

# TYPES OF LABOR DISPUTES AND APPROACHES TO THEIR SETTLEMENT

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The readers of this symposium will include not only persons familiar with labor disputes but also interested general readers who have had little first-hand acquaintance with such matters. It is primarily for the latter group that this note is intended. Its purpose is to discuss the general categories into which such disputes fall and, very briefly, the several ways in which settlement of such disputes can be sought. Detailed treatment of these approaches to settlement is reserved for separate articles appearing elsewhere in this issue.

## I

The National Labor Relations Act and the Norris-LaGuardia Anti-Injunction Act contain the same definition of the term "labor dispute."<sup>1</sup> This definition is more notable for its scope, however, than for the enlightenment it affords concerning the variety and complexity of situations which can develop when employers and labor unions engage in altercation.

One obvious approach to some systematic arrangement of "types of labor disputes" would be in terms of the forms of pressure exerted by one side or the other. Pressure moves in labor disputes are what the public sees; they are the matters which receive the greatest attention from the press. A second approach, and a more fruitful one from the standpoint of settlement, would classify the basic dispute in relation to the collective-bargaining status of the parties.

Using the first approach, it may be noted that labor disputes are at times accompanied by strikes, picketing, slowdowns, boycotts, lockouts, black-listing, strike-breaking or other similar incidents (involving, perhaps, violations of law by representatives of one side or the other). These are the external evidences of the dispute; they do not tell us much about the basic controversy. And there may be labor disputes involving none of these features which nevertheless require settlement.

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<sup>1</sup> "The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee." 49 STAT. 450 (1935), 29 U. S. C. §152(9) (1940); 47 STAT. 73 (1932), 29 U. S. C. §113(3) (1940).

If it were desirable, it would be possible to analyze the measures taken by the parties to labor disputes in terms of economic strategy, physical tactics, psychological warfare, and political maneuvering. It is possible, in fact, to view the whole body of labor law in terms of the judicial and legislative process which from time to time alters the relative strength of the parties, now giving a potent legal weapon to one side or the other, and again rendering legally ineffective a device used by one of them. Analyses along such lines, although they have some utility and are appealing because of the dynamic character of the subject-matter, overemphasize the "struggle" aspect of labor relations and distort out of all recognition the economic function performed by the enterprise in which the employment is carried on and the relationship that must exist between employer and employee in carrying out that enterprise with the maximum of benefit to the parties and the general public. If one of two parties, engaged in an enterprise in which there is mutuality of interest, wins a "battle" over the other, the probability of success of the enterprise will be lessened in proportion to the damage inflicted. Normally, however, it is the employer and his employees who are engaged in the mutual enterprise—not the employer and a union, unless the employees have chosen to make the union their *alter ego* for this purpose, or the employer has accepted the union as acting for his employees in a complete sense.

No attempt will be made here to define the pressure measures referred to above, since most of them are familiar to readers of the newspapers today. Certain special situations may deserve comment because of their prominence in current legislative proposals. A strike is a concerted cessation of work by employees seeking some concession from an employer. The *jurisdictional strike* seeks the concession at the expense of another union, or group of employees acting in concert. The dispute is really then between the two unions or groups of employees, although the pressure is brought against the employer. A *sympathetic strike* is a work cessation by employees seeking no concessions from their own employer, but lending their support to employees in another business who are seeking to force concessions from their employer. A boycott is a refusal to deal in order to force concessions. In labor disputes a *secondary boycott* is a concerted refusal to deal with persons who have dealings with an employer who is involved in a primary labor dispute. Some further discussion of these measures will appear in other portions of this note.

All of these incidents may occur in any type of dispute. They may coexist in a variety of combinations in the same dispute. They may be entirely absent. It is the dispute itself, however, that requires settlement. The nature of that dispute can be understood best by considering the areas of potential disagreement in labor-management relations. What are these general areas of disagreement? The following questions will suggest the answer:

(1) Does the dispute relate to the recognition of the union as the bargaining agent for certain employees or classes of employees?

(2) Does the dispute relate to the terms that shall govern the relations between an employer and his employees?

(3) Does the dispute relate to the application or interpretation of an agreement governing the relations between an employer and his employees?

(1) *Union Recognition.* A typical dispute concerning union recognition occurs when a union presents a demand to an employer, stating that his employees have designated the union as their representative for collective bargaining purposes, and the employer refuses to accede to the demand on the ground that the union is not authorized to speak for the employees. The National Labor Relations Act<sup>2</sup> and laws in some of the states provide a means of determining such controversies. If no law of this type applies, the parties are left to their own resources, and to the techniques of settlement which will be discussed subsequently in this note.

