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Special Comment

COLLECTIVE BARGAINING WITHOUT WORK STOPPAGES?

By ALVIN L. GOLDMAN*

INTRODUCTION

Legal institutions have provided us with numerous spectator sports. The jury trial and its predecessors, including trial by combat, are obvious examples. In the mid-nineteenth century, arguments before the Supreme Court of the United States occasionally attracted crowds of spectators and captured the front pages of the yellow press. In more recent times, proxy fights have been rumored to provide action for the bookmaking set and televised legislative investigations have won top-viewer ratings. Among the perennial spectator sports provided by our legal institutions over the past half-century or more has been the confrontation of labor and management across the collective bargaining table.

As with all spectator sports, the main intrigue of collective bargaining is the perpetual air of suspense. Unlike most other sports, however, interest in this one is heightened by the fact that here the participants can shift the rules as well as the play.

Analysts have attempted to remove the sport from the collective bargaining process by devising models to explain its operation. They strive, thereby, to bring the process within the realm of science; to substitute predictability for suspense. Some of these theorists use the old-fashioned descriptive analysis approach.¹ Others employ mathematical models,² game models³ and psycho-

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¹ E.g., M. RYDER, C. REHMUS & S. COHEN, *MANAGEMENT PREPARATION FOR COLLECTIVE BARGAINING* (1966); M. TROTTA, *COLLECTIVE BARGAINING* 68-87 (1961).

² E.g., Cheng, *Wage Negotiation and Bargaining Power*, 21 *IND. & LAB. REL. REV.* 163 (1968).

³ E.g., C. STEVENS, *STRATEGY AND COLLECTIVE BARGAINING NEGOTIATIONS* 77 (1963). Cf., Allen, *Games Bargaining*, 65 *YALE L.J.* 660 (1956) where the author proposes an interesting game model as a substitute for negotiation.

dynamic theories.⁴ To date, however, probably to the joy of the sport's public and the delight of its practitioners, these analysts have failed in their efforts to transform the collective bargaining process into a predictable series of transactions. Nevertheless, the spectators' enjoyment can be heightened, the participants' skills sharpened and perhaps even the rules of the game improved by attempts at formal and even informal analysis of how the game of collective bargaining has been played and why the players make particular moves. Recognizing that such an attempt remains art, not science, an exercise at analysis of the collective bargaining process is undertaken here not with the somberness of traditional legal scholarship but rather more in the spirit of Monday morning quarterbacking.

BACKGROUND

An excellent vehicle for examining the collective bargaining process was the 1967 round of negotiations in the automotive industry. Phase one, that year, was played between the Ford Motor Company and the United Automobile Workers Union. The game ran overtime, ending only after a forty-nine day work stoppage. The second phase was an engagement between the Chrysler Corporation and the U.A.W. This was a rather anticlimactic, relatively uneventful repetition of the Ford confrontation minus the long work stoppage but with the drama of a settlement announcement made just hours before the strike deadline. Phase three was between General Motors Corporation and the U.A.W. Like phase one, it too ran into overtime, but a work stoppage was never called. With the announcement of the new G.M. agreement, union leader Walter Reuther described the successful use of an experimental bargaining technique. It is at this point that our story begins.

By the time the U.A.W. joined G.M. at the bargaining table, on November 27, 1967, the old labor contract had long expired. However, rather than negotiate under the crisis pressure of an impending strike deadline or an existing work stoppage, G.M. and the U.A.W. agreed that no stoppage would take place before early January. Nevertheless, the parties agreed to set December 14th as

⁴ E.g., R. WALTON & R. MCKERSIE, *A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS* (1965). See also, C. STEVENS, *supra* note 3, at 23.

a target date for negotiating a new contract and stipulated that they would treat that target date with the same weight and importance as they would a strike deadline. As naive and artificial as this technique might appear to be, it worked. With the approach of the target date, the negotiating pace intensified and agreement began to take shape. When the target date arrived, the negotiators went into one of those marathon sessions which has become part of the folklore of collective bargaining. They emerged some thirty hours later with the announcement of a settlement. Mr. Reuther, who is one of labor's most successful negotiators, had praise for the role played by the artificial target date and indicated that it would be used more often in the future.⁵

