Federal Labor Laws

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Part VI – Enforcement of Collective Bargaining Agreements

XXXIII. Alternative Methods of Dispute Resolution

A. Theoretical Framework

1. The declaration of public policy in the original Wagner Act had important implications for the development of a modern American system of industrial relations. The 1947 Taft-Hartley amendments to the National Labor Relations Act signified a major shift in that public policy. The declaration of public policy states (with the Taft-Hartley changes indicated in bold print):

   The denial by **some** employers of the right of employees to organize and the refusal by **some** employers to accept the procedure of collective bargaining leads to strikes and other forms of industrial strife or unrest, which have the intent or necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

   The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

   Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.[1]

2. It is important to recognize the distinction between the legislative policy of encouragement of collective bargaining and the policy of encouragement of industrial peace and stability, both of which are included in the original act. From an organizational standpoint, the former was probably more significant in 1935, as one factor contributing to the rapid growth of the labor movement in the United States between 1935 and 1947. However, the promotion of industrial peace has been more significant in the development of federal labor relations law.

3. The 1947 Taft-Hartley amendments added an additional declaration of policy which clearly illustrates the shifting emphasis of public policy. The new declaration states:

   Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognized under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

   It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which

[1] 29 USC § 151.

affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.[2]

4. The specific affect of these changes were to:

   a. Neutralize the government by giving the National Labor Relations Board the role of regulator of labor relations rather than supporter of the collective bargaining process.

   b. Balance regulation of employers with comparable regulation of unions.

   c. Restrict union use of economic weapons to narrow the range of legal forms of pressure, in an attempt to protect supposedly neutral employers from the effects of labor disputes.

   d. Subordinate the organizational interests of unions by elevating the rights of the individual non-member.

5. The federal judiciary has followed the lead of Congress in its interpretation of public policy. Federal law of labor relations indicates a strong judicial preference for peaceful forms of workplace dispute resolution, and a comparable disdain for methods which include elements of economic coercion.[3]

6. The objective of this outline is to provide a theoretical discussion of the major alternative forms of dispute resolution in industrial relations, with an analysis of the reasons why certain forms predominate in the American industrial relations system.

B. Definition of Alternative Forms of Dispute Resolution

1. In the American industrial relations system, there are at least eight distinct forms of dispute resolution which are used to establish or enforce job rights. Most labor-management relationships depend upon a combination of methods to resolve interests and rights disputes.

2. **Negotiations**: The collective bargaining process begins with the concept of voluntary negotiations as the primary method for resolving disputes. Negotiations are direct efforts between the parties to reach mutually agreeable solutions to identified disputes.

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[2] 29 USC § 141.

[3] *See, e.g.*, *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 40 LRRM 2113 (1957), in which the judicial preference for peaceful means for the resolution of labor disputes was articulated, and *Boys Market, Inc. v. Retail Clerks Local 770*, 398 U.S. 235, 74 LRRM 2257 (1970), as one example of the Court's willingness to curb the coercive use of economic pressure in deference to peaceful alternatives.

3. **Adjudication**: Adjudication is the use of a government agency as the final arbiter of labor disputes, either in the establishment or enforcement of job rights.

    a. For the general private sector, the role of adjudication is limited to enforcement of recognized legal rights. Beyond minimum standards of conduct, parties to disputes are left to the private arena of dispute resolution.

    b. Systems of adjudication are more comprehensive in the public sector and in employment relationships covered by the Railway Labor Act.[4]

4. **Arbitration**: Arbitration is a system under which parties to a dispute submit their respective positions to a third party who is empowered to resolve the dispute for the parties. In most situations, the decision of the third party is binding on the parties.

    a. Arbitration is most common in the private sector in "rights" disputes, where the issue submitted to an arbitrator concerns the enforcement of job rights articulated in a collective bargaining agreement.

    b. In the public sector, where there has been a stronger historical resistance to recognition of the right to strike, "interests" arbitration is quite common. In interests arbitration, the third party is asked to establish job rights if the parties are unable to reach a voluntary agreement.

5. **Legislation**: It is theoretically possible to seek legislative action to resolve labor disputes, but the tradition of American law makes "private" legislation unlikely. Legislation is the enactment of laws by the duly constituted government. In the American tradition, only general standards concerning minimal conditions of work are created through the legislative process.[5]

6. **Litigation**: Litigation is the system of reliance upon the courts of law or equity to enforce contracts or standards of employment. This is a very common form of dispute resolution in the American industrial relations system, although the extent of judicial involvement is relatively narrow.

    a. The equity jurisdiction of the court system is most commonly involved in the enforcement of no-strike agreements and in the protection of the employer's property from improper strike or picket activity.

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[4] 45 USC § 151. For an example of a state public sector collective bargaining law which involves a more active involvement of the state in the substance of the collective bargaining process, *see, e.g.,* Minnesota Statutes, § 179A.01 et seq.

