EASON-WEINMANN CENTER FOR COMPARATIVE LAW SYMPOSIUM ON LABOR LAW

INTRODUCTION: AMERICAN LABOR RELATIONS LAW IN A COMPARATIVE PERSPECTIVE

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Big labor in America, battered by fifteen months of recession and a poor climate for unions, is facing a critical future. The unions are under siege on nearly all fronts: from the Supreme Court of the United States, the National Labor Relations Board (NLRB), the Occupational Safety and Health Administration (OSHA), the U.S. Department of Labor, and some union-busting big businesses. In a series of recent decisions, the U.S. Supreme Court has come down squarely against the interests of unions. The present composition of the NLRB (the Reagan majority) has made it easier for employers to rid themselves of unions. In fact, one could argue that the NLRB as it is presently constituted has turned into a mouthpiece for management. The OSHA and the U.S. Department of Labor have also contributed to the prevailing anti-union sentiments in the United

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States today.

Organized labor in the United States is also getting a run for its money from nonunion workers in some of the most troubled industries. Workers with no union affiliation are taking a wide array of jobs that once went to union workers. Efforts by businesses to save money are fuelling the trend. Because their wage levels are usually lower than union scales, employment of nonunion workers can push down production costs and often underprice unionized competitors. For their part, unionized enterprises are pressing for contract concessions to narrow the cost advantage enjoyed by firms employing nonunion workers. In some industries changes in government regulatory policies have also encouraged the trend. For example, deregulation of the trucking industry has allowed nonunion operators to enter the market and run the unionized companies ragged. The same circumstances prevail with the busline operators.

All of these trends mean that the American union movement has finally met the marketplace. The percentage of workers who do not belong to unions is rising fast in the United States. In 1965, for example, 71.6% of all American workers did not belong to unions. In 1975 the figure rose to 74.5%. In 1984 it is estimated that 80% of all American workers do not belong to a union. This trend can be expected to continue. This should be compared to the situation in comparable countries. For example, approximately 40% of the employer work force in West Germany belongs to unions; more than 50% of the employed workers in the United Kingdom belong to unions; more than 95% of all blue collar workers and more than 75% of all white collar employees in Sweden are union members.

Organized labor has never enjoyed full acceptance in the United States. Many employers fear the effects of unions, and much of the public distrust them. Even among workers, support for unions is lower today than at any time during the past half century. The irony is that by comparison with unions in the industrialized West, the U.S. labor unions constitute one of the most conservative, least ideological labor movements. The U.S. labor movement traditionally has been committed to the capitalistic system and to the principle that management should have the primary responsibility for managing. Yet U.S. employers will pay millions of dollars to experts in "union avoidance" in order to maintain their nonunion status. According to Professor St.
Antoine, in a contribution published in this Symposium, union workers generally find less satisfaction in their jobs than do similar nonunion workers. Why American unions face this opposition and distrust is an enigma.

In addition to the crisis which the labor movement is currently undergoing, one also notices certain fundamental changes in the nation’s collective bargaining system, which in turn are producing a quiet revolution in the way workers and their employers reach agreements. Negotiations are changing both in content and structure as a result of new problems and pressures, ranging from increased domestic and foreign competition to the higher level of education in the work force. Issues dealt with only fleetingly or not at all in the past, such as greater worker participation in decisionmaking, are now getting increased attention in contract bargaining. Even the bargaining process itself is being redefined. The standard three-year contract is disappearing, and agreements are becoming more fluid. The likely result of all of these changes is twofold: less turbulent negotiations and fewer strikes, at least over the long term. Statistics clearly show that strikes are on the wane. For example, in 1974 there were 424 work stoppages involving 1,000 or more workers. In 1983 the figure was down to eighty-one. In 1984, because contracts in key industries are expiring, the figure may be pushed up slightly.

However, despite organized labor’s decline in numbers and influence over the years, collective bargaining in its modern version is likely to be a vital force in industrial relations for years to come. The recession, instead of undermining the negotiation process, in fact has demonstrated the strength of collective bargaining and has shown that such agreements are far from obsolete. Collective bargaining is still the best mechanism available to companies to tell their employees “we are all in this together.” However, for collective bargaining to survive it has no choice but to become less adversarial.

