

AN OVERVIEW OF COLLECTIVE BARGAINING IN THE UNITED STATES

(contribution to Liber Amicorum Prof. Antonio Ojeda)

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1. HISTORICAL BACKGROUND

Collective bargaining has a long history in the United States, although it was not enabled and protected by legislation until the 20th century. A famous 1806 case studied by all labor law students is the *Philadelphia Cordwainers* case (*Commonwealth v. Pullis*, Philadelphia Mayor's Court (1806)).

Skilled shoemakers in Philadelphia combined to set a price for their labor. They refused to work for any employer who did not pay their desired wage. The court ruled that their combination to raise wages was a criminal conspiracy to inflict harm on the public. The court said that collective action was an “unnatural” means of fixing their salary, compared with the “natural” means of supply and demand.

The idea of collective bargaining as a criminal conspiracy persisted for much of the 19th century. But this did not prevent workers from trying to form unions and bargain collectively. In some states, judicial authorities began to look more favorably on workers' efforts to defend themselves through collective bargaining. In another famous case in 1842, the Massachusetts Supreme Court ruled that as

long as collective action remained peaceful, it was not an unlawful conspiracy. (*Commonwealth v. Hunt*, 45 Mass. 111 (1842)).

Throughout the 19th century, judicial doctrine moved away from the criminal conspiracy theory of collective bargaining. However, many state courts remained hostile to trade unions and collective bargaining. They enjoined strikes and jailed union leaders because of supposed *potential* for violence, with no evidence that violence occurred and no opportunity for trade union representatives to present evidence to the court that their activities were peaceful. (Frankfurter and Greene 1930). They allowed employers to require newly hired employees to sign a contract promising never to join a union. (Rowan 1931). Even where they did not impose such a requirement, employers were free to dismiss workers if they joined a union and wanted to bargain collectively. (Bernstein 1960).

Of course, this did not prevent labor conflict. Workers continued to suffer oppression and took collective action to defend their interests. Many strikes erupted throughout the 19th century and into the early 20th century, especially in the railroad, mining, and manufacturing sectors. Police and National Guard forces often violently suppressed them. So did private security forces hired by employers, such as the Pinkerton Detective Agency. (Montgomery 1987).

During this entire period, no federal legislation governed labor organizing, collective bargaining and strikes. They were matters of state common law on contracts and torts. This meant that state courts were the ultimate arbiters of workers' collective action. State courts in most of the United States were anti-labor and anti-union, except for a few states with more sympathetic attitudes toward trade unions, such as Massachusetts and New York. (Forbath 1991).

2. TWENTIETH-CENTURY LEGISLATION

In the early 20th century, American society began looking to federal legislation to address continuing labor conflict and to develop a unified national policy with regard to collective bargaining in the private sector. Regulation of public sector collective bargaining came later, in the second half of the 20th century.

Today the United States has three distinct regimes of collective bargaining: one for the railroad and airline industries, one for the rest of the private sector, and one for the public sector. However, this last is really 51 distinct systems, because the federal government and the 50 states each has its own collective bargaining law for public employees.

A. The Railway Labor Act of 1926

It was only natural that the first important national legislation on collective bargaining arose in the railroad industry. The industry was vital to the national econ-

omy. To prevent labor conflict, Congress enacted the Railway Labor Act of 1926 (RLA). In 1936 Congress applied the RLA to the airline industry. Airlines were seen as analogous to railroads, a national transportation system in which strikes could have a disruptive effect on the nation's economy. Today, 500,000 airline employees and 250,000 railroad employees are covered by the RLA. Collective agreements cover 60 percent of airline employees and 90 percent of railroad employees.

The RLA creates an elaborate system of bargaining, mediation, conciliation, fact-finding, arbitration, "cooling-off" periods and other measures designed to prevent strikes in the two industries covered by the Act. The system is controlled by a federal agency called the National Mediation Board (NMB), whose three members are appointed by the President.

No strike can occur unless the NMB "releases" the parties from the mediation and arbitration process. This decision is entirely at the discretion of the NMB. This means that in practice, the process sometimes can take years to reach a conclusion.

An important element of the RLA is that it requires the existing terms and conditions of employment to remain unchanged while the process is underway. This often gives a strategic advantage to trade unions facing demands for wage and benefit concessions, especially in the airline industry where market conditions are volatile. The unions are content to let the process continue for years, while employers press the NMB to "release" them.

Even if the NMB releases the parties and a strike occurs, the President has the authority to declare a national emergency and order strikers back to work. Congress then has the authority to legislate the terms and conditions of a collective agreement. This happens rarely, but when it does, it is often an orchestrated event in which trade unions *want* the President to order them back to work. They believe they will get a better deal from Congress than the one offered by employers.

B. The National Labor Relations Act of 1935

In 1935 Congress adopted the National Labor Relations Act (NLRA) covering most private sector workers outside the railroad and airline industries. It also created the National Labor Relations Board (NLRB) to administer the Act.

