

WHAT COLLECTIVE BARGAINING PROMISES AND WHAT IT DOES

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From the outset of my career in teaching, I have been deeply interested in the question of freedom. This interest is in part due to my upbringing and in part is the result of my academic training. Not only its substance but its origins, extension, and preservation have been abiding concerns. We often take freedom for granted, but quarrels and fights about its nature, conditions, and scope fill our history. Freedom had to be won. It was never, and is not now, established universally. It has had to be gained by groups who did not enjoy it. Such extensions as have been made were only by power of those who sought it. Freedom not only has had to be fought for, but, once gained, it has had to be maintained through constant defense. Eternal vigilance is the price of freedom.

Freedom, of course, is relative. Freedom of any person or group entails accommodation to the freedom of other persons or groups. Overall, it emanates from our basic laws and the accommodations of the pluralistic interests and institutions of our society. It is through institutional accommodation that the freedom of the whole is preserved, even while the scope of freedom is extended.

I have studied the origins of freedom in light of an interest in economic history and the history of unionism and labor relations, and in connection with the accommodation of unions and the practice of collective bargaining in our society. The insistence of labor unions on recognition and collective bargaining has been viewed by opponents, successively, as infringements on owner's property rights, management rights, and worker's rights. The first opponents of unionism and collective bargaining were concerned with

interference with the rights and freedom in the use of property-- from which arose the accompanying view, substantially in error in the United States, that unions were revolutionary and socialistic. As less narrow viewpoints about legal use of property slowly made their way into the courts, the emphasis of opponents of unionism shifted to the charge that collective bargaining was an infringement upon the "right" of management to manage. Both these early contentions faded considerably as employers accommodated to unions and to the practice of collective bargaining. (There is another thread here, too; management learned there are certain forms of freedom through collective bargaining once the practice is understood.)

Today, not all the rough edges of controversy have been smoothed, or completely smoothed, as may be noted by the recent and continuing controversy over "right-to-work" laws, although, in part, there has been a shift to the charge that unions interfere with the rights of individuals to work and not join unions. Such emphasis reveals a basic anti-union animus, for, if the concern for the rights of individuals to work were the genuine and exclusive reason for right-to-work legislation, why do its advocates not assail the use of seniority, which is one of the most commonly used determinants of rights to a job? In those situations where seniority prevails--and it is used widely except in situations where constant change of job sites negates the value of seniority, or in share-the-work situations where seniority is almost a dirty word--it has more influence on preserving jobs for some and denying jobs to others than does any form of compulsory membership in unions. Also, recently, the civil rights issue has come forward to impinge on the rights of unions and the rights of individuals--both the right to preserve jobs and the right to gain jobs.

It is curious that so few instructors in labor relations concern themselves with the question of freedom. It is also curious that economists have neglected, or else distorted, or perhaps have not understood, the nature of collective bargaining. It is not enough simply to accept or take freedom for granted, for the quality and value of an institution may find support and justification in its origins and development.

A study of the institutional development of capitalism, or enterprise society if you prefer, is important to an understanding of the place and basic character of collective bargaining. Collective bargaining is a product of a free society, and is found in no other. "Freedom of the market," with which the Revolutionary War was so intimately concerned, and "freedom of capital" and "freedom of labor" are not always thought of as a part of the same piece.

"Freedom of capital" to associate is best traced in the rise and legalization of the corporate form of business organization. The British scene gives the clearest chronological account insofar as legalization is concerned. It was a long process and "freedom of capital" without privileged charter and with limited liability arrived only in the middle of the nineteenth century, when the corporation finally achieved legalization, step by step, to the point where any group could incorporate legally on an equal basis with all others. Concurrently, in the United States, up to 1837, legislatures passed individual acts of incorporation for special purposes; thereafter, general laws of incorporation came into being in state after state.

A study of British history is useful, also, for tracing the rise of "freedom of labor." It has two separate meanings, the latter of which is of chief interest in this paper. First, "freedom

of labor" meant the right of workers to market their services without encumbrance of the age-old restraints of earlier economic regulations imposed by the manorial and guild systems or by laws of the land. In a real sense, this freedom was imposed upon the British worker as he was forced, or wrenched, from his customary employment as the agricultural and industrial revolutions inexorably worked themselves out, throwing the workers upon the brutalities of the late eighteenth- and nineteenth-century labor market. (I am not unaware that this seems contradictory or inconsistent with the assertion that freedom has to be gained by those who would have it; workers in England, as in other places too, had forced upon them the freedom to work or the freedom to starve.)

