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NATIONAL EMERGENCY STRIKES AND PUBLIC INTEREST*

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What is the "public interest" in relation to the problem of strikes and their settlement in the United States today? When does the public interest become involved in labor disputes? I suggest that, in our preoccupation with the consequences of interruptions in production of goods and services, we are wont to generalize much too loosely about the public interest and to invoke the mystic power of that term much too freely.

Having made that general indictment, it behooves me to prove my innocence by defining the concept of public interest as it relates to strikes and their settlement. I conceive this public interest to consist of a bundle of elements, which I express, for the sake of convenience, in the form of beliefs.

First, we believe that self-organization of employees in unions of their own choosing is a desirable thing and that collective bargaining should be actively encouraged. We have expressed this belief in a number of laws, both state and federal. We are fond of saying, and I think most of us deeply believe, that free trade unions are a strong bulwark of democracy.

Second, we believe in the right of employees to strike and of employers to lockout their employees. These rights are part of our democratic heritage. We consider it involuntary servitude to require one private individual to work for another private individual against his will, no matter how generous the compensation. Furthermore, it is generally recognized that the right to strike is an integral part of the collective bargaining process. Equality at the bargaining table means more than equality of verbal facility or equality in technical skill. It means equality in economic power—the power to withhold services on the one hand and employment on the other.

Third, we believe in the maintenance of the free enterprise system in its basic essentials. I shall not presume to define that system except in this negative fashion: it is an economic system in which the state does not exercise a controlling influence over economic policy, and particularly, intervenes to only a very limited extent in determining general wage and price policies. This definition leaves much to the imagination,

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but for our purposes it is precise enough. It is only in war emergencies, and their immediate aftermath, that the majority of the people of this country is willing to transfer to the state extensive controls over basic elements of our economic life, such as the determination of fair profits, prices, wages, and even the right to work or to set up a business. The violence and generality of the reaction in the post-war period against the so-called regimentation of the war-period is still fresh and vivid in our minds. The modification of, or if you please, the encroachments upon, the free enterprise system which occur in time of peace, come only slowly and after bitter struggles.

The fourth element is the interest in attaining and maintaining economic stabilization and maximum production. This is an interest which has become prominent particularly since the war. It is expressed, for example, in the Employment Act of 1946.[1] One aspect of this interest is that the production of goods and services essential to the health and safety of the public shall not be interrupted.

These, then, are what I consider the principal elements of the public interest in the strike problem. It is the interaction of these factors which has determined the general attitude toward the treatment of strikes, at least for the last generation, and will probably continue to do so for some time to come.

All work stoppages resulting from labor disputes involve the public interest. So far as the great majority of these stoppages is concerned, there can be no doubt that the public interest requires that there be no governmental intervention aimed at terminating them by compulsion. Such intervention would be contrary to each of the beliefs I previously named. First, it would gravely impair the effectiveness of collective bargaining. If the parties to the bargaining process know in advance that they cannot eventually resort to a test of economic strength, there can be no real bargaining. The development of responsibility in labor-management relations, of the growth of a spirit, as well as the fact, of cooperation between labor and management, is impossible when the government sooner or later takes matters out of the hands of the contestants.

Secondly, the right to strike is obviously illusory if the threat to strike, or the strike itself, is the signal for the government to step in to postpone or halt the stoppage.

Third, the prohibition of strikes requires, sooner or later, the introduction of compulsory arbitration. This means, inevitably, government control of wages, which brings with it government control of prices and other elements in our economic life. In short, the prohibition of work stoppages in general must quickly lead to a major change in our way

[1] 60 STAT. 23-25, Feb. 20, 1946, 15 U. S. C. A. §§1021-1024.

of life. Such a change, at least at the present time, would be contrary to the desires of the great majority of our people.

Fourth, most stoppages do not seriously interfere with the supply of essential goods and services, and do not threaten the health or safety of the public. Very few strikes can noticeably affect the level of production or threaten the stability of our economy. The disputants can test their strength as long as they wish and their individual struggles will cause scarcely a ripple in the economic life of the nation.