The NLRA created a collective bargaining system marked by these cardinal features:

Unfair Labor Practices

The NLRA defines and prohibits five "unfair labor practices": 1) *interference* with employees' concerted activity; 2) employer *domination* of a labor organization; 3) *discrimination* against workers for union activity; 4) *retaliation* against workers for filing unfair labor practice charges or giving testimony in NLRB proceedings; and 5) *refusal to bargain*.

Bargaining Unit

A linchpin of the NLRA is the “appropriate bargaining unit,” a group of employees in a workplace who meet the legal test of “sufficient community of interest” to be represented by the union. The NLRA empowers the NLRB to define such a bargaining unit if the employer and the union disagree. Managers and supervisors are excluded from any bargaining unit.

Majority Rule

Under the NLRA, only a union that demonstrates majority support in an appropriate bargaining unit can be certified as the collective bargaining representative. A secret ballot election is often the means of confirming majority status, but in some circumstances unions can show majority support by signed membership cards, petitions and other methods. Correspondingly, the NLRB will not certify minority unions.

Certification

By certifying a union as the bargaining agent for workers in a bargaining unit based on majority status, the NLRB confers certain protections for the employees and their union. The union represents all employees in the bargaining unit. The employer must “recognize” the union and negotiate in good faith with the union. Refusal to bargain is an unfair labor practice.

The union’s representative status and bargaining rights are insulated for one year against challenge by another union or a move by anti-union employees to decertify the union. This gives time to reach a collective agreement without the distracting fear of de-certification or challenge from another union.

Exclusive Representation

In many European countries, multiple trade unions represent employees at a single workplace. In Spain, for example, employees who labor side-by-side in the same occupation might be represented by the CC.OO, UGT, or another union. In the United States, however, the NLRA makes a certified union the exclusive representative of all employees in the bargaining unit. A dissident minority is represented by the certified union, at least until they can convince their co-workers to create a new majority in favor of a different union or in favor of de-certifying the union.

Duty to Bargain

When a union is certified, the NLRA compels the employer to the bargaining table with a legal obligation to bargain in good faith. The law requires meeting at reasonable intervals and exchanging proposals on wages, hours and working conditions affecting represented employees.

Courts have defined the “good faith” bargaining obligation as “an obligation . . . to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement . . . a sincere desire to reach an agreement.” If an employer fails to meet this legal obligation, the union can file an unfair labor practice charge alleging bad-faith bargaining.

At the same time, the NLRA does not require the employer to agree to any union proposal. The employer is entitled to engage in “hard bargaining” for proposals unpalatable to the union, as long as he does not engage in “surface bargaining.” Surface bargaining means going through the motions of bargaining – meeting, trading proposals etc. – with a hidden goal of never reaching an agreement. Employers who engage in surface bargaining often hope that employees will vote to decertify the union when they become frustrated with the lack of progress in bargaining.

Written agreements for a specified term

The NLRA requires employers and unions to express their collective agreement in a written contract. The law does not specify any length of time for a labor contract, but in practice, all collective agreements have a specified length. The normal term of a contract is three years, although in recent years many contracts have moved to longer terms, four or five years, for example.

Voluntary Mediation

The NLRA establishes the Federal Mediation and Conciliation Service (FMCS). Employers and unions must notify the FMCS when they approach the end of a contract term. But the FMCS can only intervene if *both* parties agree to request its service. In sharp contrast to the RLA, the NLRA does not require mediation or arbitration. The parties can bargain, strike, lock out etc. without ever invoking mediation services.

Impasse

Collective bargaining can end with an agreement. It can also end with each party making final offers without coming to an agreement. When such an “impasse” is reached, the employer is allowed to unilaterally implement its final offer. Workers must then live with the imposed terms, or strike to obtain their own proposal (or whatever resolution might result from the strike).

The impasse doctrine is not contained in the NLRA. It was elaborated by the courts. Again, note the contrast here with the Railway Labor Act, which does not allow employers to make unilateral changes upon an impasse in bargaining. Instead, parties in the railroad and airlines industries must turn to mediation, conciliation, arbitration and other mechanisms of the RLA, leaving unchanged the terms and conditions of employment under the prior collective agreement.

Strikes and lockouts

Whether or not impasse has been reached in bargaining, upon the expiration of a prior collective agreement workers can strike or employers can “lock out” workers in a test of economic strength to achieve their bargaining goals. Workers can withhold their labor and set up picket lines outside the workplace, but they cannot prevent the employer from continuing operations.

Employers have many options for continuing operations during a strike. In many workplaces managers and supervisors can maintain activity. As long as em-

ployers do not use threats to coerce them or promises to entice them, they are legally permitted to try to persuade workers not to join strikes or to cross picket lines and return to work.”

