BOOK REVIEW

LABOR AND THE LEGAL PROCESS. By *Harry H. Wellington*. New Haven: Yale University Press, 1968. Pp. xi, 409.

While there is some temptation to view the collective bargaining process in terms of common law concepts of freedom of contract, the analogy is quite unsound. The economic basis of the differences to be resolved in the labor area simply do not fit the assumptions of commercial freedom. Not only is there a diametric disparity in the parties' perception of the benefit of such a contract, but also the contracting parties may be effectively monopolistic in their respective offerings. Thus, a discussion of freedom of contract in labor relations can be largely diversionary, involving extended analysis as to why either public policy or economic reality dictates that each party not be left totally to its own devices.

Professor Wellington avoids the attraction of the traditional concept and chooses to speak of "freedom of collective contract,"[1] a term to which the limitations necessitated by industrial relations can be readily applied. In this posture, the author's discussion of the legislatively imposed duty to bargain need not be an apology for abandonment of the principles of freedom of commercial association revered in other contexts. Moreover, such purposeful labeling may minimize reservations about the extent to which legal institutions should define the subject matter of "free" labor negotiations. Such desensitizing is necessary, of course, because our basic labor statute in fact not only requires that management meet with labor's representative but also gives labor the right to compel consideration of particular topics.[2] Beyond this suggestive framework, national policy supposes that the economic consequences of disagreement will prod the parties to meaningful negotiations and, generally, agreement.

It is true that the natural impetus for negotiation is strong, and

[1] H. WELLINGTON, LABOR AND THE LEGAL PROCESS 52 (1968) [hereinafter cited as WELLINGTON].

[2] See Labor-Management Relations Act § 8(d), 29 U.S.C. § 158(d) (1964): "[It is] the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . ."

that for the most part the desired result—peaceful dispute settlement—has been achieved. But the satisfaction of seeing the system work reasonably well has produced the corollary that the interchange between labor and management must be left undisturbed by governmental meddling. Particularly sacrosanct is the parties' complete control of the formulation and promotion of their respective demands. In his early pages, Professor Wellington endorses this viewpoint. In general laudation of the fact that legal institutions have not required the parties to make objectively reasonable proposals, he questions "whether one can assert with assurance that substantial progress toward agreement without warfare will be made by requiring employers and labor organizations to behave toward one another in a fashion deemed reasonable by the government."[3] In the same spirit, he accepts[4] the Supreme Court's pronouncements that ours is a system in which "the Government does not attempt to control the results of negotiations"[5] and that "the Board may not, either directly or indirectly, . . . sit in judgment upon the substantive terms of collective bargaining agreements."[6]

But as the remainder of the book concedes, our legal institutions, despite this rhetoric, have interjected themselves directly into the political and economic relationships of union and management. While our ideal may continue to be non-interference, the recent history of labor relations underscores our learning that public policy at times commands that the substantive terms of agreements be judged and that the results of negotiations be controlled. Despite the initial tribute to traditional views, this book distinguishes itself in the sensitivity with which its major chapters examine the critical tension between labor-management freedom and the need for satisfaction of otherwise unrepresented employee or public interests.

The range of instances in which practice has outstripped the ideal includes such varied intrusions as the statutory prohibition upon "hot cargo" agreements[7] and administrative disapproval of benefit differentials based solely on sex.[8] Among the most potent of external

