III

COLLECTIVE BARGAINING INCLUDES STRIKES

A STRIKE in the process of collective bargaining, a strike marking an impasse in negotiations, must be considered with a first presumption that it is an appropriate move in the negotiations.

There may be a firm conviction in the minds of employers that the objectives of the strike are not proper objectives. There may be the fixed opinion that the demands which the strike seeks to enforce are unfair demands. There may be a firm belief that resort to strike action instead of continued negotiations is unwise and even arbitrary action by the workers, their union, or their leaders.

But there must be recognition that no moral stigma attaches to such a strike. There must be the premise that a refusal to continue at work, in the absence of any commitment to continue, is neither a crime nor an act of bad faith, no matter how unwise or unnecessary it may seem to employers, or to outsiders.

An illustration supplied by an old farmer has a lot of truth in it which should be recognized in our view of the strike which occurs in the process of negotiations. It seems that Jones owned a horse and a quarter acre of land. The quarter acre did not furnish full-time work for the horse, nor full-time feed for the horse or for Jones. Smith owned three acres of land and no horse. He made a deal with Jones to hire the horse for thirty days for two dollars a day and feed. On the thirtieth day, Jones opened negotiations with Smith on terms of hire for the next thirty days. Jones asked three dollars a day and feed. Smith refused to pay three dollars but offered two and a half. They could not agree, so Jones led his horse home—on strike.

Surely we and Smith can see no wrong in that, no moral ground for criticism of Jones, even if Smith's crops were at a critical stage. If Jones had pulled his horse out on a "quickie" strike during the first thirty-day contract term, we might all share Smith's indignation. But we recognize the right of Jones to withhold the work of his horse when he and Smith have no contract and have been unable to agree on wages and working conditions. Much more clearly we should recognize the right of Jones to withhold his own work when he and his employer have likewise been unable to agree.

In this oversimplified picture, there is one sharp-lined detail which can be validly transferred to the complex picture of employer-employee relations. It is the clear image of the refusal to continue work as a natural sequence, when negotiations fail to produce agreement on the terms and conditions of work. By this obvious parallel we can, and must, realize that adequate collective bargaining procedures contain the essential mechanism for the legitimate strike. Collective bargaining implies the threat of collective refusal to work.

By adequate collective bargaining procedures we must indicate procedures which provide or permit substantial equality of bargaining power. Without such equality, the organized workers cannot be in a position to risk the strike. Without the obvious ability to strike, to refuse collectively to work, organized workers cannot enjoy equality of bargaining power. The right of workers to organize and bargain collectively includes the inevitable right to withhold their work collectively.

Not only is this right to strike implicit in the right to bargain collectively, but this act of striking is made more practical and more probable by the guaranty of the right to organize and bargain collectively. The ability to strike effectively is one of the most important objectives of organization of workers into unions. In fact, it is probably the ultimate bargaining value assured to workers in any process

which protects their right to organize and bargain collectively.

Our first national legislation to recognize and guarantee this right to organize and bargain collectively was found in Section 7(*a*) of the National Industrial Recovery Act. It was not a comprehensive or self-executing law. It was merely a requirement that "every code of fair competition, agreement, and license approved, prescribed or issued under this title shall contain" the provisions recognizing and protecting the right of workers to organize, bargain collectively, be free from coercion, and to enjoy other related protections. Business, industry, employers, managements, if they desired the privileges to be obtained under a code of fair competition, must accord this right and protection to the workers in the industry covered by their code.

Section 7(*a*) stimulated an immense volume of organization and collective bargaining. Its short span of life saw relatively few major strikes, probably because of two important conditions. First, the quickly organized unions held no full treasuries to finance strikes, and their new and old members were not yet in any position to fill those treasuries. The second important condition was that employers and businesses which adopted codes of fair competition were too intent on promoting recovery, individually and collectively, to resist the reasonable demands of workers whose organization they had, in effect, invited.

