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A Reconsideration of THE RIGHT TO STRIKE

JAMES GRAHAM*

A DECISION BY the United States Supreme Court in June of 1962 denying injunctive relief to employers in federal courts against strikes in breach of collective bargaining agreements may be one of the more significant events in the field of labor relations since the passage of the Taft-Hartley amendments to the National Labor Relations Act in 1947.¹

The Sinclair Case

Mr. Justice Black's majority opinion in *Sinclair Refining Co. v. Atkinson*² certainly clashes with the temper of the times and will probably provoke serious proposals for corrective federal legislation. Insofar as the decision reanimates the statutory language and doctrines of a more turbulent era in labor relations,³ it should also generate fresh discussion about the scope, viability and morality of the so-called "right to strike."

In substance, the Court in *Sinclair* decided that when Congress amended the NLRA and gave federal district courts jurisdiction over breach of contract suits by or against labor organizations,⁴ it did not intend to waive the ban of the Norris-LaGuardia Act which prohibited injunctions "in any case involving or growing out of any labor dispute."⁵ Norris-LaGuardia was enacted in 1932 as a result of the tendency on the part of many

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¹ 61 Stat. 156 (1947), 29 U.S.C. § 185 (1958).

² 370 U.S. 195 (1962). For a discussion of this decision, see 37 ST. JOHN'S L. REV. 167 (1962).

³ See Stewart, *No-Strike Clauses in Federal Courts*, 59 MICH. L. REV. 673, 676 (1961); Note, 72 HARV. L. REV. 354, 355-56 (1958).

⁴ 61 Stat. 156 (1947), 29 U.S.C. § 185 (1958).

⁵ 47 Stat. 70 (1932), 29 U.S.C. § 104 (1958). It should be noted that unions have been successful in using § 301 to enforce collective bargaining agreements against their employers. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). The petitioner thus claimed in *Sinclair* that since the no-strike clause is the *quid pro quo* in consideration of which the employer consents to arbitrate grievance disputes,

federal judges to enjoin strikes and other forms of union conduct which disturbed their private views of order in society.⁶

Congress, in 1947 and again in 1959, clearly had exempted from the effect of Norris-LaGuardia those amendments to the NLRA aimed at curbing national emergency strikes and certain unfair labor practices by unions as, for example, "black-mail" picketing by a minority union, *i.e.*, one that does not represent a majority of the employees of the picketed employer.⁷ A proposal by the late Senator Robert A. Taft that any breach of a collective bargaining agreement be deemed an unfair labor practice and enjoined by the National Labor Relations Board passed the Senate but was removed from the 1947 bill during a House-Senate Conference.⁸

As a practical matter, an employer still has the right in a specific case to a court order compelling the striking union to arbitrate the matter in dispute and the continuation of the strike in the face of such an order *might* constitute contempt of court.⁹ But an employer, without an injunction, has no advance protection against future strikes of a similar nature. Absent injunctive relief, the remedies presently available to an employer for violation of a "no strike" clause

granting specific performance of the latter would require the same remedy for the former. See Hoebreckx, *Federal Courts Under Section 301*, 43 MARQ. L. REV. 417, 434 (1960).

⁶ See Feinsinger, *Enforcement of Labor Agreements — A New Era in Collective Bargaining*, 43 VA. L. REV. 1261, 1263 (1957).

⁷ 61 Stat. 146 (1947), 29 U.S.C. §§ 10(h), 208(b) (1958).

⁸ *Hearings on the Operation of the Labor-Management Relations Act Before the Joint Committee on Labor-Management Relations*, 80th Cong., 2d Sess. 111-12, 114, 239, 241-42 (1947).

⁹ *Sinclair v. Atkinson*, 370 U.S. 195, 217 (1962) (dissenting opinion); see Note, *supra* note 3, at 371.

in his contract are generally considered to be inadequate either as compensation or as a deterrent.¹⁰ Federal courts may award money damages in these cases but this relief is small consolation if the respondent union lacks the funds to satisfy a substantial judgment. Arbitrators and judges, as a group, are also reluctant to regard unions as entities apart from their constituent members who may be earning little more than the legal minimum wage.

It sometimes happens that strikes are "wildcat" in origin, unauthorized by the leadership, or perhaps called in defiance of the current administration of the union. The problem then arises, which is unrelated to the plight of the employer, of awarding damages commensurate with union responsibility for the illegal strike activity. Furthermore, the strike, though unlawful, may have been called to protest misconduct on the part of the employer. Finally, arbitrators, judges and even employers must take into consideration the fact that the course of future labor-management relations at the struck plant will not be aided by an oppressive verdict in money damages.

