

R E P O R T R E S U M E S

ED 012 968

EA 000 758

PUBLIC INTEREST IN COLLECTIVE BARGAINING IN THE PUBLIC AND PRIVATE SECTORS.

BY- SHAW, LEE C.

PUB DATE JUL 67

EDRS PRICE MF-\$0.25 HC-\$0.24 6P.

DESCRIPTORS- *COLLECTIVE BARGAINING, *LABOR UNIONS, *MANAGEMENT, COLLECTIVE NEGOTIATION, *STRIKES, LABOR PROBLEMS, *PUBLIC EMPLOYEES, COURT LITIGATION,

COLLECTIVE BARGAINING AND LABOR UNION STRENGTH HAVE GIVEN RISE TO TWO SERIOUS CHALLENGES FACING PRIVATE ENTERPRISE, INFLATION AND INTERFERENCE WITH MANAGERIAL AUTHORITY. IN RECENT YEARS, THE COST OF LIVING HAS AVERAGED AN INCREASE OF FOUR PERCENT PER YEAR WHILE LABOR COSTS HAVE ACHIEVED AN ANNUAL RATE OF INCREASE OF OVER SIX PERCENT. AT THE SAME TIME, AS LABOR UNION LEADERS HAVE PRESSED FOR A GREATER VOICE ON MATTERS INVOLVING THE FUNCTIONS OF MANAGEMENT, MANAGEMENT'S DOMAIN OF CONTROL HAS STEADILY DIMINISHED. THE "RESERVED RIGHTS DOCTRINE," WHICH MAINTAINS THAT ALL OF MANAGEMENT'S RIGHTS NOT LIMITED BY TERMS OF A LABOR AGREEMENT REMAIN WITH MANAGEMENT, IS INTERPRETED DIFFERENTLY BY LABOR AND MANAGEMENT. THE NATIONAL LABOR RELATIONS BOARD (NLRB) HAS PROMOTED CONTINUOUS BARGAINING, WHICH, IN EFFECT, REPUDIATES THE RESERVED RIGHTS DOCTRINE. THE NLRB'S REQUISITE FOR AN OPEN MIND ON THE PART OF MANAGEMENT APPLIES APPROPRIATELY TO ISSUES AFFECTING LABOR RELATIONS BUT NOT TO MAJOR DECISIONS WITHIN THE PROVINCE OF MANAGEMENT. SPECIAL ISSUES INCLUDE THE APPLICATION OF THE NLRB'S IMPASSE DOCTRINE TO BARGAINING OVER ISSUES IN THE REALM OF MANAGEMENT AND POSSIBLE FAILURE TO APPLY THE DOCTRINE WHEN A DEADLOCK HAS BEEN REACHED ON LABOR-RELATED MATTERS. FIVE GUIDELINES, INCLUDING THE PROHIBITION OF STRIKES BY PUBLIC EMPLOYEES, ARE LISTED FOR COLLECTIVE BARGAINING IN THE PUBLIC SECTOR. THIS ADDRESS WAS PRESENTED AT THE PACIFIC NORTHWEST ASSEMBLY CO-SPONSORED BY THE UNIVERSITY OF OREGON AND THE AMERICAN ASSEMBLY OF COLUMBIA UNIVERSITY (UNIVERSITY OF OREGON, EUGENE, JULY 20-23, 1967) AND APPEARS IN "CHALLENGES TO COLLECTIVE BARGAINING," A REPORT OF THAT ASSEMBLY. (JK)

ED 012 968

Challenges to Collective Bargaining

A report of the Pacific Northwest Assembly at the University of Oregon, July 20-23, 1967

Co-sponsored by the University of Oregon and
the American Assembly of Columbia University

EA 000 758

Table of Contents

Introduction by Paul L. Kleinsorge.....	3
Opening Remarks by Clifford C. Nelson.....	4
Collective Bargaining in the Public Service: The Road Ahead *Address by Kenneth O. Warner.....	6
Beyond Negotiations *Address by David Selden.....	10
Public Interest in Collective Bargaining in the Public and Private Sectors *Address by Lee C. Shaw.....	13
Agenda for Panel Discussions.....	17
Final Report with Minority Reports.....	18
List of Participants.....	23
Assembly Staff.....	24

* The addresses have been edited somewhat because of space limitations in this report.