[5] *See, e.g.,* the Fair Labor Standards Act, 29 USC § 201 et seq., establishing minimum wage and overtime requirements.

b. The legal jurisdiction of courts is used to enforce collective bargaining agreements, specifically agreements to arbitrate.

7. **Mediation, conciliation, fact-finding**: These methods represent the non-intrusive involvement of third parties in the negotiations of labor and management.

   a. Mediation and conciliation are systems in which a third party will attempt to remove barriers to negotiations without becoming involved in the merits of the positions of the parties. Mediation is quite common in both public and private sector negotiations.

   b. Fact-finding is a system in which a neutral collects and analyzes pertinent information with the goal of encouraging the parties to accept a rational solution to the dispute. Fact-finding systems are commonly used in public sector interests disputes.

8. **Self-help, or the use of economic power**: Power can be an effective method for resolving disputes. If either side to a dispute has the ability to impose its solution on the other, the dispute will be resolved. In industrial relations, the use of economic power as a means of dispute resolution is the objective of the strike and the lockout.

C. Relative Advantages of Alternative Methods of Dispute Resolution

1. Depending upon the nature of the relationship between a union and an employer, different systems of dispute resolution may be preferable. However, certain common concerns can be used as measures of the effectiveness of the alternatives.

2. **Cost**: Private methods of dispute resolution tend to be less costly than reliance upon outside intervention. If parties are able to negotiate a solution, the costs are limited primarily to the time spent in those negotiations.

   a. Of the alternatives, litigation is perhaps the most costly because of the necessity for the use of attorneys in the process. Similarly, arbitration is a costly process because of the expenses of the neutral which must be absorbed by the parties.

   b. Mediation, fact-finding, and adjudication are systems in which the real costs are hidden through public subsidies. The parties to a dispute in which mediation is involved may avoid the real costs of settlement by having the general public pay the expenses of the mediator.

   c. Strikes and lockouts have cost considerations associated which are of a different nature than the other alternatives. The cost of a strike or a lockout is most significant in its lack

of predictability, not its amount. As a strike or lockout lengthens, the costs and their impact increase dramatically.

3. **Time**: The length of time it takes to resolve a dispute can affect the desirability of an alternative method of resolution. Except in injunction cases, litigation is a very time consuming process, as is the effort to affect job rights through legislation. Adjudication is quicker but still quite time consuming.

   a. Despite the reputation of strikes, self-help is perhaps the quickest method for resolving a labor dispute. Even a long strike is short as compared to the time it takes for agencies and courts to act.

   b. The time involved in negotiations is unpredictable. The major problem with bargaining is that negotiations alone can be unending. Mediation, strikes and arbitration are most commonly used as methods to force timely negotiations.

4. **Expertise of the decision maker**: If outsiders are involved in resolving a labor dispute, those systems which assure an outsider will have some expertise in labor relations are generally preferable to litigation. Arbitration has the additional attraction of control. The parties can select an outsider with very specific forms of expertise which would not be available in a system of litigation or adjudication.

5. **Integrity of the bargaining process**: Assuming that negotiations are the preferable method for establishing and enforcing job rights, reliance upon any other system as an adjunct to negotiations should reinforce the bargaining process. That is the clear intent of systems of mediation and fact-finding in which the involvement of outsiders is minimized. Too often, systems of adjudication, litigation and arbitration are seen as substitutes for effective negotiations rather than as supplements.

6. **Privacy**: Negotiations, arbitration and mediation are generally private processes in which the dynamics of the parties are not subject to public scrutiny. This is generally an attractive characteristic, as parties will not necessarily want the solution to their disputes to be published.

7. **Predictability of the result**: A system of dispute resolution which allows the parties to anticipate the likely outcome should facilitate voluntary resolution. If the relative merits of each party's position is relevant to the ultimate resolution, the result of a dispute should be objectively predictable. Litigation, adjudication and arbitration are all systems which presume some continuity in the results of related disputes.

8. **Finality**: The major problem with negotiations is that it is a system of dispute resolution which lacks finality. Successful labor negotiations are generally based upon some system of forcing a solution if the negotiations process continues without success.

Most labor-management relationships are based upon negotiations with a hammer**;** some other alternative which assures that a final solution will be reached.

D. Methods for the Establishment of Job Rights

1. In private sector industrial relations in the U.S., job rights are most commonly established through a system of negotiations backed up with the threat of economic power. The fixed-term collective bargaining agreement provides the time frame for the negotiations process with the threat of a strike or lockout used as a means to facilitate successful negotiations.

    a. The role of the National Labor Relations Board as an adjudicatory body in labor disputes is limited. The objectives of the Labor Management Relations Act is to force the parties to bargain in good faith, but to leave the terms of negotiations to the voluntary arena, subject to limited legislative standards.

    b. Since the enactment of Taft-Hartley, the possibility for federal intrusion in the bargaining process has intensified. In most disputes, the involvement is limited to the provision of mediation services. However, in disputes with a significant impact on the national economy, the intensity of involvement can increase, through a form of fact-finding and significant restrictions on the use of economic power.

    c. For private sector employment relationships, litigation and arbitration are rarely involved in the establishment of job rights.