The Newspaper Blackout

Is it possible, however, for an employer to take the law into his own hands? May he, as a defensive measure, retaliate against an illegal strike with a lockout affecting neutral employees? In December, 1962 the five-member NLRB reversed its trial examiner who had concluded, after a hearing, that the Publishers' Association of New York City and its member newspapers had violated the NLRA by maintaining an agree-

¹⁰ See Hoebreckx, *supra* note 5, at 437; Rice, *A Paradox of National Labor Law*, 34 MARQ. L. REV. 233, 234-35 (1951).

ment which contemplated city-wide shut-downs as a deterrent to illegal strike activity.¹¹

Aside from its enormous legal implications, the *Publishers'* case is important because, unlike most Board decisions which are moot when handed down, this NLRB determination apparently encouraged the New York newspapers to blackout the city when the Typographers' Union struck four of their members during negotiations only several weeks after the Board had announced its decision.

Prior to this decision, the NLRB and the courts had permitted lockouts, retaliatory or otherwise, only in very limited circumstances, such as a "whipsaw strike" during contract negotiations,¹² or when the threat of an imminent strike presented unusual economic hardship to an employer.¹³ A recent instance of "whipsawing" occurred in

June 1960 when Actors' Equity precipitated a thirteen-day shutdown of Broadway's legitimate theaters by threatening to strike *seriatim* the more recalcitrant members of the League of New York Theaters.

The Supreme Court, in *Buffalo Linen Supply*, reasoned that multi-employer bargaining in this country had developed as a necessary response to the growth of large, powerful unions and that members of an employer association reasonably could protect the integrity of their bargaining unit against the threat of disintegration implicit in a whipsaw strike.¹⁴ The Court in *Buffalo Linen Supply* declined to pass upon the question whether a lockout might be equated with the right to strike,¹⁵ although in a somewhat converse situation the Court affirmed what loosely may be described as a national policy of non-interference by the government with the substance of collective bargaining, by deciding that harassing tactics, such as shutdowns, by a union during the course of negotiations did not constitute bad faith bargaining in violation of the NLRA.¹⁶ Congress, indicated the Court, did not empower the Board to determine what economic sanctions are legally available to the parties in an ideal or balanced state of collective bargaining.¹⁷

The *Publishers'* decision nevertheless represents a considerable extension of the *Buffalo Linen Supply* principle in that it encompasses situations where the alleged threat to the bargaining unit results, not from a whipsaw strike, but from the possibility of illegal walkouts in the future at the plants of non-struck employers' association

¹¹ The Publishers' Ass'n of New York City, 4 CCH LAB. L. REP. (LAB. REL.) (CCH N.L.R.B.) ¶ 11776 (Nov. 21, 1962).

¹² NLRB v. Truck Drivers' Local 449, Teamsters Union, 353 U.S. 87 (1957) (*Buffalo Linen Supply Co.*). In NLRB v. Great Falls Employers' Council, Inc., 277 F.2d 772 (9th Cir. 1960), a union struck only one of the members of an employers' association and the remaining employers locked out their employees. Subsequently the employees were permitted to work only a part of each week so as to be disqualified from receiving unemployment compensation. This was held not to be an unfair labor practice.

¹³ "[T]he Board has held that in single-employer cases lockouts cannot be used as a weapon against a union; they may only be used to protect against economic loss." Teamsters Union v. NLRB, 262 F.2d 456, 463 n.19 (D.C. Cir. 1958). In American Brake Shoe Co. v. NLRB, 244 F.2d 489 (7th Cir. 1957), an employer was permitted to utilize lock-out procedure just before the strike occurred where economic necessity for such action could be shown. See, e.g., Betts Cadillac Oldes, Inc., 96 N.L.R.B. 268 (1951); International Shoe Co., 93 N.L.R.B. 907 (1951); Duluth Bottling Ass'n, 48 N.L.R.B. 1335, 1354-60 (1943).

¹⁴ *Supra* note 12, at 94-95.

¹⁵ *Supra* note 12, at 93 n.19.

¹⁶ NLRB v. Insurance Agents' Int'l Union, 361 U.S. 447 (1960).

¹⁷ *Id.* at 500.

members. Consequently, the decision may not be sustained on appeal.