There are variations from the typical pattern, all involving a union-recognition question of some sort. For instance, a union may present a demand to an employer that he henceforth employ only members in good standing of that union, without asserting that any of the employees are members of the union or even that they desire the union to make the arrangement set forth in its demand. In an aggravated situation of this kind the employees may have already indicated their desire to be represented for collective-bargaining purposes by a union other than the demanding union, and there may have been an official certification of the other union by an appropriate governmental agency. The object of the pressure applied in the jurisdictional struggle thus precipitated is to compel the employees to change their union preferences by threatening them with the loss of their jobs. This was the situation which the President of the United States had in mind in his 1947 message to Congress on the state of the Union,<sup>3</sup> when he stated that the jurisdictional strike should be outlawed when it sought to compel an employer to deal with a union other than that certified by some governmental agency or otherwise legally designated by the employees themselves.

(2) *Contract Negotiations.* Disputes in the negotiation of contracts have to do with the basic framework which is to govern the relationship between an employer and his employees. Most of the recent spectacular strikes in basic industries have been outgrowths of this type of disagreement. The category includes not only disputes in the negotiation of an initial agreement or of any renewal of such an agreement, but also disputes concerning provisions of the contract which are subject to reopening and renegotiation during its term. For instance, the contract may run for a one-, two-, or three-year period, but it may provide that the question of wages may be reopened by either party at six-month intervals, or after thirty days' notice, or upon certain changes in the cost-of-living index, or upon certain changes in the price of a basic commodity vitally affecting the industry. Any of these con-

<sup>2</sup> 48 STAT. 449 (1935), 29 U. S. C. §151 *et seq.* (1940).

<sup>3</sup> 93 Cong. Rec., Jan. 6, 1947, at 135.

tingencies may lead to a "contract-negotiation" dispute. Also included in this area of disagreement are those questions which remain subject to negotiation because of the fact that the agreement neither resolves them nor furnishes a procedure for settling them.

It is contract-negotiation disputes which present the greatest difficulty to outsiders attempting to promote industrial harmony, and, as experience in 1946 has shown, it is these disputes which lead to the greatest loss of man-days in strikes.

(3) *Contract Interpretation.* The third area of disagreement concerns the application and interpretation of the collective agreement. From the standpoint of settlement this, in many respects, is the easiest type of dispute to deal with. More and more it is being recognized that such questions can be resolved through procedures established by the parties themselves. In many contracts provision is made for their ultimate settlement by arbitration. It should be noted that the interpretation of contracts has historically been a function of the courts, so that proposals that disputes in this area be submitted to a court or an arbitrator for decision do not involve any sharp departure from custom and tradition.

## II

With this brief discussion of the types of labor disputes in mind, we may turn to a consideration of the approaches to settlement which are available to the parties and to representatives of the public. The complexity and variety of labor problems are such that any generalization or short treatment of this subject must be something less than the full truth. It is believed, however, that the following list includes all of the usual approaches to settlement of a labor dispute:

- (1) Discussion and negotiation
- (2) Conciliation
- (3) Mediation
- (4) Voluntary arbitration
- (5) Investigation and fact-finding
- (6) Compulsory arbitration
- (7) Court action
- (8) Legislation

(1) *Discussion and Negotiation.* Discussion and negotiation between the parties involved, without the assistance of any outside agency, is, of course, the first step in any effort to settle a dispute. If the dispute relates to union recognition, the employer may deem it inadvisable to enter into such discussions until certain preliminary steps have been taken (for example, until the union has been certified by the National Labor Relations Board). Discussion and negotiation with respect to the terms of a contract is encompassed in the term "collective bargaining," a process in which all parties—labor, management, and government—today proclaim

their belief. Adherence to the principle of collective bargaining implies willingness to seek in good faith a solution to the demands of the other party. Discussion and negotiation of disputes in the third category (contract interpretation) are usually conducted in accordance with grievance procedures outlined in the contract.

The success with which this approach is used in the solution of labor difficulties depends in a large measure upon the willingness and desire of the parties involved to achieve stability in industrial relations without recourse to outside agencies. The extent to which it is used successfully may, therefore, be regarded as an index of the maturity of the relationship between the parties, although it must be remembered that "immaturity" of only one of the parties to the relationship can defeat the attempt to work out problems through mutual discussion and reasonableness.