2. In industries not covered by the Taft-Hartley Act, different forms of interest dispute resolution are more common.

    a. In the railroad and airline industries, negotiations take place in an arena closely monitored and supervised by public agencies. The use of economic power is still an important lever in negotiations, but on a less significant scale than in the general private sector.

    b. In the public sector, a majority of workers do not enjoy the legal recognition of the right to strike. Therefore, alternative forms of interest dispute resolution are much more common. Mediation, fact-finding, adjudication and arbitration are all prevalent as forms of establishing job rights for public sector workers.

E. Methods for the Enforcement of Job Rights

1. Since the collective bargaining agreement has developed as the principle document establishing job rights for organized workers, the methods used for enforcing those rights has evolved in a consistent manner.

a. Most collective bargaining agreements give to the employer an important measure of economic stability through negotiated no-strike and no-lockout agreements. As unions have given up the strike in exchange for fixed term collective bargaining agreements, it has become necessary to substitute alternative methods for enforcing rights established by contract.

b. Although the Taft-Hartley Act gave federal courts jurisdiction to enforce collective bargaining agreements, the most common method used to support the negotiation of rights disputes is arbitration. Since the 1950's both the Supreme Court and the National Labor Relations Board have indicated a preference for arbitration as a means for enforcing negotiated job rights.[6]

c. The most common method for union enforcement of contractual rights is negotiations through a limited grievance procedure, with the ability to invoke arbitration if the negotiations fail.

d. For employers, the most common form of dispute resolution during the life of a collective bargaining agreement is litigation.

2. In the public sector, arbitration is also a commonly negotiated method of dispute resolution for rights disputes. However, the unique nature of public sector employers also makes adjudication a significant alternative.

F. The Social Compact

1. It has been suggested that the period from World War II through the early 1970's was an era in which the overall industrial relations climate was based on mutual tolerance between labor and management in the United States. During this era, both sides pursued strategies of moderation, in tacit exchange for benefits extended from across the table. The extent of this "social compact" went beyond the collective bargaining process.

2. In bargaining, the social compact era was characterized by agreements which gave broad rights to both management and labor. Central to this compact were relatively long, fixed-term collective bargaining agreements with assurances of gradual pay increases. In return, management was given stability and a disciplined workforce, through contractual no-strike pledges, recognition of broad management rights, and a relatively bureaucratic grievance procedure that removed dispute resolution from the point of production. The union structure was strengthened

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[6] Textile Workers Union v. Lincoln Mills, note 3, *supra*; Spielberg Mfg. Co., 112 NLRB 1080, 36 LRRM1152 (1955).

through union security agreements and management recognition of a strong steward system.

3. The mutual accommodation of this era included a move away from union reliance on the mass strikes of the 1930's and 1940's. What emerged was a form of "polite strike" scenario in which the use of economic pressure in labor disputes became largely ceremonial. Major strikes in basic industries typically led to a voluntary management cessation of operations and union restraint in the numbers and activities of pickets. Strikes were as much microeconomic models for the balancing of costs of agreement and disagreement as they were shows of worker solidarity. The bargaining process was detached from the emotion of shop floor solidarity.

4. Similar moderation was apparent in the political arena. Both labor and management confined their political agendas to polite disagreement over the potential conflict between the market and the social welfare system. The extremes of both sides were controlled, with labor systematically supporting the candidacy of moderate democrats to compete with the moderate republicans of management's choice. The radical left wing of the labor movement was suppressed and the radical right was curbed.

5. The social compact theory is a significant factor in dispute resolution models because of a widespread belief that the business community broke the agreement in the early 1970's. Much of union strategy and many of the arguments for particular forms of dispute resolution assume that the contemporary period continues to be one based on relationships of mutual toleration. To the contrary, current management trends indicate a much greater willingness to restore a trend of conflict based labor management relations. Some of the significant shifts in management strategies include:

    a. A much greater willingness of employers to attempt to continue production operations in the event of a strike.

    b. A rapid growth in bargaining patterns based on either wage or work rule concessions.

    c. Greater utilization of the mobility of capital to shift production capacity away from traditionally strong union centers to low wage, non-union and off-shore facilities.

    d. Support for the resurgence of the radical right wing of the republican party.

    e. Direct political attacks on moderate proposals from labor's agenda, including labor law reform and prevailing wage protection.

    f. Board stacking, through which clear advocates of management philosophy are supported as nominations for positions on the National Labor Relations Board.

5. Given the shift in political and economic strategies of the business community, a fundamental issue facing organized labor is whether traditional assumptions concerning the adequacy of dispute resolution systems remain valid. For example, arbitration of rights disputes in an era of mutual toleration is a system which encourages voluntary negotiation of grievances. In many situations today, the costs of arbitration are a weapon used by management to avoid settlement of even minor disputes.