimum expectations of its members. Such unions tend to emphasize legislative programs such as increases in the legally required minimum wage.

The shift of criterion for union recognition has ameliorated the problems of the organizational strike. It has created a whole new series of problems which have not yet been fully resolved and, to a surprising extent, have not yet been fully appreciated. What are the responsibilities of the employees to the union which legally represents them? It has always seemed to me that this is the basic question rather than: should the union shop be permissible?

What is entailed in union representation of employee interests, i.e., what is the basic function of the union? Varied answers are given. When the so-called sweetheart contract is in the spotlight, emphasis is placed upon the function of the union in seeking whatever the employees aspire to. Yet, to an increasing extent, the union function involves a mediation between the conflicting interests of its own membership. There are times, moreover, when the union is called upon to restrain employee demands either in the interest of effective plant and company operations or in the interests of national planning. There is an apparent conflict between such functions and the public disposition to make the union more responsive to employee direction.

What is the appropriate unit of representation for collective bargaining? It is obvious that substantive determinations of employment terms often depend in large measure upon the unit within which majority rule is exercised. In our field, this issue is not simply whether unions have become too big or are too little—as is indicated by a stressing of the union monopoly question—but whether the unit of bargaining is appropriate to a solution of the problem to be resolved. In short, we are faced with the kinds of problems that are always encountered in making representative government viable. Especially is this the case as respects the appropriate unit question which, to me, is one of those pervasive problems of representative government found in union structure,

the states rights issue, the common market, and the organizational problems of new nations.

Despite the many unresolved and formidable problems created in the wake of the Wagner Act, there is no doubt but that confrontation with them rather than with the problems of the organizational strike are still deemed to be in the public interest.

It is not possible here to discuss the development of public policy as respects labor-management relations subsequent to the Wagner Act—the regulation of collective bargaining, of internal union affairs, and of the uses of union power. They stem essentially from the basic policies of the Wagner Act and reflect what has been deemed by the public to be shortcomings in industrial self-government.

Another dissatisfaction with the use of the strike as an ultimate arbitrament in labor-management relations developed whenever collective bargaining was actually undertaken. Even before the passage of the Wagner Act, dissatisfaction was voiced in a number of industries, by union and management representatives alike, with the inadequacy of strikes to settle employee grievances. Whether or not the discharge of an employee would stand up ultimately depended not so much upon the equities of the case but upon the fluctuations of relative economic power week by week, season by season, and year by year. It was in the highly competitive needle trades that the non-viability of defining economic grievance right in terms of total economic might first became apparent to all. There was no point in discharging anybody for anything in the weeks before Easter, but management could discharge anybody for nothing in the summertime. The capricious results, and the guerilla warfare that developed, could possibly be justified in theory by reference to the movement of the invisible hand of the market in response to supply and demand factors. However, that harsh and capricious hand made it virtually impossible for people satisfactorily to do their living and working together under reasonable conditions. Interests deemed vital by the individual employee were maltreated at times while management rights got pushed around at other times. What has come to be called the retained rights doctrine was exercisable only when business was bad. For dealing with human beings and for meeting the managerial necessities of plant operation, a more logical standard for

resolving grievances was needed. As you all know, grievance arbitration and the concomitant no-strike clause came into being through collective bargaining in the needle trades.

One result of the widespread adoption of grievance arbitration was a channeling to the arbitration hearing, rather than to the picket line, of the deep-seated issue between managerial prerogatives and the handling of grievances on a basis of equity. Labor agreements were relatively simple to begin with. It was recognized, we then thought as a matter of simple common sense, that definitive answers could not be provided beforehand for all the unknown day-by-day issues which might arise in the future during the agreement term. The parties decided to work out real problems as they arose, to keep them as simple as possible, and to prevent them from getting artificially enmeshed with cosmic principles. It is significant that, in the needle trades, the "arbitrator" was and is commonly called an "impartial chairman." He was an unusual kind of a mediator because he was accorded a reserve power finally to decide the particular case. His decisions were not supposed to provide precedents (which would intrude upon collective bargaining) but, of course, they could build up to a sort of common law. Some further limitation upon the jurisdiction of the impartial chairman was nevertheless desired. A now-famous clause was fashioned (I believe I first wrote it many years ago), that arbitrators should not add to or subtract from the terms of the agreement. It was originally conceived as a means of limiting the arbitrator's jurisdiction over grievances to the subject matters directly covered by the agreement. Disputes over matters not covered were to be dealt with in the next contract negotiations. At issue was the scope of the co-determinations process; i.e., subjects not covered by the agreement were, in general, matters for unilateral management determination during the agreement term. The management security issue was phrased in such terms.