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
OFFICE OF EDUCATION

THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL OFFICE OF EDUCATION POSITION OR POLICY.

ED012968

Public Interest in Collective Bargaining in the Public and Private Sectors

by Lee C. Shaw, Seyfarth, Shaw, Fairweather and Geraldson, Attorneys at Law, Chicago, Illinois

I don't think anyone will quarrel with the proposition that the strength of our economy depends on a healthy business climate which permits a reasonable return on capital investment. I think that labor leaders, politicians, and everyone who has considered this subject will agree that if we are going to have a private industrial system that produces the high standard of living that the United States enjoys, we should not impair that economy by taking it down a path that will weaken it. I believe that the process of collective bargaining coupled with the strength of labor unions has presented at least three serious challenges to the well-being of the private enterprise system.

With a few minor interruptions, we have experienced creeping inflation in this country since the end of World War II. Compared with the dollar in 1946, the value of today's dollar is 60 cents. If we continue to experience the same rate of inflation, the dollar will be worth 36 cents twenty years from today. If history tells us anything, it tells us that it is difficult to control inflation once it begins. This is not inflation in the historic concept where there are more dollars than there are goods as was true at the end of World War II and the Korean War. This is inflation caused by the constant push upward in the cost of producing goods. It is unnecessary to point out that inflation causes very serious problems to individuals, particularly those on fixed incomes. Companies, corporations and business, like individuals, must save money for future expenditures. If the dollars that are put aside today are worth substantially less in the future, the cost of future investments will rise significantly and could reach the point where many businesses would be unable to continue because they did not have the necessary capital.

So far as this country's labor background is related to this problem, statistics show that American employers are subject to longer strikes than are employers in other major industrial nations and almost invariably

with more costly settlements. The government advocated 3.2% guidelines were shattered completely by labor negotiations in a number of industries, but most closely identified with the airline strike last year when it was conceded by the government that the guideline approach had failed completely to keep wage increases in line with increases in productivity. A good case could be made for the proposition that wages and fringe benefits should not eat up all of the increase in productivity, but that some return should be passed on to consumers. But the 3.2% guideline theory is to give labor the full increase that comes from the increase in productivity, for the President's economic advisory board feels that if labor costs increase only to the extent of increases in productivity, full employment would exist and inflation would be prevented. Of course, this has not been the case.

Very recently, the wage increases being negotiated were almost double this national average increase of 3.2%. While I'm not convinced that the government is sincerely and wholeheartedly willing to use its pressure to hold increases to the 3.2%, I have come to the conclusion that there is really only one segment of the public involved in this problem that can do anything about holding increases in labor costs down so they do not exceed increases in productivity. Without equivocation, the only restraint upon the power of organized labor rests within the collective conscience of its thought leaders to be reasonable in the pursuit of their objectives.

The experience with the guidelines has demonstrated that appeals for moderation, irrespective of where they emanate, are meaningless. Since labor began to exercise its newly bestowed powers in the late 1930's, wages have increased over 375%. Since 1947, the increase has been over 150%. I am not contending that there wasn't room for increases; I am not arguing that workingmen did not need wage increases and fringe benefits, and that they do not need them today. My thesis is simply

that there must be restraint in that area as there must be restraint in many other areas. I do not believe that restraint has been exhibited or that there is any evidence that it is going to be exhibited. Wages and salaries are being increased this year, 1967, about 14 cents per hour compared with eight cents at this time last year—that's almost double. The cost of living has achieved a rate of advance of about 4% a year, when anything over 1½ to 2% is viewed with apprehension by economists. And labor costs have achieved a rate of annual increase of over 6%, totally out of line with the 3.2% rate of annual productivity increase.

In summary then, as I view it the first challenge that collective bargaining raises to the economy is that we have a built-in force for inflation as the result of labor's overwhelming power at the bargaining table. There is not any company, no matter how large, in this country that is a match for any one of the larger unions.