But Section 7(*a*) fell with the rest of the National Industrial Recovery Act, when an unusual, unanimous decision of the Supreme Court declared the entire law to be contrary to the provisions of the Constitution. Employees who had organized under the supposed protection of the law found the supposed protection gone. Employers who had willingly or reluctantly seen their employees organized, who had willingly or reluctantly bargained with those employees, found themselves released from the supposed compulsions of their respective codes. Also, they found themselves deprived of the

privileges and protections of the codes, which had reconciled them to the recognition of the employee right to bargain collectively.

The sequence of events was natural. The unions which had been formed or expanded were forced to substitute economic power for the lost protection of the law, or wither and die. With their hot-house start, they had to grow strong and tough, quickly, to survive in the open air. Employers, many of them, welcomed their freedom from the obligations of Section 7(*a*). Improving business conditions lessened their grief over the loss of other code protections. Labor had a new strength, on paper, and had to prove that it could retain that strength without the props of the defunct law. A considerable number of employers were convinced that labor's strength was artificial, and that it should be minimized. The issues and the alignments for conflict were ready.

The conflicts naturally came. It is impossible to measure the relative importance of the open conflicts against the other movements which were going on at the same time. One was a scattered but large number of instances of complete or partial elimination of new unions. These usually included discharge of trouble makers, sometimes cuts in wages. The other, and probably much greater, movement was toward voluntary continuance of the recognition of unions by employers who had begun such relations under the commitments of the NRA codes. An important number of the collective bargaining relationships of today are the fruits of these mutually tolerant continuances of those relationships born under the Blue Eagle.

But there was confusion and conflict. We may here pass quickly over the Congressional struggles and final passage of the Wagner Act in July 1935, over the dramatic activities of the La Follette Committee, over the bad guess and bad taste of fifty-eight "greatest" lawyers who told us that the Wagner Act was completely unconstitutional and invalid, and by inference

suggested that it be ignored. Through all these stages the conflicts continued and even reached the incredible form of the sit-down; but in the midst of the conflicts, "Big Steel" surprisingly and peacefully signed up with John L. Lewis. We may pass quickly to the day in April 1937, when the Supreme Court of the United States affirmed the validity of the Wagner Act. From that day it was the law of the land. It was accorded immediate observance to a large degree, it commanded observance by zealous enforcement, but it never came close to the objective set forth in its own text. And it never could.

Most employers have had a very vague idea of the stated objectives of the National Labor Relations Act of 1935, the Wagner Act. They had a confused emotional belief that the real purpose of it was to help the CIO in its battle with the AFL, or perhaps to strengthen all labor unions. It is a reasonably safe estimate that not one percent of the employers in the United States read the law itself, or read the Congressional Declaration of Purpose, at any time between the date of the Supreme Court decision in 1937, and the discussion of the Taft-Hartley Act in 1947. Because the Taft-Hartley Act professed the same objectives as the Wagner Act, and professed to offer an improved machinery for reaching those objectives, business men and employers in 1947 found themselves looking more closely at the stated purposes of both these laws. No attempt is made here to justify the claim that Mr. Taft and Mr. Hartley did a better job than Mr. Wagner in charting the course toward this objective. Our interest here is concerned with a general misconception concerning the objective itself.

Stripped of legal language, argument, and oratory, the lawmakers in 1935 said, and the lawmakers in 1947 repeated, the following essential premises:

1. Strikes and work stoppages which affect (interstate) commerce result in a burden and interference on that commerce; the Congress is charged with regulating, and therefore with protecting, that commerce.

2. The refusal of employers to permit or recognize the organization of their employees, and to bargain collectively with their employees, has been a cause of strikes and work stoppages.

3. The guaranty of the right of workers to organize, and the compulsion on employers to bargain collectively with their workers, will tend to eliminate strikes and work stoppages.