Consideration of each of the elements constituting the public interest leads to but one conclusion—so far as the great majority of strikes is concerned, it would be contrary to the public interest for the government to intervene in them with any compulsory process to terminate and settle them. The foregoing analysis may appear to be—and probably is—a belaboring of the obvious. I have done it, however, in the hope that I could thus isolate some relevant principles. I have sought some light in areas uncomplicated by the presence of extreme heat.

Our primary question is whether or not the public interest requires an attitude toward such strikes as may be deemed to affect health and safety different from that taken toward all other strikes. Specifically, should we retain legislation of the type of, though not necessarily containing the same provisions as, Title II of the Taft-Hartley Act[2] dealing with national emergency strikes? This includes compulsory cooling off periods, strike ballots, temporary injunctions, etc. Let us apply our public interest criteria to situations of this type.

First, what of the effect on collective bargaining? In my opinion, we have a wealth of experience demonstrating the destructive effect of such mechanisms. The outstanding example is the National War Labor Board. The former members of that Board would be the first to admit that the process of collective bargaining suffered substantially during the war. Both employers and unions went through their preliminary motions rather perfunctorily, for the most part, fully expecting the case to land in the lap of the Board. Despite everything the Board could do, it was quite evident that the parties to disputes very frequently failed to exhaust the potentialities of collective bargaining before coming to the Board. Also the requirement of the Smith-Connally Act[3] for cooling-off periods and strike ballots was universally conceded to be a complete failure, and one of the reasons was that unions came to use the strike ballot as part of the process of building up pressure against the employers.

I believe the emergency procedures of the Taft-Hartley Act are re-

[2] 61 STAT. 152-156, June 23, 1947, 29 U. S. C. A. §§171-182.
[3] 57 STAT. 163-168, June 25, 1943, 50 U. S. C. A. App. §§1501-1511.

peating history. The employers and unions whose activities may fall within the scope of the law have, to a considerable extent, already made the expected injunctions part of the bargaining process. The injunction has become an instrument for building up pressure. It is no exaggeration to say that the very possibility that an injunction may be obtained becomes a major factor in precipitating the strike. If the parties know that the calling of a strike or lockout irrevocably throws down the gauge of battle, they will weigh the alternatives with all the wisdom they have before taking the final gamble. On the other hand, if they believe that they can be bailed out by an injunction for a period of 80 days, or any other period, they will be more likely to take the risks of a stoppage, and will be more intractable in the bargaining process. The result is that settlements are delayed, the strikes generally occur anyhow, and they probably last as long as they would had there been no injunction.

In other words, such procedures actually impede the maturation of the collective bargaining process. This is of particular importance, since most of the recent serious strikes have occurred in industries where no real mutual trust has developed. The industry most frequently hit by injunctions obtained under Title II of the Taft-Hartley Act was the maritime industry. Collective bargaining in many parts of that industry has not progressed much beyond the primitive stages. Whatever be the reasons, it is evident that the parties have little confidence in each other. The development of such confidence is the *sine qua non* of industrial peace.

Second, what of the right to strike? It is said that in these emergency situations it should be recognized that the right to strike and lockout is simply not available to the parties. Consider the consequences of the formal recognition of such abandonment. In those particular areas of our economy which require the highest development of the art of collective bargaining, in order to insure against interruptions of production, the parties will be deprived of the ultimate sanction that gives meaning to the bargaining process. Furthermore, with rare exceptions, as between employer and employees, it is only the employees who suffer by such recognition. They are the ones usually making demands. If the employer knows in advance that they come only as suppliants, there is little likelihood of a fair bargain. To say, then, as a general rule, that the right to strike or lockout cannot be recognized in emergency situations, is, for all practical purposes, to throw the weight of the government on the side of the employers. Aside from any question of the invasion of democratic rights, the exercise of such favoritism cannot be considered in the public interest.

Once we are launched on this course, we shall sooner or later be

forced into compulsory arbitration. Certainly that will be the result—which has already occurred in a few states—if certain types of strikes are entirely banned. Once compulsory arbitration is adopted for a few important industries, the effect will be widespread. Once wages are set for a few key industries, their influence will be felt throughout the economy. Our postwar experience demonstrated that, when so-called wage patterns quickly blanketed the country. Under such circumstances, demand for state control of basic elements of our economy will be insistent, and irresistible. It appears, then, that the prohibition of, or even serious limitation on, the right to strike, even in so-called emergency situations, is contrary to the interest of the American people in the preservation of the basic elements of the free enterprise system.