In the past, the Board itself questionably has refused to equate a lockout as an economic weapon similar to the right of employees to strike. In a 1952 decision, the Board bluntly expressed the "underdog" rationale which helps to explain the American attitude toward strikes, at least those strikes aimed at primary (as opposed to secondary or neutral) employers by stating "the Union has only *one* effective weapon — its ancient and protected right to strike . . . [whereas the employer] has a whole arsenal of weapons from which to choose."¹⁸

Origin of The Right to Strike

Judges, among them the late and respected Learned Hand, have suggested that the right to strike and to induce others to do so and the right to bargain collectively are derived from the common law.¹⁹ Perhaps that is so. It is certainly true that the traditional Anglo-Saxon repugnance for involuntary servitude can be found in the thirteenth amendment to the United States Constitution, but those unionists who have been imprisoned in this century in the name of the common law may be somewhat cynical of unqualified rhetoric about the right to strike.

In the view of Sidney and Beatrice Webb, the right to strike was always a mere derivative of freedom of contract.²⁰ At the turn of the last century, the very term "direct action" was unknown in Eng-

land. The strike was regarded not as a distinct method of trade-union activity, but merely as the culminating incident of a breakdown in collective bargaining. Senator Taft, during the 1947 legislative debates, affirmed his belief in the right to strike as a necessary element of the free enterprise system.²¹ We can find that right still guaranteed in Section 13 of the NLRA,²² except as it has been limited by a number of other Taft-sponsored amendments. This apparent ambivalence is not reflected in the cautious language of the *Sinclair* decision but Mr. Justice Black, dissenting in another recent case, expressed his views on the right to strike more fully, stating that "to say that the right to strike is inconsistent with the contractual duty to arbitrate sounds like a dull echo of the argument which used to be so popular, that the right to strike was inconsistent with the contractual duty to work — an argument which frequently went so far as to say that strikes are inconsistent with both the common law and the Constitution."²³

Anti-Strike Legislation

The Citizens' Union of New York City and several of the daily newspapers recently criticized the municipal government for allegedly incorporating this uncritical attitude toward strikes in an "anti-strike-breaking" ordinance. The same civic officials have also been reluctant to enforce the admittedly harsh provisions of the

¹⁸ *Davis Furniture Co.*, 100 N.L.R.B. 1016, 1020 (1952).

¹⁹ *Douds v. Local 1250, Retail, Wholesale Dep't Store Union*, 173 F.2d 764, 770 (2d Cir. 1949).

²⁰ WEBB & WEBB, *THE HISTORY OF TRADE UNIONISM* 664 (1920).

²¹ 92 CONG. REC. 5705 (daily ed. April 23, 1947).

²² 61 Stat. 151 (1947), 29 U.S.C. § 163 (1958). This section has been interpreted as a congressional command to the courts to resolve doubts and ambiguities concerning unfair labor practices by unions in favor of an interpretation which safeguards the right to strike. *NLRB v. Teamsters Union*, 362 U.S. 274 (1960).

²³ *Local 174, Teamsters Union v. Lucas Flower Co.*, 369 U.S. 95 (1962).

Condon-Wadlin Act²⁴ against teachers who struck the public schools, yet the Mayor and other city officials seemed powerless, until the intervention of Governor Rockefeller, to resolve the crisis of conscience generated by the strike against some of New York's voluntary hospitals in June and July of 1962. The hospital strike resulted from the efforts of a local of the Retail, Wholesale Department Store Union to seek recognition as the collective bargaining representative of the nonprofessional employees. The strike has been from its inception a source of embarrassment to organized labor as well as to the politicians. The New York City union leaders, for the most part old-line militants now representing a relatively prosperous rank and file, apparently were shocked to learn that this city does count the very poor among its inhabitants. At first they supported the strike on its merits and hailed the proposal for compulsory arbitration legislation. Several weeks later, however, the state AFL-CIO, with only the Department Store Union dissenting, emphatically rejected the idea with the argument that such legislation would open the door to compulsory arbitration generally.

In September 1962, a strike by the American Federation of Television and Radio Artists (AFTRA) blacked out New York City's first educational television station on its opening night. Whatever the merits of the dispute, AFTRA's conduct in this case constituted at best a brutal and unnecessary demonstration of economic strength which

certainly made no friends for organized labor. It is only fair to add, however, that a double standard seems to prevail on the question of strikes. Last summer, we witnessed instances of direct action by the medical profession which, in the opinion of this writer, were more outrageous than anything ever contemplated by organized labor. Some doctors in New Jersey threatened to strike against the medicare plan of the Kennedy administration; most of the doctors in the Saskatchewan Province of Canada did in fact strike, obviously for other reasons. Yet criticism of either group in responsible publications, when compared with the usual reactions to a strike of milk deliverers, for example, was surprisingly mild. Even adverse criticism of the conduct of the Canadian doctors was often tempered with the curious assurance to readers that "emergency" care was being provided during the strike. Statistics may never be made available but the fallacy here becomes evident when we consider the not-so-remote possibility that a citizen or citizens of Saskatchewan might have died from cancer discovered two weeks too late because at the time of the first complaint, the patient's doctor was exercising his common-law right to strike. Though not an "emergency" case *ab initio*, the hypothetical patient died all the same.