In the midst of all of this gloom there is some good news for organized labor in the United States. Organized labor is banking on new collective bargaining laws in a drive to sign up state and local public workers. In recent months some states, notably Illinois and Ohio, have enacted legislation providing for collective bargaining for public workers. In 1983, Illinois enacted that state’s first collective bargaining law for teachers and other public employees. In the same year, Ohio enacted a law approving
collective bargaining for teachers, sanitation workers, highway crews, and other nonsafety workers. This law also gives these public workers the right to strike if negotiations reach an impasse. Recently, the American Federation of State, County and Municipal Employees (AFSCME) won the right to represent about 30,000 employees of the University of California system. Whether or not these new developments will result in any dramatic increase in unionization among public employees in these three states remains to be seen.

The papers that are published in this Symposium were generated by the Fourth Annual Colloquium of the Eason-Weinmann Center for Comparative Law at Tulane University. The topic of the Colloquium was *A Comparative Re-Examination of Labor Law* and it was held on November 11-12, 1983. Panelists at the conference were: Professors Paul L. Barron (Tulane University), Xavier Blanc-Jouvan (University of Paris I), Paul L. Davies (Balliol College, Oxford University), Julius G. Getman (Yale University), Robert A. Gorman (University of Pennsylvania), William B. Gould (Stanford University), George Schatzki (University of Washington), Theodore St. Antoine (University of Michigan), and Clyde W. Summers (University of Pennsylvania). The moderators of the Colloquium were Professors Christopher Osakwe (Tulane University), Joel Wm. Friedman (Tulane University), and Mary Ann Glendon (Boston College). The three specific issues that were discussed at the conference were: “Have Labor Unions Outlived Their Usefulness in a Modern Industrialized Society?”, “A Comparison of the Methods of Plant Shutdowns and Relocation: Moral and Legal Perspectives”, and “Worker Involvement in Management Decisions: Problems and Prospects.”

During the two-day conference the panelists compared industrial relations law in the United States, Great Britain, France, West Germany, and the Scandinavian countries as it relates to the three issues outlined above. In two specific comparisons, the American worker emerged as the clear loser vis-a-vis his foreign counterpart. Professor Gorman compares the legal protection afforded to the workers in the United States and in Western Europe when the management of a business decides to shut down or relocate and concludes that, on this question, the legal environment is much more hospitable to the interests of employees in Europe than it is in the United States. Professor
INTRODUCTION

1295

Gould compares the legal frameworks that grant the unions access to management information in the U.S. and in Western Europe and comes to the conclusion that U.S. laws handicap rather than promote such access. In Western Europe, by contrast, he finds that the unions are assisted by a network of national laws as well as international agreements. As a result of this, he tells us, the West European worker has considerably more access to management information than does his American counterpart.

Of the nine papers that were presented at the Colloquium, only seven are published here. Those by Professors Davies and Getman were not available at the time of this publication. Of the remaining seven papers, three deal with the various aspects of worker participation in management decisions, that is, the papers by Professors St. Antoine, Gould, and Blanc-Jouvan; three papers (by Professors Barron, Gorman, and Schatzki) deal with the legal ramifications of plant shutdowns and relocations; and that of Professor Summers looks at the usefulness of labor unions in a major industrial society. A casenote on the NLRB's *Milwaukee Spring II* decision written by Mr. Robert B. Mitchell of the Louisiana bar is also included in this special issue of the *Tulane Law Review*.

In his provocative piece, Professor St. Antoine asserts that collective bargaining lies at the heart of the union-management relationship. Its purpose is to protect employees against reprisals when they form an organization to represent them in dealing with their employers. Federal law, even while placing the force of government behind collective bargaining, has so artificially confined its scope that the process has been seriously impeded from achieving its full potential. He argues that the pro-union Congress that passed the Wagner Act in 1935 and imposed the duty to bargain did not see fit to define that duty. This gap was remedied by the pro-management Congress that enacted the Taft-Hartley amendment in 1947. His conclusion is that collective bargaining has promoted both industrial peace and increased worker participation in the governance of the shop, while at the same time stimulating higher productivity and causing only modest dislocations in the economy generally. At the same time he feels that the true potential of collective bargaining has not been tapped. He calls for a more sweeping and wide-open duty to bargain, essentially because giving the individual a voice in the shaping and operation of his job is a sound
industrial relations policy and may enhance efficiency and productivity.