[3] WELLINGTON at 57.
[4] *Id.* at 58.
[5] NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 488 (1960).
[6] NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 404 (1952).
[7] Labor-Management Relations Act § 8(e), 29 U.S.C. 158(e) (1964).
[8] Decision of EEOC, Case No. YNY9-034, CCH EMPLOYMENT PRACTICES GUIDE ¶ 8105

standards has been the duty of fair representation. In the past, it has been used extensively to attack racial discrimination. Its application in this area has justified the nullification of contract provisions which expressly prohibited employment of black workers in particular capacities,[9] restricted the percentage of blacks employed in certain job classifications,[10] and effectuated a work distribution system which was racially-based.[11] But it is with relation to more subtle forms of economic discrimination that the duty of fair representation could serve its most pervasive role in legitimatizing judicial and administrative scrutiny of the substantive terms of collective bargaining agreements. And it is at this level that the question of institutional nonintervention becomes a significant issue. Were present concepts refined, the labor representative approaching the bargaining table would not have unlimited discretion to allocate its bargaining energy among the range of interests it represents. As a check against abuse, each employee would be given the right to question whether he has received his share of the negotiated benefits. Yet, beyond broad principles framed to favor wide discretion in the bargaining representative, the standards for judging benefit allocation are not apparent.

In his discussion of standards, Professor Wellington notes the statement of the Supreme Court that the duty of fair representation imposes upon a labor representative a duty analogous to that imposed upon a state legislature under the equal protection clause.[12] But the absence of democratic institutions in the labor constituency leaves the analogy quite vulnerable to the author's criticism that collective decisions are not deserving of the same judicial respect as decisions of state legislatures.[13] Even the more recent pronouncement of the Court limiting the union's representational discretion to exercises undertaken in "good faith and [with] honesty of purpose"

(1969); Decision of EEOC, Case No. 68-9-183E, *id.*; ¶ 8053 (1969). The General Counsel of the EEOC early rejected the argument that a discriminatory benefit plan included in a collective bargaining agreement is immune from Title VII prohibitions. Opinion Letter, EEOC General Counsel, August 30, 1966, LAB. REL. REP., LRX 2122-23 (1969).

[9]Central of Ga. Ry. v. Jones, 229 F.2d 648 (5th Cir.), *cert. denied*, 352 U.S. 848 (1956).

[10]Tunstall v. Brotherhood of Locomotive Firemen & Engineers, 323 U.S. 210 (1944); Steele v. Louisville & N.R.R., 323 U.S. 192 (1944).

[11]Local 1367, Longshoremen, 148 N.L.R.B. 897 (1964), *enf'd.* 368 F.2d 1010 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967).

[12]Steele v. Louisville & N.R.R., 323 U.S. 192, 202 (1944).

[13]WELLINGTON at 159.

has not supplied a satisfactory basis for review.[14] For Professor Wellington, these are decisions in the institutional perspective, responsive to the limitations of the judiciary's capacity to serve as a forum for calling the representative to the defense of his bargain. Unfortunately he leaves his analysis at that point: the suggested standards are inappropriate, but judicial review may be unsatisfactory in any case. In the absence of guidelines more precise than those suggested by the Court thus far, distribution of economic benefits will be largely left to internal union decision-making. The element which compels rejection of the analogy between the duty of equal protection—an absence of democratic institutions within the union—also makes it doubtful that the decisions reached internally will be fair to all segments of the membership group. Our experience with racial discrimination in union representation underscores the danger. As long as the force of federal policy preserves not only exclusivity of representation but also the union's authority to exact financial support from every member, we should be disturbed by this implication.

Current precedents may not, however, be determinative of future developments with respect to economic discrimination, for they have been produced in cases which do not confront the particular issues which might be raised when, for example, an employee alleges that his union has not expended equal effort in negotiating a benefit package for his job classification. This sort of case does not offer the compelling policy choices which have characterized fair representation decisions to date, particularly those involving racial discrimination, and should necessitate a rethinking of the sincerity of judicial homage to a broadly-framed duty of fair representation.