But "freedom of labor" has another, perhaps more important, meaning, akin, as should be obvious to anyone who looks closely, to "freedom of capital." Both involve associations. In Britain, the various Trade Union Acts, particularly those from 1869 to 1875, legalized associations of workers, making it lawful for them collectively to do whatever was lawful for workers to do as individuals, significantly, to bargain over wages and working conditions and to strike and picket.

American chronology is different, but the legal principles behind the developments are basically the same. The British produced changes by statute, whereas, although we inherited the British common law, our changes came through our common law.

What is the basic principle to which I refer? In my teaching, with labor and management groups as well as in the academic classroom, I have found it very useful, and very educational, to present the proposition that "the intentional infliction of harm is actionable," that is, it is a civil wrong (and may be criminal, too) and is a basis of a suit for damages. Almost universally the students,

in whatever group, will agree that it should be. People should have redress against others who intentionally do harm to them. Having achieved assent to this, I question further. I ask union folk how in the world they then justify the strike for they certainly want to hurt the employer by it; and I ask management folk how they can defend the principle that competing entrepreneurs want to beat competitors even when they know they are inflicting hurt upon them. In my academic classes I challenge the students with respect to both. Mostly, there is a good deal of floundering. After an appropriate amount of confusion and difference of opinion, I confess that I have given them only part of the statement of the "prima facie" theory of torts, that is, "the intentional infliction of harm is actionable unless justified." This, then, provides the basis for a further round of discussion as to what constitutes justification.

Let a group of representatives of management explain how they get away with inflicting harm upon competitors, even to the point of diminishing the value of the latter's business enterprises through reduction of their incomes, and even to driving them out of business and destroying their investment. Sure, competitors inflict harm and they know or expect they may or will. You know that, too. But what is the principle which tolerates or justifies that? It has been stated already, "the free pursuit of economic self-interest." The law permits, or privileges, the infliction of harm which is incidental to the pursuit of economic self-interest if the means are lawful. Of course, the pursuit must be within the framework of legality. There are rules of the game; for example, one cannot lawfully pursue self-interest when the motive is malice or the means unlawful.

Some people recoil against what I have been developing here, but it is a central factor in enterprise society. This notion in our law developed concurrently with the Darwinian principle of survival of the fittest and, obviously, it is similar to it. To some it is too harsh. Justice Holmes recognized such a viewpoint, stating in Vegeahn v. Guntner that if competition were too harsh a word, we could substitute for it "free struggle for life"--which always has sounded more harsh to me than the term competition.

It took a little doing to get the courts to accommodate the strike, as an instrument effectuating the process of collective bargaining. Supreme Court opinions of dissent by Justices Holmes and Brandeis are particularly interesting here. Fortunately, their viewpoint finally prevailed. They tried to uphold the normal actions of unions at a time when their colleagues saw unions motivated by malice against employers and saw them illegally interfering with employers' rights; their colleagues actually applied the law one-sidedly, allowing free pursuit of economic self-interest in the field of business enterprise while denying to unions the same right; whereas Holmes and Brandeis wanted to recognize one principle of law equally applicable to both. It should be understood, but is not often thought of this way, that collective bargaining is justified by the same principle of law that justifies competition.

Time does not permit a discussion of the basic postulates that must be understood to appreciate fully the context within which collective bargaining takes place in an enterprise society and why it is such a valuable and indispensable institution.¹ Suffice it to say that there is a mutuality of interest between labor and management, which is both ideological and pecuniary, but at the same time there exists a conflict of interest. It is in an atmosphere of conflict that bargaining takes place. In addition, each party is controlled or

influenced by restraints, external ones (legal, economic, political, and social) and internal ones (the rules and requirements of the organizations and their internal mix of interests). But of central significance is the fact that collective bargaining is a power process. It is not a problem-solving process, except incidental to the power process, a fact which frequently is not understood or appreciated, even by, or especially by, economists. A balance of power is necessary and the respective bargaining organizations structure themselves (that is, create or modify the bargaining structure) to produce such a balance.