The second challenge is the reduction in corporate profits. We hear a great deal about the spectacular rise in gross national product. But this indicator, related as it is to the volume of output, tells us nothing about profits nor of the relative standing of shares in the economic pie and in economic growth. On the other hand, we hear very little about corporate gross product which may be defined as the composite of what corporations, excluding agriculture and government, pay out and earn in the process of adding value to raw materials purchased or to services performed—in simpler terms, the fruit of human endeavor applied in the corporate enterprises. The gross national product, productivity statistics and dollar profits or wages standing by themselves mean nothing when we try to get down to the heart of what is happening to our economic system. Corporate gross product is the significant statistic.

For the past nineteen years, labor's share of corporate gross product has remained virtually constant at 64% while corporate profits before taxes have declined steadily from about 23% to 18%; corporate profits declined about one-fifth between 1948 and 1966. The after tax profits in the same period declined about one-third. Again, I am not arguing at what level those profits should be—maybe the 15% in 1948 was too high; maybe the 10.6% for about a one-third decline at the present time is about right. But I am pointing out that if labor's share in the increase of corporate gross product remains constant with the increase in the gross national product generally, and if the corporate profit portion of that corporate gross product declines as much as one-third in this period of time, then at some point in time corporations are not going to be in a position to continue to expand and replace equipment. As the economic pie grows, labor is getting a constant percentage of the growth increment while ownership percentage is on

the decline. On the down cycle, labor not only has a protective floor by reason of set contracts, but it has demonstrated capability during such periods to continue with repeated annual rounds of wage and salary increases.

The third challenge is interference with managerial authority to run a business. In the last year, the Labor Government of the United Kingdom has been investigating the acknowledged productivity gap between the United Kingdom and the United States. Investigations by the Royal Commission produced the following testimony from an official of Massey-Ferguson, a company which has plants in both countries: "The major difference between the systems of North America and the United Kingdom is that the United States system of collective bargaining assigns to management a precise and specific management function which it may exercise during the term of a contract, subject only to the right of the union to file grievances for processing by the grievance procedure, culminating in arbitration on rights issues. The effect is that within these precise, specific management functions, management is able to produce change at a much faster rate than is possible in the United Kingdom. Greater productivity arises from stability and definitely accepted management functions."

At the time the Royal Commission was hearing this testimony and making this study, decisions of the Labor Board in the United States were circumscribing the right of management to make decisions during the term of a contract, with most important effects on the economy.

Arthur Goldberg, during a debate on the "Role of Management and Labor in Labor Relations" at the University of Wisconsin in 1956 stated, "The right to direct where it involves wages, hours or working conditions is a procedural right. It does not imply some right over labor's right; it is a recognition of the fact that somebody must be boss—somebody has to run the plant. 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 interests of the employee with the same stature accorded management. To assure order, there is a clear procedural line drawn. The company directs, and the union grieves when it objects. Management determines the product, the machine to be used, the manufacturing methods, the prices, the plant layout, plant organization and innumerable other questions. These are reserved rights."

Reserved rights are inherent rights, exclusive rights which are not diminished or modified by collective bargaining. Simply stated, the reserved rights doctrine is that all of management's rights which are not limited or

taken away by the terms of a labor agreement remain as the rights of management. Mature, cooperative bargaining relationships require reliance and 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, devise a way to improve a product and have that improvement effected, establish prices, build plants, create supervisory forces, and not thereby become embroiled in a labor dispute. In addition to these exclusive rights to do things without any union say, the exclusive right to manage and direct should be very clearly understood by all parties. This is not an easy concept for union people. Very often union men are disturbed by decisions they consider entirely wrong. Nevertheless, a company's right to make its own judgment is clear. It is my firm belief that the most important thought leaders in the labor movement agree with the proposition that joint management between unions and the business community to run the business enterprise is not desirable.

The reserved rights doctrine has come under serious attack by the Labor Board whose recent decisions assume that the parties normally bargain to an incomplete bargain, that their final agreement is not final; and the United States Supreme Court has affirmed those decisions. This assumption does violence to our history of collective bargaining and ignores the fact generally accepted in this country that management's rights not specifically surrendered in a collective bargaining agreement are reserved to management. The Labor Board has taken the position that the parties to a collective bargaining agreement are obligated to bargain during the term of the agreement on any subject which is not specifically covered by the agreement, in effect giving labor veto power over management's everyday decisions. The reserved rights doctrine is the essential rule for the interpretation of the rights and obligations established by the labor agreement; without it there is no compass to guide the arbitrator; without it management will hesitate instead of taking action necessary to run a business efficiently.