On the issue of worker participation in management decisions, Professor Gould informs us that the American and European trade union movements approach this problem in fundamentally different ways. While both have made headway in establishing rights relating to access to information which could have an impact upon job security, Europeans have focused upon international or regional involvement as an adjunct to collective bargaining and labor law at the national and state level to achieve this goal. American trade unions, on the other hand, have made progress in gaining access to information in spite of the law relating to labor-management relations. He illustrates this by noting that in the U.S. an obligation to provide information is triggered only upon a union's request. Employers have no generalized obligation such as is provided for in the OECD Guidelines and ILO Tripartite Declaration. Nor do employers in the United States have a specific periodic obligation to report such as that contained in the Vredeling Initiative. He opines that the possible reason for this difference is that the American adversary process makes this kind of information—admittedly directly related to job security prospects—immaterial to the collective bargaining process. By contrast, the inquisitorial nature of the employer-employee collective bargaining negotiation in Europe presupposes the duty of the employer to disclose information to the union without having to wait for a specific request from the latter. But he concludes that a movement towards more access to information is taking place in the United States in spite of the law rather than because of it.

Professor Blanc-Jouvan's article is a critical evaluation of the forms of worker participation in management decisions in France. The essay begins with a comparative discourse of the mechanisms for worker participation in different countries. Worker involvement in management decisions, according to him, takes four different forms: collective bargaining agreements, standing committees consisting of representatives of management and labor to cooperate with the employer in the decision-making process, inclusion of workers on the boards of large companies, and the possibility of direct and immediate participation by the employees themselves in matters relating to the management of the enterprise.
INTRODUCTION

While no country in the world relies solely on any one of these four forms, the author opines that the U.S. and possibly Great Britain tend to stress collective bargaining as the primary form of worker participation in management decisions. In Germany the practice is for collective bargaining to take place at the level of the lands (states) while worker representatives sit on the supervisory boards at the company level. By contrast, France seems to provide for all four forms of worker participation in management decisions. Some of these forms are imposed by legislation, others are entered into voluntarily by the parties.

The author notes that traditionally collective bargaining was not an important form of worker participation in management decisions in France. However, that state of affairs is gradually changing largely because of recent legislation. The present experience with this new law, however, is not very encouraging. Because the courts have refused to recognize as lawful any contractual limitation on the right to strike, employers have little incentive to negotiate and have still less of an incentive to conclude an agreement since the points settled can at any time be subject to renegotiation under the threat of strike. The rest of his essay is a carefully reasoned critique of the recent French legislation of 1982 and 1983 on industrial negotiations. His conclusion is that these new laws were ill-conceived and could actually paralyze the employer.

In his essay entitled "Negligible Impact of the National Labor Relations Act on Managerial Decisions to Close or Relocate," Professor Gorman notes that when the management of a business decides to shut down a plant or to relocate it, the NLRA offers workers very little protection, in part because a substantial number of American workers (approximately one-third of America's work force) falls outside the coverage of the Act. Even for the remaining two-thirds of the persons employed in the United States, however, the Act affords no effective protection. And as if that were not depressing enough for such employees, it is also true that the limited protections of the NLRA have been narrowly and inhospitably applied by the Supreme Court and by the federal courts, which have been generally more sensitive to protecting managerial prerogatives than legitimate employee interests in job security. By comparison with the rights accorded European workers in such circumstances, the American worker is living in a very hostile legal environment. To
remedy this social injustice, Professor Gorman thinks that greater protection will have to come from new state or federal legislation.

Professor Schatzki’s essay closely follows the general thinking of Professor Gorman’s article. He begins with the statistical observation that, more than ever before, major employers in the United States are relocating significant parts of their business. These moves invariably have a significant impact on a wide variety of people and institutions. While agreeing with Professor Gorman’s view that the NLRA, in a case of shutdown or relocation, presently protects only those employees who are members of unions with collective bargaining agreements, Professor Schatzki urges the courts to extend the same protection to non-unionized workers. In his view, the fact that there is no explicit contractual language that precludes an employer from shutting down or relocating a plant without consultation with the workers does not necessarily demonstrate that the parties meant to leave the employer free to do as he chooses. While recognizing that there are constitutional limitations on what legislatures can do to help the worker who is suddenly abandoned by his employer due to shutdown or relocation, Professor Schatzki nevertheless urges the legislature and the courts to find an equitable remedy to the current plight of the neglected American workers.