When grievance arbitration was first adopted in the recently organized mass production industries, beginning about 1941, employer insistence upon a broader type of management security resulted in a more restrictive concept of collective bargaining. It was urged that collective bargaining was concluded when a labor agreement was consummated and that grievance handling was merely a matter of strictly administering the terms of the agree-

ment. With the advent of the no-strike clause, previous inhibitions upon management assertion of the retained rights doctrine were minimized. There was less risk in arguing it before an arbitrator than in establishing it through a work stoppage. The fact remains that, in most cases, no specific agreement between the parties had been made on the point.

The "umpire" concept of arbitration, originally utilized in the anthracite coal industry after its 1902 strike, found favor among managements in the mass production industries as a way of strengthening the retained rights doctrine. This involved strict construction of the agreement and limited authority to the umpire. It was overlooked, however, that a no-strike policy was never developed as a concomitant to the umpire provision in the anthracite coal industry. There are reasons to believe that many so-called wild-cat strikes in the 40's and 50's in the mass production industries were an employee response to the disposition of grievances by administrative application of labor agreement terms, often on mere technical grounds. Another consequence of the adoption of the umpire concept has been the expansion of labor agreements from relatively simple documents to complex tomes. These agreements get bigger every year as unions spell out the detailed rights of employees that will not be recognized by employers unless they are in writing. In consequence, a few labor agreements have become a shambles of contradictions. Many have become so complex as to be beyond the comprehension of mortals. Grievance handling can become a game in which advantages and disadvantages are sought on technical grounds.

It is encouraging that a few companies with their unions have had the vision to break through this situation and to revise their concepts about grievances and the ways of dealing with them. Reference is to such notable programs as those instituted at International Harvester, Inland Steel, Kaiser Steel, and others. If their activities become a pattern, it may well be that the volume of business for arbitrators will go into a cyclical decline. I leave it to you as to whether or not this will be in the public interest. In considering the matter don't overlook the possibility that a vital contribution to meeting the shortage of college professors might be an important by-product.

Because of the complexity of the expanded subject matter of labor agreements nowadays, it may be expecting too much to think that the individual employee can have a sense of direct participation in their negotiation. Indeed, in some situations employees and even local officers have expressed their inability to understand even the rudiments of the agreement submitted to them for ratification. As one example, I feel sure that most employees do not fully appreciate the number and nature of future contingencies that can thwart receipt of the full pension benefits specified in many a labor agreement. Other terms are as difficult to comprehend. In recent discussions about an agreement which has been much heralded as embodying statesmanship of high order, someone reported that it had been translated into sixteen foreign languages. A small voice in the back of the room queried: "When will it be translated into English?" Such observations are doubtless germane to most legislative enactments in the political field which specify the rights and the obligations of the citizens. However, these laws are not subject to specific ratification by the electorate. The electorate exercises its power in the election of its governmental representatives. This ultimate power in a representative government is evidently being rediscovered and exercised as seldom in the past by union members in 1965. One can only conjecture about the effect of this rediscovery upon the negotiations of the future.

It has been said that the succession of difficulties encountered in securing employee validation of labor agreements, hailed by union negotiators as the "best ever," stem in part from a lack of understanding. Educational steps designed to overcome this will doubtless have to be developed. Another aspect of what has been termed "the rank and file revolt" involves even greater problems. The large accumulation of those "little" unresolved issues over real and imaginary employee grievances, accentuated by an unduly technical administration of some labor agreements, can, it seems, create a mounting employee dissatisfaction that finally cannot be overcome even by a large wage rate increase or substantial retirement benefits. Maybe what has come to be regarded as "traditional wisdom" in grievance settling should be carefully re-examined and revalued. Perhaps, it is here that the employee can secure a sense of direct participation in working out the con-

ditions of employment under which he works. Even though such a course would seem to be a matter of simple common-sense, one cannot be overly sanguine about the possibility of change simply because some basic policies have been shown to be not viable. A great many vested interests are involved when "traditional wisdom" is under scrutiny.