Striker replacements

Most important, employers may hire replacements for striking workers. This, too, is a result of judicial decisions, not legislation. Replacement workers can be temporary, leaving the worksite when the strike ends. But management may also hire them as permanent replacements, leaving workers who exercised the right to strike jobless. The strikers are not dismissed; they remain on a recall list to return to work only when a job is vacated by a replacement worker. After one year, an NLRB election to decertify the union can be held, with strikers not eligible to participate in the vote.

The striker replacement doctrine applies when workers engage in an “economic” strike over terms and conditions of employment. If they engage in an “un-fair labor practice” strike motivated by the employer’s violation of the NLRA, workers cannot be permanently replaced.

C. Current extent of private sector collective bargaining

The high point of collective bargaining in the United States came in the 1950s, when one-third of the labor force was covered by collective agreements. Since then a steady decline has taken hold. Today about 7 percent of private sector workers – about 8 million – are covered by collective agreements. (U.S. Department of Labor 2013).

But this decline bears further analysis. The United States is a big country. Collective bargaining coverage is in many ways a regional phenomenon. In New England, around the Great Lakes, on the West Coast, and in other states, collective bargaining is still deeply rooted in transportation, communications, food processing, health care, manufacturing, retail, service, entertainment, hospitality, and many other sectors.

Most collective bargaining in the private sector takes place at the level of the individual firm. Unlike Europe, the United States does not have sectoral bargaining between peak-level social partners. Instead, unions usually bargain with management at the enterprise level. For large national groups like General Motors or General Electric, bargaining takes place at the national level on a “master agreement,” followed by “supplemental agreements” at the company’s different facilities.

Where unions have not been certified to represent employees, employers have complete freedom to act unilaterally as long as they comply with basic labor legislation such as minimum wage, overtime pay, non-discrimination etc. Employers’ desire for such flexibility and control explains why union organizing is so difficult in the United States. Where workers in a non-union workplace try to form a union, management typically launches an aggressive campaign to frighten them into voting against union representation, with implicit threats that the company will close the workplace if the union wins the election. (Human Rights Watch 2000).

3. COLLECTIVE BARGAINING IN THE PUBLIC SECTOR

Collective bargaining for public employees began to take root in the 1960s. Before then, rights of assembly under the First Amendment to the Constitution allowed public employees to form associations that could lobby legislatures for improved salaries and working conditions. But genuine collective bargaining between trade unions and public authorities did not exist.

The first legislation granting public employees the right to collective bargaining took effect in the state of Wisconsin in 1960. In years that followed, as public employees' associations became more politically active, other states enacted collective bargaining laws for state employees and for employees of subordinate jurisdictions such as counties and municipalities. However, this trend was not universal. Today, 31 states permit some level of collective bargaining for public employees, while 19 states prohibit it. (Congressional Research Service 2011).

At the federal level, a 1962 executive order by President John Kennedy established collective bargaining for federal government employees. The executive order was later transformed into federal law during the presidency of Jimmy Carter in 1978. It allows collective bargaining over working conditions and disciplinary procedures, but it prohibits bargaining over economic issues such as salaries and benefits.

In the federal sector and in most states that allow collective bargaining, strikes are prohibited. Legislation creates various procedures for mediation, conciliation, fact-finding, recommendations etc. If they still fail to yield an agreement at the bargaining table, mandatory arbitration sets terms and conditions of employment.

About 7 ½ million public sector employees are union members, approximately the same absolute number as that of private sector workers. On a percentage basis, however, public employee union membership is five times greater: 36 percent, compared with 7 percent in the private sector. This brings the overall level of union membership in the United States to 11.3 percent – again, however, with large regional differences. New York, California, Pennsylvania, Illinois and other states have union membership approaching or exceeding twice the national average, while Texas, Florida, North and South Carolina, and other states had less than half the national average. (U.S. Department of Labor 2013).

4. CONCLUSION

American history reflects a long cycle of trade union decline and growth. Analysts routinely predict the death of the labor movement. (Yeselson 2012). Heralds of labor's demise often argue that unions were needed in the past, but modern, enlightened management and the need for economic competitiveness make them obsolete. (Troy 1999). But then, workers fed up with employers' exploitation de-

cide to find new ways to defend themselves.

In 1932 George Barnett, the incoming president of the American Economics Association, said that he saw “no reason to believe that American trade unionism will so revolutionize itself . . . as to become in the next decade a more potent social influence than it has been in the past decade.” Instead, the labor movement tripled in size in the next decade. (Porter 2012).

History does not repeat itself, and conditions now are not the same as those spurring the great organizing drives of the 1930s and ‘40s. Still, American workers have shown deep resourcefulness over long cycles of trade union growth, decline and regeneration. Workers’ need for “somebody to back me up” in the face of employer power never disappears. The labor movement built by workers in the United States over the past century is still a strong base for working class advances and strengthening of collective bargaining in years to come.

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