Moral Attitudes

Two papal encyclicals, *Rerum Novarum* (1891)²⁵ and *Quadragesimo Anno* (1931),²⁶ which have had no little impact upon social reforms in the United States and other nations, are apropos of this discussion. The late Philip Murray, first president of the merged AFL-CIO, once referred to *Rerum*

²⁴ N.Y. CIV. SER. LAW § 108. "No person holding a position by appointment or employment in the government of the state of New York, or in the government of the several cities, counties, towns or villages thereof . . . shall strike." N.Y. CIV. SER. LAW § 108(2).

²⁵ Leo XIII, *Rerum Novarum* (1891), FIVE GREAT ENCYCLICALS 1 (1939).

²⁶ Pius XI, *Quadragesimo Anno* (1931), FIVE GREAT ENCYCLICALS 125 (1939).

Novarum as the "Magna Charta of labor's rights."²⁷ *Quadragesimo Anno* figured prominently in the Wagner Act legislative debates.²⁸ Referring to both encyclicals, G. Mennen Williams, while Governor of Michigan in 1951, said in an address:

Today we do not question the fact the issues of right and wrong must be considered in our social policy along with questions of profit and loss. . . . The voice of the Vatican . . . was profoundly influential in bringing the world to its senses.²⁹

The encyclicals nevertheless contain a non-doctrinaire view of the right to strike. Pope Leo XIII wrote that: "Religion teaches the laboring man and the workman to carry out honestly and well all equitable agreements freely made . . ." ³⁰ and that public remedial measures should be utilized to remove the underlying causes of strikes "for such paralysis of labor not only affects the masters and their work-people, but is extremely injurious to trade and to the general interests of the public. . . ." ³¹ Pope Pius XI, in *Quadragesimo Anno*, suggested a system of labor-management cooperation which would abolish strikes (and lockouts) altogether.³² The Jesuit priest, Benjamin L. Masse, has interpreted *Quadragesimo Anno* on this point to mean that the right to strike is a natural right but one that can be exercised legitimately only as a last resort, and peaceably.³³ The papal teachings on labor

have always stressed a comprehensive view of social justice and the need to relate particular applications of the teachings to the community as a whole.³⁴

If, as suggested above, the right to strike has its American origins in the common law, there is substantial evidence that it has developed along radically different lines in other nations, including England. The British historians, Sidney and Beatrice Webb, noted in 1920 a growing tendency among British labor unions to abandon the strike, even as a collective bargaining weapon, in favor of political action.³⁵ A 1960 study by Professors Paul Hartman and Arthur Ross of the Institute of Industrial Relations in California concluded that only in the United States and Canada is the strike still an essential element in a non-regulated collective bargaining system "sufficiently frequent as to constitute a significant method of determining conditions of employment and sufficiently long as to test the staying power of workers and employers." It is startling to learn that in 1958 and 1959 the average annual work loss due to strikes exceeded two days per union member only in India, Finland and the United States. Excluding the totalitarian countries from consideration in this respect, Hartman and Ross seem to attribute the discrepancy to an almost world-wide tendency among unionists to favor broad political endeavors as a means of remedying industrial grievances rather than strikes.

Alternatives

We need not conclude from all this that the right to strike is, or should be, obsolete.

²⁷ Oak, *Social Encyclicals of the Pope*, 49 CATHOLIC MIND 665, 667 (1951).

²⁸ *Hearings on the Operation of the Labor-Management Relations Act Before the Joint Committee on Labor-Management Relations*, 80th Cong., 2d Sess. 481, 491-92 (1947).

²⁹ Williams, *Not Statism, Not Socialism*, 49 CATHOLIC MIND 660, 661 (1951).

³⁰ Leo XIII, *supra* note 25, para. 16.

³¹ Leo XIII, *supra* note 25, para. 31.

³² See Pius XI, *supra* note 26, para. 94.

³³ Masse, *The Popes and the Industrial Revolution*, 49 CATHOLIC MIND 635, 640 (1951).

³⁴ Baerwald, *The Labor Encyclicals Today*, 49 CATHOLIC MIND 622, 629 (1951).