In addition to the interest of the workers in job security, other social interests are adversely affected when a plant decides to close down or move, including those of the local community that is being abandoned. On the other hand, the relocated enterprise promises to benefit the prospective new workers and the new location. To which of these conflicting interests should we look in regulating plant shutdowns and relocations? Professor Schatzki concedes that these competing interests do not lend themselves to a rational integration. He feels, however, that the equities are on the side of the to-be-abandoned employees and locality. His suggestions on how to solve this problem are quite interesting.

Professor Barron’s essay examines the nature and impact of plant shutdowns and relocations and assesses the various solutions outside the NLRA that have been either attempted or proposed. Professor Barron specifically identifies two reasons for plant relocations: economic considerations and antipathy toward labor unions. Then the author examines the various legal theo-
ries that have been advanced by the injured employees or abandoned locality in suits against the relocating companies; among them, detrimental reliance on the promise to make the enterprise profitable, the surrounding community's property right in the nature of an easement, and a refusal to sell the enterprise to a community-based company as a violation of anti-trust laws. The legislative solutions to the problem of plant shutdowns and relocations that the author examines include the following: notice requirements, government oversight, financial aid to employees, transfer rights, and assistance for employee buyouts. His conclusion is that at the very least notice requirements and a severance pay provision should be part of any legislative response to the problem. In his view, these relatively modest steps are merely simple justice.

In the final article, Professor Summers examines two questions that are on the minds of most Americans today, i.e., whether labor unions have outlived their usefulness in modern industrial society and whether collective bargaining is merely a passing phase in the evolution of modern society. He starts off by stating that the usefulness of unions should be measured by identifying the functions in society which unions have performed in the past, the functions they are performing now, and the functions that they may potentially perform in the future. He warns, however, that if we look only at unions in the United States we may have a limited vision of what unions are or what they may become. Instead, he urges a comparative analysis of the issues. For his study he chose to focus on three foreign jurisdictions—West Germany, Sweden, and the United Kingdom—which he contrasts with the role of labor unions in the United States.

The author compares the relative standing of the labor unions in the four systems, but in the end he deliberately avoids answering the two questions that he posed at the beginning of his essay. What is particularly interesting about this piece is the author's display of the power of comparative analysis of the status of labor unions in these four industrialized Western democracies. Anyone reading through the author's description of the labor union situation in Sweden cannot but detect striking similarities between the status of labor unions in Sweden and in the
Soviet Union.¹ This in turn raises two questions in my mind: Is it possible for labor unions to perform similar functions in societies that have diametrically opposed social, economic, and political systems? If so, is there anything that the American and West European democracies can learn from the Soviet Union’s state-party-labor union relationship?

One of the goals of any comparative study of law is to compare the experiences of different jurisdictions and to seek solutions to problems in one jurisdiction by borrowing transplantable ideas from other legal systems. As any true comparativist knows, a solution to a common problem may work very well in a donor system but prove to be unworkable in a recipient system. This word of caution must be borne in mind as one reads the comparative perspective that is embodied in the individual essays that are published here. The Fourth Annual Colloquium of the Eason-Weinmann Center set out to examine what those foreign jurisdictions that are comparable to the United States are doing about the three issues that were addressed by the distinguished panelists. The results of that inquiry are presented here to readers of the Tulane Law Review. For the first time in the history of the Center, papers that were generated at its Annual Colloquium are being published in the Tulane Law Review. As the Director of the Center, I welcome this new collaboration between the Tulane Law Review and the Eason-Weinmann Center for Comparative Law.

¹ For an examination of the status and role of labor unions within the Soviet system, see C. Osakwe Soviet Trade Union Organizations in Legal and Historical Perspectives, 20 Law in Eastern Europe (Part 3) 267-319 (1979).