

MANAGEMENT'S RESERVED RIGHTS: A LABOR VIEW

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It is good to be here among so many friends and co-workers. Whether we happen to represent unions or management or serve as arbitrators, we are all dedicated to the same general purpose. We want better understanding, stable relationships in industry, profitable, prosperous, private industrial enterprises, an ever rising standard of living, and health and happiness for the workers.

The service rendered to our country by arbitrators has been tremendous—and yet your task is largely thankless. Usually the public knows little of your real accomplishments and the parties are sometimes quick to condemn. But in recent years a growing realization is taking place among union men and company executives that your contribution cannot be measured by a box score. This is not only an outgrowth of maturity of the parties but is a testimony to your constructive achievement of an increasingly secure position in the labor-management fabric.

Today I can speak here representing labor's viewpoint in only a limited sense. There are such wide varieties of problems, traditions, and patterns of bargaining in the many unions which make up the American labor movement that I could not begin to undertake to speak in terms of all of them. Therefore, please bear in mind that I am speaking primarily for the Steelworkers and to some extent in terms of my knowledge of other unions in basic industries. What I say may have much broader application; I suspect it has. But I know there are such great differences as to preclude any universally applicable remarks on our subject.

In my remarks I must necessarily expand my consideration of "Management's Reserved Rights" to a somewhat broader area taking in also Labor's Reserved Rights. Too many spokesmen

for management assume that labor's rights are not steeped in past practice or tradition but are limited strictly to those specified in a contract; while management's rights are all-inclusive except as specifically taken away by a specific clause in a labor agreement.

This view of the history of rights is not accurate; nor is it reasonable. Labor always had many inherent rights, such as the right to strike, though its exercise could lead to varying consequences; the right to organize despite interference from management, police powers, and even courts; the right to a fair share of the Company's income even though this right was often denied; the right to safe, healthful working conditions with adequate opportunity for rest. Failure of management to recognize such rights does not indicate they did not exist. Public opinion always supported such rights. Who then can say the right did not exist?

Collective bargaining does not establish some hitherto non-existing rights; it provides the power to enforce rights of labor which the labor movement was dedicated to long before the institution of arbitration had become so widely practiced in labor relations.

I cannot agree, therefore, that management's reserved rights were all-embracing to the exclusion of any labor right. The bit of historical fiction that some of my management colleagues attempt to write is neither accurate nor well-founded. As I understand it, it goes something like this: First, there was management. Its power was supreme. Then came unions and challenged this absolute power. Management's rights are diminished only to the extent that labor's challenge has been successful. The success of this challenge is measured, the story goes, only by specific contract clauses wherein a right is specifically established for labor. No other right for labor exists.

I cannot agree to this appraisal of the reserved rights of management. The law of the land has established labor's right to bargain collectively over wages, hours, and working conditions. Bargaining implies that each party can agree or not agree and

that a bargain is necessary if business is to be done. Management controls the property and the tools; unions represent the labor necessary to utilize the property and the tools. If the property and tools are not available, labor cannot produce. If labor is not available, the property and tools cannot be used for production. Because both are needed, a bargain is needed.

Usually the bargain is reduced to writing. The written document does not represent labor's imposition on management's reserved rights; rather it represents the basis on which both parties agree to go forward. In examining the meaning of an agreement, it is proper to inquire about the conditions under which the bargain took place with a presumption that the normal practices which did exist are expected to continue except as the agreement would require or justify alteration and except as conditions make such past circumstances no longer feasible or appropriate. Both parties have rights to stability and protection from unbargained changes in wages, hours, and working conditions.

What then are management's reserved rights? These are usually rights reserved in the agreement subject to the substantive clauses of the agreement. Some of these rights relate to subjects excluded from the collective bargaining area by custom, by law, or by express provision. When a contract says that management has the exclusive right to manage the business, it obviously refers to the countless questions which arise and are not covered by wages, hours, and working conditions, such as determination of products, equipment, materials, prices, etc.

Not only does management have the general right to manage the business, but many agreements provide that management has the exclusive right to direct working forces and usually to lay off, recall, discharge, hire, etc.