There is one respect in which our legal institutions might seem to give full effect to a policy of non-intervention in the collective bargaining process: the parties can presumably choose not to bargain at all about a particular matter. Thus, where neither labor nor management perceives any advantage in securing concessions from the other on a subject, a governmental entity will not demand consideration of it. But this does not mean that the matter is immune from the legal process. Indeed, whatever commitment there is to governmental non-intervention in collective bargaining may be illusory in terms of the result ultimately effected. Employers and

[14] Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953).

labor in the construction industry, for example, have chosen not to bargain meaningfully about increasing the employment opportunities for members of minority groups. National policy cannot accept that decision and requires, at least for those projects involving federal expenditures, that unilateral efforts be undertaken by the government to effectuate reversal of prior employment practices. The institutional response in this instance was the Philadelphia Plan, under which specific numerical commitments to minority manpower utilization are made a condition of bidding for federally funded construction projects.[15] Thus by executive declaration, the admission and referral policies of unions, and the employment futures of existing members, have been radically adjusted to satisfy national policy. It is not supposed that labor or management had sufficient interest eventually to initiate a satisfactory program for achieving increased employment opportunities for minorities. But the lesson is clear. When a superior national labor policy requires implementation, we are equipped, both institutionally and philosophically, to abandon the assumptions upon which traditional notions of free collective bargaining are based. In this context, the principle of non-intervention must be restated to recognize that the freely-bargained result is exalted only to the extent it does not impinge the creditability of the legal process. Beyond that, continued institutional perpetuation of the principle cannot be justified.

Professor Wellington confronts this limitation inherent in permitting self-selection of bargaining topics. While the issue he selects is wage-price guidelines as a control of inflation rather than minority employment opportunities in the construction industry, the proffered analysis has broad implications. He suggests methods for satisfying national policy without resort to the type of unilateral governmental action undertaken in the Philadelphia Plan. The alternative most persuasively pursued is that of integrating guidelines such as those of the Council of Economic Advisers[16] with the statutory duty to bargain. Not only would the parties have a general duty to bargain in good faith, but they could be made to discuss in good faith their respective positions with regard to the several flexible guidelines proposed by the Council.[17] The author

[15] See CCH EMPLOYMENT PRACTICES GUIDE ¶ 16,176 (1969). *See also id.* ¶¶ 8069, 8104.
[16] ANN. REP. OF THE COUNCIL OF ECONOMIC ADVISERS (1962).
[17] WELLINGTON at 324.

appropriately does not require compliance with these standards. Provision for judicially enforced conformance would undercut the impetus for negotiation since the bargain struck might not be that to which the parties are ultimately required to adhere. Anticipating that a more forceful procedure may be required, the author examines other, equally innovative approaches.[18]

To the extent that the book presents a recurring statement of the fundamental truths of labor in the legal process—and the diversity of its coverage does not readily admit to a singular categorization—its viewpoint is summarized in this discussion of wage-price restraints. The author's preference is clearly for the collectively bargained result. Dispute resolution by undisturbed private negotiation, in his view, is most likely to satisfy the national interest in minimizing industrial warfare. Even when other national interests are left unsatisfied in the substantive terms of the bargain achieved, the reaction of our legal institutions should be guided by respect for the bargaining process. In fashioning alternative means of effectuating policy, that process should be abandoned only after every means of incorporating it into the decision-making structure has been explored. The hallmark of this philosophy is its patience in deferring realization of national policy goals while alternatives utilizing the bargaining process are field-tested. However, herein lies its limitation. Resolution of some issues cannot await the finding of a workable approach within the bargaining context. For other questions, such as employment opportunities in the construction industry, the hoped-for result is unlikely to flow freely from private negotiation by parties neither of whom has a significant interest in providing broad solutions.

John C. Weistart*

[18]One alternative envisages a federal committee, made up of representatives from labor, management, and the public, whose purpose it would be to restate economic policy in terms relevant to collective bargaining. Effectuating the policy formulated at the national level would be commissions drawn along regional or industry lines and given authority to intervene in those contract negotiations which have a significant impact on national economic conditions. Also pursued is the possibility of adding some variation of the above to the range of procedures which should be available to the President for dealing with major work stoppages. WELLINGTON at 327-33.

*Assistant Professor of Law, Duke University; B.A. 1965, Illinois Wesleyan University; J.D. 1968, Duke University.