## II

## THE SCOPE OF COLLECTIVE BARGAINING

COLLECTIVE bargaining is not industrial relations. It is not even a process for reaching agreements to cover the principal and most important relations between employees and employers. Its scope, its appropriate subject matter, includes relatively few of the relationships between employees and other employees.

The scope of collective bargaining has been materially changed during the years of our experiments with laws on the subject. It was limited and actually reduced by the provisions of the Fair Labor Standards Act. By that law, it became impossible for employers and unions to bargain on weekly overtime hours and overtime rates which did not equal the provisions of the law, in any employment affecting interstate commerce. Obviously, the statutory minimum wage, the forty-hour straight-time week, and the time-and-a-half overtime rate were better provisions than had been obtained by many employees through bargaining. But the fact remains that a certain area was in effect removed from the field of collective bargaining.

Section 7(*a*) of the National Industrial Recovery Act dealt with code provisions for the right of employees to "organize and bargain collectively through representatives of their own choosing." Section 7(*b*) made a modest attempt to define the subject matter of collective bargaining. It refers to "standards as to the maximum hours of labor, minimum rates of pay, and such other conditions of employment as may be necessary . . . to effectuate the policy of this title." The pertinent items in the policy seem to be these:

> . . . to remove obstructions to the free flow of . . . commerce . . . to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices . . . to avoid undue restriction of production . . . to reduce and relieve unemployment, to improve standards of labor. . . .

The National Labor Relations Act gave no more practical help in defining exactly the subject matter within the scope of collective bargaining. It made specific reference to "the refusal by employers to accept the procedure of collective bargaining" and to the evils of "inequality of bargaining power." It cited the value of "friendly adjustment" of disputes over "wages, hours, or other working conditions." It declared a policy of encouraging and protecting workers in organizing and bargaining collectively "for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

Common sense gradually settled on the assumption that the scope of collective bargaining was "wages, hours, and working conditions," which was assumed to be reasonably clear. But the clarity disappeared, gave way to confusion and diversity, in actual practice. Many specific conditions were brought within the definition by certain unions and employers, as a matter of course, while the same subjects were definitely or tacitly held to be entirely outside the scope of collective bargaining by other employers and other unions. Probably no one has even ventured to explore the possible scope of collective bargaining for "other mutual aid or protection."

The Taft-Hartley Act placed definite barriers against the inclusion of certain subjects in certain forms of collective bargaining, and excluded other subjects from any collective bargaining. A "rank and file" union could not bargain on behalf of foremen on any subject. No union or employer could bargain on the subject of a closed shop. The forms of union security which could be negotiated, other than a closed

shop, were greatly limited as to substance and procedure. There could be no bargaining on a general check-off of union dues, nor on an individual check-off authorization to be irrevocable after one year.

Under both the Wagner and Taft-Hartley Acts, the meaning of "working conditions" is uncertain. The phrase obviously refers to some conditions other than wages and hours. It is almost generally assumed to include such matters as seniority considerations in layoffs. It was usually assumed to include rules for promotion to nonsupervisory jobs. There were disputes and strikes when employers refused to admit that it included work assignments, the number of machines per operator or of operators per machine, the number of helpers per operator, or the units of product per day. Employers logically lost these arguments. They had to face the fact that these were essential elements in any definition of "working conditions" and properly within the legal and logical scope of collective bargaining. But, of course, they retained the right to bargain over them in fact, and to refuse to concede demands which they considered unreasonable.

Some union contracts, arrived at by collective bargaining, have prescribed the location of entrances and time clocks. Others have provided that supervisors must not use abusive language in speaking to employees. Many have said that union officers, regardless of length of service, shall have seniority over all other employees. It is common to many contracts that any union member selected for a full-time union job shall have an automatic leave of absence, with the right to return to his regular job in one year. Such a clause often provides that he shall continue to accumulate seniority on his regular job while he is not working at it but at his union job.

Many contracts provided for re-employment of veterans, in terms identical with the federal law on the subject. Others have included terms for the re-employment of veterans, more

liberal than the terms of the law. It is not unusual to find a provision that the employer "shall observe all state and federal laws affecting safety and sanitation."

In a relatively small number of contracts, there are either general or specific provisions dealing with retirement plans. Other agreements include provisions for group insurance. There are occasional "deals" covering the use of physical examinations, either in the hiring of new employees or in periodical checkups on all employees. There are provisions relating to citizenship requirements for new employees, or disclaimers of connections with subversive organizations by all employees. Some contracts specifiy the allowance of time, sometimes paid for by the employer, to give each employee the opportunity to vote on election day. There are instances of specific permission to employees to absent themselves on certain religious holidays which are not business holidays.