Why is the bargaining process so valuable and so important, involving, as it does, the proverbial--ridiculous appearing--exorbitant demands, numerous meetings, marathon sessions before a deadline, and settlements almost always only at the eleventh hour and often in the corridors rather than at the bargaining table? The first thing to understand is that negotiations are for the purpose of finding out the settlement position of the other party without prematurely revealing one's own. This is not understood by those who advocate problem solving and who desire each party to lay out all the facts on the table at the outset and, then, in all good faith, seek the solution the facts would support. This, of course, is nonsensical. It would not work. Whereas negotiation, as a process, in spite of difficulties does work. Those who practice it intelligently are engaged in a very fine and sophisticated art. The evidence shows that it produces results not obtainable any other way, at least not in a politically democratic enterprise society. Finding out settlement positions is only one side of the process. Concurrently, it is a process of achieving consent, that is, acceptance of the settlement. This is the aspect of collective bargaining that makes it so valuable in a democratic sense. It produces results which the

parties are willing to live with. (I am fully aware of the importance of administration of the agreement, the day-to-day living, which, as is often emphasized, is at the heart of the whole business. It, too, is of inestimable worth.)

There is a problem which has hovered over the practice of collective bargaining from its beginning and it has not been satisfactorily faced, let alone resolved. It is both philosophical and practical. Under our system of government and the legal principles behind it, we are aware that legislative bodies enact laws while individual relationships are often governed by contract. Legislation and contract are cornerstones of our society. But where does the collective bargaining agreement fit in? It partakes of each but is different from both; it is not legislation, but often resembles it. (Some courts have pictured it as legislation, an extension of legislative authority to private groups.) It is not contract, although often referred to as such, and does not fit very well the requirements of contract. What is needed is a law of associations, recognition of the role of groups, or associations, in contrast to government and legislation and individuals and contract.

This is not to say that associations have not been given some recognition in our society, or have not been dealt with under the law. The courts, however, have had a predilection toward individuals and contract and have shied away from, or avoided, activities of groups as groups. There is an individualistic bias in our political and legal doctrines. Groups are often seen only as a composite of individuals, whereas they are real entities which need recognition and, perhaps, some regulation.

The law of contract was a product of freedom, equality of individuals, and the right of the individuals to act for themselves by recognition of their legal competence. The collective agreement

meets some of the conditions of contract but not all. Contract does not reach to important realities of association. As Louis Selznick puts it,

Contract begins from different premises and offers tools of analysis that are irrelevant, unhelpful, and often downright inimical to the development of a jurisprudence of associations.²

Associations have an inherent governmental role. They can and do serve the interests of their members. But the association, like any institution, can be captured by leaders and it can control. Hence, there is a need to protect the rights of members against the centralization of control which may leave the individual helpless or simply used by leaders.

It is easy to see that collective bargaining has created new institutions; it is a new institution; it is a form of self-government under rules which the association develops to achieve its ends. The association is an agency of administration. (Here, we see the bargaining unit, the bargaining table, and the grievance machinery.) How often have we heard of self-government, industrial jurisprudence, and the common law of the shop? We recognize these things; we see the collective agreement as a useful creation and we feel that it should be upheld as binding on the union and on the members. But, the fact is, we have not yet fashioned a body of law applicable to all aspects of associational life.

This is not to say that associations have not been recognized, have not been dealt with under the law, but, as stated, they are more than composites of individuals. Judges ought to understand *more* about institutions and institutional behavior. The right of association seems to be about as basic and inalienable as any other

right. But this is not enough. Association in our society provides many persons with their only meaningful participation in economic affairs. The individual, through association, can stand up to central authority--whether private or governmental. Besides the right to associate, there is the right of freedom in associations; private associations can be more bureaucratic and oppressive than government. We do as well as we do because of the pluralism of our society with the accommodation of countervailing forces produced by it. But the law is behind the times and a comprehensive body of law, recognizing associations for what they are, would be helpful. The collective agreement would then fit into it.

Labor relations and collective bargaining must be the central theme in the School, in its curriculum and in all of its educational and public activities. The School must never allow itself, nor be allowed, by intent or drift, to become simply or primarily, or substantially, a social sciences school. The social sciences have their place and should be present as adjuncts, not, however, as even partners, but only as helpmates. There is a problem and it should be recognized and the School should adhere to the role given it in its charter.

Notes

1. See Vernon H. Jensen, "The Process of Collective Bargaining and the Question of Its Obsolescence," Industrial and Labor Relations Review 16 (July 1963): 549 ff.; Vernon H. Jensen, Strife on the Waterfront, The Port of New York Since 1945 (Ithaca, N.Y.: Cornell University Press, 1974), pp. 13-17.

2. Louis Selznick, Law, Society and Industrial Justice (New York: Russell Sage Foundation, 1969), p. 150.