The interest in the continuity of production or service in these emergency situations appears to be in conflict with the other three interests. Does it outweigh the other interests to the extent that we should conclude that general legislation of the type of Title II of the Taft-Hartley Act must be continued? The number of these crucial situations, in toto, has been extremely small, even if we admit, which I am not willing to do, that every case in which President Truman invoked the law was one that imperiled the health, safety or welfare of the country. And remember that our experience of the past three years, with all the reconversion strains and stresses, cannot be considered normal. The conditions precipitating most of the strikes were peculiar to a postwar situation and may never recur. Again, what industries are to be included in the category of industries essential to the safety and health of the public? Shall it be all public utilities, or only those national in scope, such as interstate railroads and communications facilities? Shall it be coal and oil? They why not steel? Will not the threat to health and safety depend on the length of the stoppage? Assuming we agree on the industries involved, what proportion of an industry must be stopped before the danger to health and safety arises? I mention these questions only to indicate the complexity of the problem of definition. Despite all these questions, I do not deny the proposition that there may be strikes or lockouts which, by general agreement, would fall in the category we are discussing. It does not follow, however, that a general statutory structure should be erected in order to encompass these rare cases. It is still true that hard cases make bad law. The definitions used in any statute must be broad enough to include a wide variety of possibilities. Considering the high development in this country of propaganda devices and techniques for manufacturing hysteria, it will be only a short period before the law is applied to situations not originally contemplated. What starts out as an instru-

ment devised for use only in crises, becomes a tool employed with chronic regularity.

In view, then, of all the qualifications that must be interposed concerning the interest in continued production of goods and services essential to the health and safety of the public, taken in conjunction with the other elements constituting the public interest, I submit that, on balance, the public interest is opposed to legislation controlling work stoppages of an emergency nature.

This does not mean that our government must always stand by impotently, regardless of the gravity of the stoppage and regardless of the peril to our economy. It does mean that the remedy should be prescribed for the specific case when it arises. It is just as necessary for the expert to diagnose an acute labor relations disorder *before* prescribing treatment as it is for a doctor to do the same in regard to a physical or mental disorder. General rules adopted in advance may be more than useless—they may be positively harmful. After the expert, who may be a regular or special government official, has made his diagnosis, a number of alternatives are open: special mediators may be employed; fact-finding boards may be set up, before or after a strike is called, with or without power to make recommendations; pressures may be exerted from the White House, etc. In any event, the procedures used will be ad hoc, crisis measures. The parties to disputes will not know in advance what to expect.

There is one other method for insuring continuity of production which I have not mentioned, namely, seizure of the plant or facility involved in the stoppage, and operation by the government. Superficially, this appears to have a certain advantage over the injunctive process because it cannot be charged that employees are being compelled to work for a private employer for his profit. Practically, if the war experience is a safe guide, this would be a fiction, though a legal fiction. Although the government would be the nominal employer and operator, the personnel of the private employer would continue to work as usual. In other respects, the objections to the injunctive process would apply with equal force to seizure. If there is no method provided for finally settling the dispute, and the working conditions *quo ante bellum* are maintained, then we have a case where the government has interceded on the side of the employer and rendered the union impotent. If compulsory arbitration is provided, then seizure is unnecessary. In short, seizure is no better answer to the emergency strike than is the injunction.

The formula I have supported in this discussion may sound utterly unsatisfactory because it is not a formula. It provides no guarantees. It offers no certainties that crises can be avoided. It is based on the

proposition that spectacular failures of collective bargaining are not to be countered by spectacular displays of force but by more and better collective bargaining. It is based on the proposition that mature men will rise to their responsibilities to the community on a voluntary basis much sooner than under the goad of legal compulsions. It is based, finally, on the proposition that the preservation of our basic democratic rights and privileges is worth the payment of a high price.