Perhaps the numerical record of strikes in American business and industry, since the validation of the Wagner Act, is the best evidence of the fact that the medicine did not work the expected cure. It is not completely valid evidence, however. It needs to be explored as to circumstances. A scientific study would require the examination of each strike affecting interstate commerce, and the classification of each strike as to its causes.

The record shows that a very substantial number of these strikes resulted from the refusal of the employers to comply with the mandates of the National Labor Relations Act. This includes cases in which employers persisted in their interference with the rights of their employees to organize; cases in which organization had been effected but employers failed or refused to bargain collectively; and cases in which employers, rightly or wrongly, denied the application of the law to their particular enterprises. In all such cases, it cannot be said that the machinery for collective bargaining set up in the Wagner Act caused these strikes. In fact, the zealous enforcement of the Wagner Act provided a police weapon which the organized employees could have used, and should have used, in preference to the strike. However, it is perfectly clear that the statutory specifications and the administrative orders based on them created and defined clear-cut causes for disputes and resultant strikes.

The records maintained by the United States Department of Labor show that the great bulk of important strikes be-

tween 1937 and 1947 were not those caused by noncompliance of employers with the provisions of the Wagner Act. The overwhelming majority of the workers who engaged in strikes during this period found themselves "hitting the bricks" against employers who had complied with the provisions of the law. They found themselves striking against employers who had not interfered with the organization of their workers, who had not refused to bargain collectively with the representatives designated by their workers. They found themselves on strike because the employer was actually bargaining collectively with them, and in the course of the bargaining, had refused to grant certain of their bargaining demands. The fact that they were organized gave them the machinery and the power to bargain collectively with their respective employers. It also gave them the machinery and the power to strike as a means of emphasizing their demands and of demonstrating their bargaining power.

That is the lesson from the record. An examination of the theory leads to the same conclusion. A strike is a very difficult accomplishment for unorganized workers. Such strikes have been precipitated by intolerable working conditions, or intolerable attitudes or actions of the employer, or inflammatory leadership. They are rare and unusual, and their success is even more rare and unusual. A real strike is an organized collective refusal to work. By its very nature, it requires organization in advance.

A strike is a conspiracy. It was once punishable as a criminal conspiracy. Even before the Norris-LaGuardia Act, the Recovery Act, or the Wagner Act, the judicial attitude had been so greatly modified that a conspiracy to strike was no longer a criminal conspiracy. The Wagner Act took the final step by guaranteeing to workers the right to organize their forces in a way that provided the essential technical organization for a strike.

Collective bargaining by its very nature includes the

strike. In its ideal form, collective bargaining is a process of discussion between representatives of employees and the employer, in an attempt to agree upon terms on which the employees will work for that employer. The attempt to agree upon terms automatically assumes the possibility of failure to agree. It is a logical presumption that if workers cannot agree with their employer as to the terms upon which they will work, they will not work. When they act as a group on the decision not to work, that is a strike. The theory of collective bargaining includes the strike as a natural and possible step in the bargaining process, in 100 percent of the negotations. If 99 percent of the negotiations result in an agreement without a strike, that record is not due to the fact that the collective bargaining negotiations were compulsory. It is, rather, due to the fact that there is so much common sense, tolerance, and intelligent reasoning demonstrated by workers, their spokesmen, and employers.

The strike which occurs in the process of collective bargaining is not beyond the technical or moral scope of collective bargaining. It is part and parcel of the process of collective bargaining. It is one of the principal units in the weight of argument on the side of those who bargain on behalf of the workers. It is their final right to refuse to work on terms which are not acceptable to them.

The effective measures to avoid strikes are not to be found in any legislation that protects the right and increases the power of workers to organize and to bargain collectively. They are not always to be found in the actual conduct of the negotiations and are never found entirely in the process of negotiations. They are measures which lie beyond the scope of collective bargaining, in the daily working relationships, in traditions of fair dealing, and, above all, in the mutual understanding of facts, conditions, problems, and attitudes, which adds up to the mutual recognition of mutual interest.