³⁵ WEBB & WEBB, *THE HISTORY OF TRADE UNIONISM* 664 (1920).

Proposed alternatives which have been successful in other nations, such as compulsory arbitration and the formation of a Labor Party, might prove unworkable here and even obnoxious to the American eco-political system. It is also true that in this country most employers will never welcome unions with open arms and in the last analysis, despite the protections and prohibitions of the federal and state labor statutes, unions, in most cases, will be forced to resort to a show of economic strength to force recognition and/or just bargaining demands upon recalcitrant employers. But the point sought to be made here is that the right to strike is by no means absolute. A democratic desire to sympathize with the "underdog" should not obscure the fact that the entire community, including employers, has a legitimate interest in industrial peace.

Mr. Justice Brennan argued in his vigorous dissenting opinion in the *Sinclair* case that the justification for the Norris-LaGuardia Act in 1932 was that federal court injunctions had stripped unions of their strike weapon without substituting any reasonable alternative. However, an agreement, freely made, to arbitrate all disputes arising during the term of the contract obviously does offer such an alternative.

Ironically enough, the *Sinclair* decision will also add to the woes of many harassed union leaders. It is unfortunate but true that those labor organizations which are most democratic in their internal affairs are often most guilty of illegal strike activities; either the leaders cannot control dissident elements in the ranks or, facing re-election difficulties, must cater to the desire of the members for dramatic action to protest real or imagined grievance. In the past, the threat of an imminent injunction has been urged when necessary by union officials,

without losing face, as a compelling reason for resorting to arbitration rather than a work stoppage for satisfaction of the grievance.

It is quite likely that in the next few years, Congress will avoid the effect of the *Sinclair* decision by either amending the venerable Norris-LaGuardia Act or, more likely, by amending the NLRA to make an unjustified breach of a no strike clause an unfair labor practice, enjoined at the discretion of the NLRB. In certain vital industries or occupations, compulsory arbitration may be the necessary alternative to strikes of any kind. Teachers and hospital workers, for example, who in effect are denied the right to strike under all circumstances, should not be forced to rely solely on the generosity or political sensibilities of public officials for redress.

But the larger problem will still remain and that is the failure of some unionists, particularly in industries like construction where labor organizations are enormously powerful, to comprehend that employers who can afford a wage demand should not automatically and in every instance be compelled to pay it. Perhaps a more cogent example of union callousness is the not infrequent jurisdictional or work-assignment dispute in which the employer is usually an innocent bystander. Several years ago, the writer had occasion to become involved in such a controversy which could fairly be described as the result of pique on the part of one of the competing unions, but which threatened to halt construction on a downtown New York City skyscraper. The owner of the building quickly capitulated to the more powerful of the two unions because even a two-day strike might have cost him thousands of dollars in broken leases.

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even though the new physical state was obtained by the use of nonjuridical means. The party should, therefore, be allowed to enter into a licit and valid marriage con-

tract. The example above cited is, in our estimation, one of the cases which clearly illustrates the absolute independence of law from medical science.

RIGHT TO STRIKE

(Continued)

Employers in certain industries almost always bow to union demands because, having banded together in collective bargaining associations with their competitors, they are in a position to make the public pay the price of increased wages or shorter hours. This is an oversimplification, of course, but it would not be naive not to suppose, for example, that at least one effect of the inflated wage scales in the building trades is to make it more difficult for the lower-income groups to increase their earnings and someday to buy a home.

Conclusion

In any event, it would appear that government neutrality in labor disputes is fast becoming a thing of the past. The Kennedy administration has to date shown no reluctance to invoke the Taft-Hartley injunction procedures in labor disputes affecting the national welfare. A proposal by former Secretary of Labor Goldberg that government representatives participate as "observers" in major negotiations was greeted with

a cry of indignation from George Meany and a chilly "no thanks" from management spokesmen, but Goldberg's proposal does reflect an increasing concern for the public interest in labor-management disputes. It seems that government mediators often will intervene in disputes that only remotely affect national defense interests. Perhaps this tendency has been influenced by the widely-held view among labor practitioners that public tolerance for strikes is much lower today than during the years when unions were organizing in the mass production industries.³⁶

In conclusion, it is safe to say that additional legislation to curb illegal strikes and to compel arbitration in certain industries may not only be inevitable but necessary as well. We also can expect government regulation over other areas of collective bargaining unless the powerful unions pay heed to the principle enunciated by Pope Pius XI in *Quadragesimo Anno* that the right to strike should be exercised only as a last resort and in situations where it needs no justification.

³⁶ N.Y. Times, Oct. 7, 1962, p. 48, col. 2.