May I suggest, with the brashness which a "so-called public representative" sometimes assumes, that some present distressing experiences reflect serious shortcomings in the use of grievance procedures and grievance arbitration as a substitute for the strike. It should be possible to evolve more effective processes as a substitute for grievance strikes which would result neither in impaired employee morale nor strikes over accumulated unresolved grievances at the time of agreement-making. The cost of resolving grievances at this juncture is high. I fully realize that, at least for the present, this diagnosis will find few takers among the parties or, indeed, among the arbitrators. The critical reaction from representatives of all these interests to the Supreme Court decisions in *Lincoln Mills* and, especially to the subsequent "trilogy" of cases, is rather strong evidence. Adoption of some of the concepts embodied in these decisions as working precepts, even with modifications, would entail, in most cases, some rather drastic changes in grievance handling policies. I am sure that the judicial expressions do not constitute self-effectuating concepts. Indeed, I would have much preferred that the adaptation of grievance arbitration to the needs of the day would have come about through a sort of common law created by the parties themselves in collective bargaining. Industrial relations are not all law and, indeed, not all general economic theory. Their nature is also fashioned by the leadership shown in creating and developing institutional form for resolving conflict. Maybe the common law approach is still possible. At any event, a reasonable question for objective examination is: to what extent, if at all, has grievance handling become afflicted with a hardening of the industrial relations arteries?

On the record, then, it is not easy to create continually viable substitutes for the strike in labor-management relations. The substitutes bring their own unique issues and formidable problems which don't get settled once and for all. At least this has

been our experience in using the employee election, along with legally required collective bargaining, as a substitute for organizational strikes and in the utilization of various forms of private arbitration as a substitute for grievance strikes.

Now, there is a growing conviction among the public—as well as among a few of the bargainers themselves—that acceptable alternatives to the strike need to be developed for arriving at the terms of new labor agreements. The motivation for this conviction derives from (1) the recurrent problem of how to deal with so-called public emergency disputes. In my opinion, the approach suggested by the President's Advisory Committee on Labor-Management Policy in its report on Collective Bargaining provides a solid basis for further discussions about this matter. (2) The complexities and the wide range of subjects now treated in collective bargaining which cannot be satisfactorily disposed of by the arbitrament of economic power. This has given rise to a number of well-known experiments in the use of continuous bargaining as distinct from crisis bargaining. (3) The emergence of what may be termed the public emergency settlement. Some brief comments about this relatively new factor seem to be in order.

One has to be notably unobservant to overlook the increasing public interest and concern over the possibility that the total effect of fragmented wage and price decisions in private power centers may impede or even prevent attainment of the national goals established as vital to the national well-being and safety. Yet, to me at least, it is axiomatic that an enervation of the private enterprise system would impede or prevent the attainment of these very goals. Our generation's confrontation with history has given rise to critical questions in this area which are of the greatest importance to the future of labor-management relationships. Fundamentally involved is a harmonizing of governmental and private policies which, to an unprecedented degree, have substantial interacting effects. There is little or no evidence of a disposition in the United States to phrase this problem in such terms, let alone to seek ways of dealing with it.

On numerous occasions, I have had the temerity to question the efficacy of the guide posts for private wage and price determi-

nation set forth by the Council of Economic Advisors. They constitute the enunciation of particular criteria for wage and price determination which, as far as I know, have never been used in the private sector of the economy. Certainly they have never been used to subordinate or virtually to exclude all other criteria. They interject a new complication—they can be utilized for tactical purposes in collective bargaining. All this means, however, is that the answer to an exceedingly important emerging problem has yet to be discovered. The search for the answer is likely to be found ultimately, I believe, through a greater degree of co-operative endeavor between representatives of labor, management, and the government than presently seems to be possible. If the public interest requires a national wage policy, the matter will, I believe, eventually be dealt with by participation of the various interests directly involved.

At the outset of these remarks an attempt was made to depict the history of labor-management relations in the United States as a record of relatively rapid changes in policies, public and private, and in institutional forms. This record provides, I suggest, a useful perspective for appraisal of the current scene. It also evokes the inquiry: what next? Some glimpse of the future may also emerge from a consideration of the present in its historical perspective. Whether or not there is substance to this hope, I am most grateful to you for extending the opportunity to exercise one of our most important heritages—the right of free speech.