The right to direct, where it involves wages, hours, or working conditions, is a procedural right. It does not imply some right over and above labor's right. It is a recognition of the fact that somebody must be boss; somebody has to run the

plant. People can't be wandering around at loose ends, each deciding what to do next. Management decides what the employee is to do. However, this right to direct or to initiate action does not imply a second-class role for the union. The union has the right to pursue its role of representing the interest of the employee with the same stature accorded it as is accorded management. To assure order, there is a clear procedural line drawn: the company directs and the union grieves when it objects. To make this desirable division of function workable, it is essential that arbitrators not give greater weight to the directing force than to the objecting force.

Thus, when the company says Jones is to be laid off, the union cannot direct Jones to show up. But when the union claims that Jones should not have been laid off, the arbitrator must be careful not to be influenced by the weight of the accomplished fact. It is easy to conclude that the mistake made was honest or unintentional and therefore the award should be softened or diluted. But such temptation should be avoided.

There are many industries where far greater restrictions are placed on management's direction than in steel, for instance, where we have developed a system of flexibility in operations, management power to give direction, and labor right to challenge each directive with complete effectiveness. Disruption of this desirable balanced system would have unfortunate effects. It would lead labor toward demands for curtailment of management's right to direct and could easily lead to conflict, confusion, and instability.

The rights reserved to management, usually in management clauses, should be viewed in proper context. These clauses do not confirm some notion of labor's inferior position in the bargaining process or in the administration of a contract. They merely establish affirmatively certain areas in which it is the company that acts, not the union, without implying any greater weight to the direction than to the grievance.

These remarks have been made because there does exist an effort to somehow dilute labor's participation in the adminis-

tration of the labor agreement. I note significant, widespread, but usually subtle efforts to persuade arbitrators that the company's responsibility to manage somehow requires that grievances be extra well-founded to justify interference with this right to manage.

So many times we hear a company justify an action by indicating that the judgment it used was reasonable. Thus, the opinion of a company witness relative to ability must be given more weight than an opinion expressed by a union witness; the company's declaration that an emergency existed should carry some special weight; invoking the need for "efficiency" should carry some magic with it because who dares suggest a greater consideration!

These represent efforts to place labor's interest in the application of the agreement on a lower level than management's interest. Somehow a company motivated by a desire for greater efficiency is aligned on the side of the angels, but a union motivated by a desire to retain conditions which please the workers is playing politics or failing to live up to its responsibilities. How often we hear these sentiments! Yet what do they represent but the belief that the parties to the agreement are not equal and that the desires of one are weighty but the desires of the other are frivolous.

The source of this uneven treatment is the "reserved rights" concept and the philosophy of history from which it stems. First, there was the company and all was well. Then came the union and injected or created rights for workers which had not theretofore existed. Therefore, all rights revert to the management except those which specifically are wrested away by means of contractual clauses.

This concept is not only distasteful; it is based on extreme over-simplification of history. It overlooks the degree to which collective bargaining modifies workers' rights—the right to cease work, the right to press a point without regard to any set of rules or guides, the right to improvise concepts of fairness on the basis of the necessities of the moment without com-

mitment to the future. How could management obtain employee acceptance of job evaluation without the union's modification of the inherent right of workers to press wage complaints on whatever ground appears suitable at the moment. No—this wresting away process is not all one way by any means.

I have made these remarks because the concept of management's reserved rights has been misused so often and has been expressed so unfairly not only by management representatives but even on occasion by some arbitrators. Having made these remarks, I now want to turn to another phase of this subject and emphasize the proper place that does exist for an appropriate concept of management's reserved rights or perhaps a better term is exclusive rights.

Management determines the product, the machine to be used, the manufacturing method, the price, the plant layout, the plant organization, and innumerable other questions. These are reserved rights, inherent rights, exclusive rights which are not diminished or modified by collective bargaining as it exists in industries such as steel. It is of great importance that this be generally understood and accepted by all parties. Mature, cooperative bargaining relationships require reliance on acceptance of the rights of each party by the other. A company has the right to know it can develop a product and get it turned out; develop a machine and have it manned and operated; devise a way to improve a product and have that improvement made effective; establish prices, build plants, create supervisory forces and not thereby become embroiled in a labor dispute.