(2) and (3) *Conciliation and Mediation*. These two terms are discussed together because in the vocabulary of modern labor relations they are for practical purposes interchangeable. Conciliation denotes the intercession of an outside party who attempts to bring the disputants together and who encourages them to resolve the dispute. Strictly speaking, the conciliator may concentrate his powers of persuasion on one party alone. Mediation suggests a more positive and affirmative role for the interceding third party, and contemplates his dealing with both disputants. If original meanings were strictly retained, the process would correctly be called conciliation if *X*, being informed of the fact that *A* and *B* are in dispute, urges upon *A* and *B*, or either of them, the necessity and importance of resolving the dispute. The term "mediation" would be properly applied if *X* in this situation should work with both parties to resolve the matter, and present to both *A* and *B* a concrete proposal for settling their differences. This distinction, however, is of little current importance. It is well known that the United States Conciliation Service, for example, makes full use of the process here referred to as "mediation." Neither term connotes enforced compliance with the suggestions of the conciliator or mediator. Some statutes introduce an element of compulsion by requiring disputants to notify a governmental agency that a dispute exists, so that an opportunity for conciliation and mediation is afforded, or by compelling the parties to submit themselves to the process even though they remain free to disregard the recommendations of the mediator.

It would be interesting to discuss at length the techniques of conciliation and mediation. That they constitute an art to be mastered only through aptitude and diligence is demonstrated by the known proficiency of certain individuals, as well as by the established fact that the inept intervention of a well-meaning third party may frequently destroy such opportunities as do exist for bringing a dispute to a harmonious conclusion. Briefly, the conciliator or mediator can perform the function of clarifying for the parties the issues involved; he can perform the function of suggesting new approaches when the parties have grown stale; he can be used as an intermediary to whom the parties may reveal facts or positions which they are

unwilling to reveal directly to the opposing party. At times, the conciliator or mediator can provide technical data and draw on his experience in the industry, in addition to making suggestions based on his experience with the solution of similar disputes.

(4) *Voluntary arbitration* means that the parties willingly place the dispute before a third party with the request that he resolve it in accordance with the terms of the "submission" in which the parties have joined. The parties agree that the arbitrator's decision shall be binding on them. The submission may be *ad hoc* (that is, covering a single specific dispute), or the general agreement governing the relationship between the parties may include a provision that all disputes of certain types will be submitted to arbitration.

Arbitration is judicial in character, in contrast to mediation and conciliation, in which reliance is placed upon compromise and mutual concessions. The arbitrator is a judge. By their agreement the parties define his jurisdiction and the issues to be submitted to him. This agreement distinguishes voluntary arbitration from compulsory arbitration, which will be discussed below.

A dispute as to the negotiation of a new collective agreement may be submitted to arbitration by the parties, although this approach to settlement is more normally used in the contract-interpretation type of dispute.

(5) *Investigation and Fact-finding*. This approach to the settlement of labor disputes was approved by the President of the United States in his request for legislation in 1946.<sup>4</sup> The proposed bill<sup>5</sup> would have provided for the appointment of fact-finding boards with full authority to investigate labor disputes and to report their findings, but with no authority to force the parties to accept such findings nor to take any action based on the findings. The bill was not passed, but pursuant to Presidential order there was extensive use of fact-finding boards on an industry-by-industry basis in the period immediately following the abolition of the War Labor Board. This technique is appropriate, normally, only in contract negotiation disputes. It represents an extreme degree of third-party interference in the dispute between the parties, although it stops short of forcing acceptance of the findings upon the parties to the dispute. Advocates of this procedure rely upon public opinion to force acceptance. It is likely that this approach will prove more effective on a local and unofficial basis than in nationwide industrial disputes.

(6) *Compulsory Arbitration*. Compulsory arbitration is the requirement that disputes not otherwise resolved must be submitted to third parties for final and binding determination.

In disputes involving union recognition, compulsory arbitration has in effect been established for cases falling within the National Labor Relations Act. Furthermore, a great many contracts provide for the arbitration of disputes concerning their interpretation and application, and in affairs outside the field of labor relations

<sup>4</sup> H. R. Doc. 381, 79th Cong., 1st Sess. (1945).

<sup>5</sup> H. R. 4908, 79th Cong., 1st Sess. (1945).

it is quite common to compel contending parties to submit their disputes over the meaning of agreements to a compulsory process. Consequently, the use of compulsory arbitration in these two types of labor disputes involves no startling innovation. However, when we turn to disputes of the second type, relating to the negotiation of the agreement which is to govern the relationship between the parties, we encounter what seems to many an insurmountable obstacle to the employment of compulsory arbitration; for here arbitration means that a third party is called upon to say what the agreement between the parties shall be when the parties themselves have been unable to reach agreement. It is this fact which makes the contract-negotiation dispute the paramount one for study and consideration, as is evidenced by the number of articles in this symposium dealing with it.