In the recent Acme Industrial case, the trial examiner made this pertinent observation: "We are approaching a point where the employer may well wonder if he has anything to gain by engaging in collective bargaining if any dissatisfaction with the operation of the contract on the part of the contracting union may be taken to review by the Board under the charge that the employer had not bargained over something not covered by the agreement."

What the Board is really coming out with in these very recent cases is that the employer today has an obligation to bargain continuously over management decisions even though there is no provision in the contract

which limits the management's right to make that decision or to take that action. The question is not whether this concept is good or bad to the unions or to American business; the real question is whether it is good or bad for the American economy.

In addition to the Board's decisions that there must be continuous bargaining, another impediment is the Board's traditional impasse doctrine which says that labor and management must negotiate to an impasse before unilateral action can be taken. In many of these cases, the Board has said that a period of eleven to twelve months was not long enough in the way of bargaining before the impasse has been reached. If every management decision which may have an effect on an employee's condition of employment must first be bargained to an impasse before any action can be taken, the obvious burden upon the decision-making process would be catastrophic.

We have had a true test of bargaining in the private sector where the agreement is hammered out with concurrence on wage increases, fringe benefits, and working conditions; and once that agreement is made, the union recognizes that management then manages under that contract, challenging if they think there's been a violation of the contract. It has been done the other way in England where they have a debating proposition on virtually every management decision. I think it would be extremely serious if the recent Labor Board cases become a way of life so far as this concept of continuous bargaining is concerned.

The challenge to management's authority to manage, coupled with the consequences of inflation and reduced corporate profits, in my judgment, will seriously weaken our business economy unless we can persuade union leaders that interference with the development of our business enterprise should not take place and that they should join with us to make sure that it does not.

Turning briefly to the public sector, you are all aware of the strikes for recognition that have been going on in the public sector primarily with the teachers' unions, and the negotiations in some instances which have resulted in strikes. There isn't a law on the books in any state in this country nor as far as the federal government is concerned which gives public employees the right to strike, but we've had them—strikes by firemen and policemen, teachers, nurses, and welfare agency employees. Obviously the public is immediately and directly involved in this problem, and it is not prepared for it. We could have a very serious round of consequences before we get it settled to the point of some appreciation of the importance of getting rules that can be lived with in the public sector. Many people, including those representing business interests, feel that public employees should have the right to choose a bar-

gaining agent, and that they should have the right to negotiate their terms and conditions of employment, much as is done in the private sector. Of course, there are special problems with respect to budgets, managerial authority involving Civil Service, and so on; but all of those could be solved. However, I think there are two things that must be considered very seriously.

If public employees are not going to restrain themselves from strike activity or its equivalent—sick calls—and if the public must suffer the loss of essential services, there is only one foreseeable solution to the problem and that is compulsory arbitration. And if we get compulsory arbitration in the public sector, I think there is a very good chance that it will lead to that in the private sector. Recent Congressional action in the railroad dispute providing for compulsory arbitration if no agreement is reached in 60 days is an indication of Congressional impatience with anything that could seriously affect our economy, particularly when the country is engaged in many problems around the world.

With all the faults of the free, wide-open collective bargaining system in the private sector, I think it has worked out pretty well. No other country has the advantages of our private arbitration system which settles literally thousands of disputes each year. While the

problems will always be with us, and while there will be ones we haven't even thought of tomorrow, nevertheless, they can be worked out. They have been worked out to the extent that it would be extremely unfortunate if we must have a dictated result by compulsory arbitration. And the strange thing is that I think this may come about because the public will become so aroused over strikes in the public sector that the legislatures on the state and federal level will say that it cannot be tolerated. And if we get compulsory arbitration in the public sector, who is to say that it is much different if the steel industry goes down, if a private transportation system goes down, or if any other industry large enough that the public is immediately and seriously affected is stopped by a strike? So if we have compulsory arbitration in the public sector, as we now have it in the railroads, perhaps we had better have it generally. I, for one, would hate to see this come about.

We have a very big stake in this. If you believe that we are better off with collective bargaining on the free basis that we have had, you'd better exercise all of the influence you have in whatever areas you have it to urge both sides to exercise restraint, so we do not lose something that, on the whole, has been workable and beneficial to everyone.