Our ability to have this accepted without question depends on equally clear acceptance by management of the view that the exercise of these rights cannot diminish the rights of the worker and the union. For instance, a new method of manufacture may raise several issues of working arrangements, crews, spell periods, schedules, rates, etc. These are usually susceptible to determination by application of contract clauses, practices, precedents, etc. An effort to claim that the exclusive right of management to establish a new method of manufacture keeps

the worker from objecting effectively to the resulting working conditions not only confuses the labor-management issues, but it makes more difficult unequivocal acceptance of the rights of management. We are entirely in agreement that the company can establish the manufacturing methods, but, if management attempts to use this right as the basis for diminishing labor's rights, then there must inevitably develop hostility to the whole concept of exclusive management rights. This oft-used technique of argument—and even propaganda—represents a disservice to management's best interests and should be avoided if we hope to develop an increasingly mature basis for stable relationships.

In addition to these exclusive rights to do things without any union say, the exclusive rights to manage and direct should be very clearly understood by all parties. The union cannot direct its members to their work stations or work assignments. The union does not tell people to go home because there is no work. The union does not notify people who are discharged to stay put. The union does not tell employees to report for work after a layoff (except perhaps as an agent for transmitting information in behalf of management). The union does not start or stop operations unless perhaps some urgent safety matter is involved and there is some contractual or other basis for such action.

This is not an easy concept. Very often union men are disturbed by decisions they consider entirely wrong. Nevertheless, a company's right to make its own judgments is clear.

But the union has rights too; the worker has rights. In fact, the union has the duty and as a union man the employee has the duty as well as the right to challenge the company's acts when they violate the workers' rights. That challenge is made through the grievance procedure, not through rebellion. But the grievant should lose nothing by carrying out the company's direction. If arbitrators act on any other basis, they help to drive labor toward demands which would curb the right of management to manage. It is high time that management

and counsel for management understand this. When arbitrators are asked to attach extra weight to a management judgment because of the right to direct and manage, then management is playing a dangerous game. To make an argument, to win a point, the whole balance of management's directing right and labor's grieving right is being jeopardized. That balance means more to management than any specific case. The ability of a Union to do its part is related to the willingness of management to do its part in developing respect for the rights of each party.

Arbitration of disputes involves two parties to a contract, both of whom have first class roles in the administration of that contract. One role is different from the other but not more exalted. The contract does not represent an expression of an agreement by the company to grant certain rights to an employee who would otherwise have no rights. Hardly. The contract is related, not to a relationship of long standing between employer and employee, but to a relatively new relationship. It is the establishment of the union and collective bargaining which creates the basis for the contract. The union has the right to participate in the determination of wages, hours, and working conditions. It is interesting to note that, in the absence of a contract, where no contract has yet been established, or during a period of negotiation, it would be illegal for a company to change wages or other conditions of employment without first taking the matter up with the union.

This collective bargaining idea exists in the knowledge that both labor and management are essential to operations and production and that they must come to terms before a settlement is reached. After they have come to terms, we cannot now assume that somehow one party to the deal brings into it a backlog of rights and powers it enjoyed in dealing with individual employees.

A backlog of rights and practices and precedents does develop as the collective bargaining relationship continues, based not on pre-union history but based on the period of the collective bargaining relationship.

The real question that arises is, what is the deal? Is it the contract or something more? I cannot agree that the deal includes the acceptance of the pre-union past as a guide for the future. But the practices which grow up during decades of a collective bargaining relationship cannot be swept aside. They have weight which must be measured in the specific case in the light of many factors. These practices, grievance settlements, understandings, etc., inevitably represent the set of circumstances which formed the back drop of the negotiation of the current agreement. Since every matter involving wages, hours, and working conditions is a matter to be determined by collective bargaining—and if this is not so then just what is collective bargaining?—then it is reasonable to assume that the contract is made in the light of the present circumstances. To the extent that present conditions and methods for change are not revised, they are accepted.

Therefore, each party has the right to assume that changes in wages, hours, or working conditions not provided for by contract can be made only by mutual agreement or by following practices for making changes which have existed during the collective bargaining relationship or by virtue of management's exercise of an exclusive right (such as, introduction of new product, new machine, new material, new method of manufacture, etc.). To suggest that management can make changes at will unless the contract specifically bars it is unfair and can lead to placing so many bars in the contract as to make successful negotiating increasingly difficult and operations less and less flexible, with detailed consideration of the facts and merits of each case replaced by precise rules and regulations.