The records of the War Labor Board during World War II throw an interesting light on many of the borderline subjects. Issues came before that Board in connection with disputes which threatened the war production effort, which were emotional, inconsequential, and impractical of solution even by the award of a tribunal exercising substantially the powers of a court of arbitration. Hundreds and possibly thousands of these minor and borderline issues impeded the work of that Board, at a time when its most efficient performance was needed to smooth the path of the war effort. Although that Board was the top labor disputes authority of the most important government in the world, its experience of being handicapped by these borderline or extraneous issues has a parallel in the large or small collective bargaining conference. The time, ability, and patience of negotiators on both sides are frequently consumed and wasted in dealing with such questions.

A typical experience of the War Labor Board gives a dramatic instance of such unnecessary burdens on machinery

set up for more important purposes. One serious dispute involved working conditions for long-distance truck drivers. Presented to the Board were sixty-two issues in dispute between the employers and employees. One of these issues dealt with the quality and character of the mattresses in the sleeping unit, where the second or relief driver sleeps while his mate is at the wheel.

In this particular case, it appeared that the War Labor Board by unanimous decision handed the whole case back to the parties to the dispute, for the elimination of this and similar minor issues. It is understandable that the Board found it necessary to draw the boundary at some place to mark the limits of "working conditions" coming properly under their jurisdiction, and that all the members of the Board representing management, labor, and the public, agreed that they could draw the line somewhere between "working conditions" and "sleeping conditions."

This is typical of the subjects which, in the minds of many employers, are in the clouded area, just inside or just beyond the scope of collective bargaining. If they are properly within the boundary, it is because they are "working conditions." If they are outside, it is because they are not "working conditions."

While there was a War Labor Board which had been substituted for the normal processes of collective bargaining, it was reasonable to expect the line to be drawn somewhere. When the normal processes of collective bargaining are at work the employer faces a different problem and a different responsibility. In bona fide collective bargaining negotiations, there is no impartial power to decide, either as to the agenda or as to the disposition of it.

It is probably poor tactics or a vain hope for any employer to contend that any phase of his relations and dealings with his employees will be found to be technically outside the meaning of "working conditions." He is on a weak

foundation when he refuses to discuss any condition which his employees seriously demand, if he must rely on the doubtful technicality that the subject is not one on which he is legally required to bargain. He can make a better investment of his time and intelligence by studying the reason for the demand. He cannot afford to continue any practice which creates dissatisfaction and resentment, merely by reason of his supposed ability to bar the subject from the bargaining table.

But there are positive and constructive reasons why many of these, and many more subjects of other kinds, should not be subjected to the formal procedures of collective bargaining. The very fact that they have not been satisfactorily handled, outside the process of collective bargaining, usually creates a difficult and militant attitude toward the normal problems of collective bargaining. Many of these subjects are, by their very nature, impossible of settlement, or agreement, or compromise. There is no language which can be incorporated in any labor contract which can solve some of these problems. And yet their injection into the discussions in the process of collective bargaining usually has a positive and unfortunate effect on the entire atmosphere of the negotiations.

Quite frequently subjects which are on the border line of propriety are injected into collective bargaining negotiations, as a matter of clever tactics. A skilled union negotiator has frequently accomplished his major purposes by advancing requests or demands on a number of subjects which he knows will not be accepted by the employer as proper subjects for collective bargaining. He cannot do this effectively unless he has some basis for the demands, some degree of dissatisfaction or discontent among the employees. On rare occasions the union negotiator will unexpectedly gain a concession by an employer which was not seriously desired by the union. But more frequently the union negotiator will abandon his

fringe demands one by one, reluctantly and almost tearfully. When the real bargaining has narrowed down to a final ten cents an hour difference in wages asked and wages offered, he is in a strong position to say:

"There is some point at which these representatives of your employees must refuse to be pushed around any further, and we think this is the point. We have sat here for days during which you have done very little except say 'No' to our requests. One after another, we have given up these demands for conditions which these workers want. We have certainly demonstrated our sincere desire to reach an agreement with you. We have certainly not made these concessions with the intention of giving up this very minimum demand on wages. I can say to you frankly that we did not expect you take advantage of our willingness to make these other concessions, to the extent of denying this last request. And I can say to you, Gentlemen, that you are not going to get away with it. We are at the end of our concessions. We are all through with being talked out of our demands."