Compulsory arbitration has become an emotionally charged term. Some seek to avoid the emotional connotations by suggesting "labor courts." Obviously such variations in terminology are immaterial except in a psychological sense. The nub of the question is whether or not the disputants must accept the decision of a third party when they have not agreed to be so bound. Requirements that parties give notice and postpone during a "cooling-off" period the use of their economic power to engage in a strike or lockout, that they submit their disputes to certain processes of mediation or to investigation and fact-finding before using such power, are measures which partake of compulsion, but they do not constitute compulsory arbitration unless coupled with the requirement that there be compliance with a decision imposed from the outside. During the recent war there was compulsory arbitration of labor disputes by the War Labor Board. Yet in the board's operations the semblance of voluntarism was preserved because it was founded on a national no-strike, no-lockout agreement reached by labor and industry representatives in December, 1941, in which it was agreed that all disputes would be settled by peaceful processes.<sup>6</sup> Even so, the War Labor Board could not enforce its own orders.<sup>7</sup> That had to be done under the war powers of the President.<sup>8</sup>

(7) *Court Action*. It is frequently urged that courts should resolve all labor disputes. It should be noted that such proposals involve compulsory arbitration. The mere fact that the third-party function is performed by a court does not relieve the process of its compulsory character, nor remove the basic objection in contract-negotiation disputes that a non-contractual solution is imposed upon the parties.

However, quite apart from proposals for extending the functions of courts in this field, it should be noted that the courts do play an important part in labor disputes even now, particularly in dealing with their external evidences. For example, action on the picket line may involve breaches of the criminal law. Civil damage

<sup>6</sup> See EXEC. ORDER No. 9017, Jan. 12, 1942.

<sup>7</sup> See *National War Labor Board v. Montgomery Ward & Co.*, 144 Fed. (2d) 528 (App. D. C., 1944), *cert. denied* 323 U. S. 774 (1944).

<sup>8</sup> See *U. S. v. Montgomery Ward & Co., Inc.*, 150 Fed. (2d) 369 (C. A. A. 7th, 1945), *vacated* 326 U. S. 690 (1945) on the ground that the cause had become moot.

suits may grow out of the same set of facts, and other union activities such as boycotts may lead to damage suits to be tried in courts. Injunctions against certain types of union activity were used quite extensively before the passage of the Norris-LaGuardia Anti-Injunction Act and its state counterparts. Questions with respect to the enforcement or meaning of collectively bargained agreements may be brought into courts; the courts may be called upon to determine the validity of arbitration awards, and so on. The generalization is still true, however, that the courts do not provide a medium for the solution of most basic labor disputes, and they perform no function whatever in grappling with the very difficult contract-negotiation dispute.

(8) *Legislation.* Legislation is listed as an approach to the settlement of labor disputes because through legislation certain disputes may be entirely eliminated or procedures may be provided for their settlement. Legislation providing settlement procedures, however, results only in requiring or extending one or more of the approaches previously discussed.

One of the most important pieces of labor legislation, and one which is prominent in current discussions of the problem of dispute settlement, is the National Labor Relations Act. This Act does not purport, however, to provide solutions or even formal procedures for the solution of major types of labor disputes. It affirms the full freedom of workers to organize and to designate representatives of their own choosing for the purpose of negotiating the terms of their employment and for other mutual aid or protection. As has already been noted, it establishes compulsory procedure for the settlement of one type of dispute—the union-recognition disagreement. It sets up legal machinery for the prevention of unfair labor practices which obstruct the function of collective bargaining. Its primary purpose is to insure the removal of impediments to collective bargaining, in the hope that through that process, negotiating freely and in good faith, the parties themselves may reach agreement. The Act does not attempt to prescribe the results to be reached, nor to impose solutions in those cases in which the method of collective bargaining fails to produce a settlement.

However, it is possible by legislation to deal with the substance of the employer-employee relationship and, by defining the rights and duties of the parties, to remove certain elements of that relationship from the field of economic contention. This is shown in a negative sense by those state statutes which forbid agreements establishing the closed shop or the union shop. The Fair Labor Standards Act<sup>9</sup> is another instance of legislation which cuts down the area of dispute. All employees covered by the Act must receive at least forty cents per hour, and time and one-half after forty hours per week. Agreement between the parties cannot validly effect any arrangement which would be less beneficial to the employees. Thus through legislation it is possible to take certain matters out of the hands of the parties entirely,

<sup>9</sup> 52 STAT. 1060 (1938), 29 U. S. C. §201 *et seq.* (1940).

or to circumscribe the area within which they can bargain and hence the area within which disagreements can arise.

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From the great number of bills introduced this year in Congress and in the legislatures of the several states, it is obvious that many people believe that by "passing a law" the labor-dispute problem can be largely dissipated. Legislation can, indeed, be helpful, but it is hoped that this brief analysis has served to create some doubts concerning any easy, "over-night" solution to the problems here under discussion.