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The Law, Lawyers, And Labor Relations

An article by Russell A. Smith, Edson R. Sunderland Professor of Law, reprinted from the *Michigan Challenge Magazine*

Professor Russell Smith

In 1806 some cordwainers (bootmakers) were charged with a criminal conspiracy for banding together in what we would now call a "labor organization" with the intention of using their combined strength, through strike action if necessary, to increase their wages. The judge, instructing the jury, condemned the conspiracy on the ground that it was designed to interpose arbitrary and artificial restraints in the determination of employee wages and hence was inconsistent with public policy. The judge was reflecting some basic policy premises, obviously anti-union, held at that time by those in position to govern.

Time has wrought radical revisions of these early attitudes. Our public policy now views unionism and collective bargaining at least in private employment—and even increasingly in public employment—as an acceptable, even desirable, and perhaps in any event inevitable, institutional part of our democratic society. This change of basic attitude has not been accomplished easily and without travail.

Many unfortunate and even bloody episodes are part of our relevant, recorded history. And many problems remain. The functions of the law remain today, as in the early years of the Republic, to reflect the consensus

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of our society and in the implementing of that consensus, to illuminate, shape and develop it.

Thus, today's law concerning labor relations establishes the framework within which today's policies apply. Some laws, unrelated directly to trade unionism, but obviously supported by unions, impose standards of employment on all employers, whether "organized" by unions or not.

Examples are our workmen's compensation, wage-hour, child labor and factory health and safety regulations. Other laws are concerned with the employment relation as affected by trade unionism, and with the internal functioning of labor organizations.

These, especially those establishing the so-called "rights of unionization and collective bargaining," accept the premise that the determination of working conditions, beyond those minimum standards represented by the first-mentioned kinds of laws, are best left to the collective bargaining process.

In a very real sense, then, collective bargaining agreements, and the principles resulting from their application, have become part of our basic "law" of labor relations. Indeed, it can be argued with much persuasiveness that the rules of plant life emerging from collective bargaining are far more important to the parties concerned —employer, employees, the labor organization and, indeed, the public—than most of our formal labor legislation.

Moreover, the importance of the agreement-making process is obvious. I suggest that the public is becoming increasingly tolerant of failures of parties to reach agreement without recourse to "economic" force.

In this entire fabric of labor relations the lawyer has a vital role. In earlier times he was called upon to handle strictly legal problems as advocate for employer or union. He was concerned with the assertion or protection of legal rights, usually in relation to union attempts to organize a plant although sometimes in the post-organizational, collective bargaining phase.

One of his principal tasks was to seek or oppose an attempt to obtain a court injunction against a strike, picketing or a boycott. The moving party was usually the employer, and courts were more easily persuaded then than now to grant relief. This was the era of "the labor injunction" and of the development on the side of labor of a strong distaste for the law, lawyers, and judges.

The last two decades have produced a change in the lawyer's "job specifications" concerning labor relations. The "organizational" phase of union activity is largely over except in the public employment sector and among white collar employees in the private sector.

Collective bargaining has become an accepted way of life in large segments of industry and increasingly in the public sector. So the labor relations lawyer of today finds himself very much involved, directly or indirectly, with the post-organizational collective bargaining process, and less involved with the strife and bitterness associated with labor's attempts to organize.

In general, the collective bargaining process assumes

the existence of an established employer-union relationship. The tasks confronting the parties are not those of litigants who hope they will not see each other again but are those of participants with some mutual and some conflicting or competing interests in a continuing enterprise and association.

The labor relations lawyer of today, therefore, has the opportunity—and, in my view, the responsibility—of providing a service which includes but goes far beyond that of legal representation in litigious situations. In connection with the collective bargaining process he can, should and, indeed, must develop and use the skills of advisor, mediator and negotiator, not only at or behind the bargaining table, but in the private, preparatory counsels of his client, whether employer or union.

He often participates in the discussions of the group of individuals attempting to formulate the collective bargaining policies of his client. If he is skilled, and has gained perspective through experience, he can perform a valuable service in this role frequently as a kind of mediator. In acting for his client at the bargaining table and in disputes concerning the implementation of the collective bargaining agreement he can develop a constructive, good faith rapport with the other party which will make an important contribution to the collective bargaining relationship.

Finally, the lawyer of today has the opportunity and the responsibility, along with others, of helping in the continuing evolution of the basic legal framework of labor relations. Important questions remain unresolved or call for review and re-examination of existing policy.

I will conclude by mentioning only two areas of major concern. One is the dispute settlement process; the problem is how to achieve fair settlements while decreasing interruptions of production. The other is the entire range of questions associated with the extension of the rights of "self-organization" and collective bargaining to public employees, federal, state and local. Here lie some of the most intriguing and challenging issues of our day, including the accommodation of collective bargaining to traditional constitutional and statutory delegations of decision making authority and the extremely difficult problem of producing methods of dispute resolutions while maintaining a "no strike" policy.