It would probably be inappropriate for the General Counsel of the United Steelworkers of America to conclude these remarks without commenting on the steel "past-practice" clauses. There are many persons from labor, management, and the Academy who have played important roles in developing, interpreting, and applying these clauses. Past-practice clauses have been important in bridging the gap between the necessarily

broad coverage of the contracts and the multitude of specific problems that arise in daily operations.

These clauses have not created hardships; they have not kept the industry from enjoying great advances in productivity and rapidly increasing prosperity. They have merely given to the workers some protections which have been of great value and comfort. I hope we can all keep our perspective in these matters.

I do not entirely agree that the union's right to enjoy existing and past benefits arises only because of these so-called past-practice clauses. I believe such rights would exist without such clauses; but no one can answer that now because we cannot turn the clock back and start all over again just to find out.

One thing is certain: These clauses, no matter how they differ among the various steel agreements, all agree on the right of the company to abandon a practice when the circumstances underlying the practice are eliminated. In other words, they are based on the right of the management to make changes in product, material, machinery, etc. This consideration is important to the industry.

Equally, these clauses give a degree of stability to existing practices, customs, local agreements, benefits, etc. This has been important to the union, but, even if these clauses did not exist, many of the benefits and practices and customs and local agreements would have validity and, in my opinion, would be applicable in the consideration of the propriety of specific grievances.

All of us are in a relatively new, developing field of human experience. Putting a measure of democracy into the operation of our private capitalism and our industrial establishments is important, desirable, and very difficult. We try to do it with a minimum of governmental interference and a minimum of uniformity or imposition from above. What we are witnessing, really, is a new body of experience and precedent. We are all experimenting, even groping, in an effort to find constructive

workable methods for serving the common interest, which includes maximum consideration for the aspirations of each group.

What I have said represents my best judgment in the light of some years of experience, including several hectic and important years in the steel industry during which these very issues have been in the forefront in negotiations, debate, and arbitration proceedings.

It is not appropriate to assume that all the questions were answered years ago in a law article or some declaration. Let us not accept a doctrine merely because it sounds simple or seems consistent with some things we learned in law school some years ago before there was an opportunity to study at first hand the experiences of present-day collective bargaining. We—the people in labor and management and in the field of arbitration—are the architects of something new. With origins going back only 15 to 20 years, with maturity of organization and stability of relationship barely established, we are still developing new ideas and new modes of labor-management behavior. We are not primarily the interpreters of established rules; we are still pioneers in giving meaning to collective bargaining and labor-management relationships in the basic industries.

Many of the experiences which go back far before the origins of the present-day Union in steel do not help much because they are based on such thoroughly different economic factors with concepts wholly different from those which we live by.

I emphasize this because your understanding and creative contribution are essential. Many of you hear argument in terms of grievance facts; yet your decisions rest on broad areas of interpretation and theory. I know that many of you are subjected to mundane presentations from union grievance men and high-toned, elaborate discussions of alleged legal theories from company lawyers. Perhaps that is why I am taking pains today to emphasize the underlying philosophy of the Steel Union, at least, in the enforcement of contracts. I ask you to help in thinking through these problems. These are not matters where

the best presentation rules; the proper course is more important than which party makes the better argument.

Successful collective bargaining is vital to our way of life. Effective arbitration is vital to successful collective bargaining. I am sure some unions, some companies, and some industries get along very well without arbitration. But in the massive widespread basic industries, where integration of operations, policies, and procedures is essential, where a wide variety of operations, conditions, localities, and problems is inevitable, there must be arbitration of disputes under the contract. The role of such arbitration is of enormous importance. It affects the whole course of enterprise and the bargaining history. I know arbitrators say they are the creatures of the parties, confined to the role prescribed by the parties. But this is far too modest, because within those limits there are extremely important decisions to be made.

Let me conclude by saying that it is well that so many able men with so great an understanding have become part of this relatively new profession of arbitration. You have already made great contributions, not only as arbitrators but in government service, in administering wartime regulations, in mediation, and in helping to promote better understanding between labor and management. We in steel are especially grateful for the services of exceptionally able and fair-minded men, both as permanent umpires and in ad hoc roles. Their presence and their counsel have given us greater understanding and confidence in the future.

Discussion—

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The question of management's reserved rights always focuses attention on one of the most troublesome phases in labor-management relations.