The employer-negotiator who finds himself in this position is likely to find that his seat is hot. Regardless of the fairness or unfairness of their tactics, the union negotiators have been "smart." It is difficult to explain, either to employees or to the public, why the employer refuses to grant demand No. 12 after the union has given up demands Nos. 1 to 11, inclusive. The employer may know and say that items 1 to 11 were not proper subjects for collective bargaining and that they are subjects which cannot be settled by contract. That explanation is not likely to be convincing either to the workers, to the public, or to an impartial arbitrator.

In reviewing such a predicament, many an employer has come to the conclusion that there ought to be a law. He is required by law to engage in collective bargaining with his employees. There should be another law, to set forth specifically and in detail the subjects upon which he is compelled

to bargain. There should be a law to which he can point to justify his refusal to negotiate the quality of mattresses for truck drivers, a law which omits mattresses from the list of proper subjects for collective bargaining. Too often employers in such situations become parties to increasing the trend toward law discussed in chapter vi.

The old defenses against such tactics were fairly simple. Perhaps not applicable to mattresses, but definitely applied to union security, work assignments, qualifications for promotion, and a number of similar issues, employers have said with convincing dignity: "That is a subject which we cannot discuss here. It is a matter of principle with us." Most employers have gained an objective viewpoint of their own problems and their own behavior with the passage of years. Most of them are now ready to admit that whenever they said "No" on the grounds that "this is a matter of principle," they actually meant "this is something that we will not do; at least, we do not want to do it."

Another favorite device for limiting the scope of collective bargaining was to brand certain requests as "an invasion of the prerogatives of management." This was applied to subjects which were in fact not proper matters for collective bargaining. It was also, and perhaps more frequently, applied to demands which an employer was unwilling to grant, and against which he could not think of any better argument. Largely because they erected this fortification, which they called "the prerogatives of management," employers invited and challenged the unions to storm the fortress. It has been stormed. The wall has been pierced in a hundred places. The "prerogatives of management" which some employers once considered sacred have not all been abolished; but management has had to learn that it cannot decide for itself what its prerogatives are.

The scope of collective bargaining, both in theory and in practice, is a flexible and changing one. There is almost no

theoretical limit. As unions press for the inclusion of one subject after another, they arouse the opposition of employers against the extension of the bargaining area. As employers engage in this opposition, rather than in a constructive treatment of the conditions involved, they invite new administrative findings as to whether they, the employers, have refused to bargain collectively and in good faith, on disputed subjects. The past trends of these administrative decisions should convince employers that this is not an intelligent way to limit the scope of collective bargaining. The tactical resistance of single employers has resulted in administrative findings, frequently backed by court decisions, which have frozen additional subjects into the collective bargaining agenda for all employers.

There is an important lesson on the practical scope of collective bargaining to be drawn from the experience with the multiple-employer bargaining unit. One of the benefits of such units which has been largely overlooked is the tendency to limit the bargaining to issues that are common to all or many of the separate employer units. There is usually a logical willingness to exclude demands and debates on petty desires, annoyances, "gripes," and details of the daily relations within a single plant. Such items do not usually enlist the interest of the employee representatives from the other plants and companies. It is seldom necessary for an employer to point out that the temperature of the water in the showers at Plant B can hardly be allowed to take up the time of representatives from thirty local unions and thirty different employers. The larger bargaining unit tends to concentrate the bargaining on essential items of common interest. The small bargaining unit provides a better stage for dramatizing such items as the temperature of the shower water.

The only practical way to limit the scope of collective bargaining is to deal constructively with every borderline or extraneous subject before it is forced into the agenda of the

negotiations. The principal index of the propriety of the inclusion of any subject is the degree to which it can be dealt with by specific agreement and stipulation. This degree cannot be established by argument. Any subject which an employer honestly believes cannot be dealt with practically in the process of collective bargaining should be dealt with practically outside the scope of collective bargaining. Such a subject will be injected into the collective bargaining procedures only if it has not been dealt with satisfactorily elsewhere, through procedures involving frankness, tolerance, and co-operation. If any subject affecting the daily relations in the establishment is not dealt with satisfactorily within those daily relations, it cannot be permanently excluded from the scope of collective bargaining on the ground that it is not theoretically or legally within that scope.