Despite this claimed success of target date bargaining in the G.M.—U.A.W. negotiations, students of the collective bargaining process remained skeptical. It all seemed too simple and too naive. Could grown men, especially those hard-nosed veterans of the innumerable rounds of negotiations and periodic work stoppages encountered in the automobile industry, actually be persuaded by an artificial device to act as though they were confronted with a real crisis? This skepticism was borne out a few months later when the U.A.W.'s attempt to use target bargaining in negotiating with American Motors failed to produce any results.⁶

A careful analysis of the success of target bargaining in the G.M.—U.A.W. situation, however, quickly reveals that there is more here than meets the eye. Indeed, the underlying explanation of the success of the technique in the G.M. situation is quite simple and not in the least naive. Before exploring that matter, however, it will aid our understanding to take a brief look at the classic theory of the function of the work stoppage in collective bargaining and see how target bargaining at G.M. fits within, or without, that theory.

HOW COLLECTIVE BARGAINING OPERATES⁷

The tool of the work stoppage, as bizarre and masochistic as it

⁵ N.Y. Times, Dec. 16, 1967, at 38, col. 3.

⁶ On Feb. 13, 1968, the U.A.W. announced that February 29th would be the target date in its negotiations with American Motors. N.Y. Times, Feb. 14, 1968, at 33, col. 4. Agreement was not reached until a month after the target date. Washington Post, Mar. 16, 1968, at 14, col. 1.

⁷ See generally, E. BEAL & E. WICKERSHAM, *THE PRACTICE OF COLLECTIVE BARGAINING* (rev. ed. 1963); STEVENS, *supra* note 3; WALTON & MCKERSIE, *supra* note 4.

often appears, is almost universally regarded by the experts as indispensable to true collective bargaining. The weapon is available to both sides. When invoked by management it is called a lockout; when invoked by labor, it is a strike. Whoever calls the stoppage, both sides (and frequently the public too) are expected to suffer substantial economic injury. The employees, of course, are expected to suffer from loss of wages. Secondary losses, such as an automobile repossession by an unpaid creditor or family quarrels brought on by the extraordinary presence of the breadwinner at home, are additional employee burdens resulting from a work stoppage. On the other hand, a work stoppage deprives management of the profits of a going operation and may cause the business to lose those customers and suppliers who make new contacts during the hiatus. In addition, management may find it quite expensive to carry its idle plant, equipment and executive and supervisory personnel. If the employing unit is economically vital, the public, too, will suffer from loss of its product or services. Further, the public loses tax revenue and may suffer a drain on welfare type funds as a result of the stoppage.

Why is so much economic injury tolerated? One answer is that in the overall picture, the impact of work stoppages is really not very great. Work stoppages occur in about only five percent of all contract negotiations.⁸ The annual percentage of total work-time lost from work stoppages has rarely gone over one-half of one percent in the past forty years, and some of those stoppages did not involve contract negotiations.⁹

Another reason for tolerating the economic injury caused by work stoppages is that, as experience has demonstrated, in the vast

⁸ Although the author has seen the figure cited as three percent, that estimate is probably a bit too low. There are roughly 140,000 collective bargaining agreements in the United States. Of these, most are for a duration of two or more years. In an average recent year, the number of stoppages attributable to collective bargaining has been around 2,400. Therefore, assuming that about 50,000 collective bargaining agreements are negotiated per year, about five percent of those negotiations will entail work stoppages. See, U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, 1968 HANDBOOK OF LABOR STATISTICS TABLES 130 and 133 (1968); U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1425-4, MAJOR COLLECTIVE BARGAINING AGREEMENTS 7 (1966); U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1460, ANALYSIS OF WORK STOPPAGES 1964 2, 13 (1965); U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1596, DIRECTORY OF NATIONAL AND INTERNATIONAL LABOR UNIONS IN THE UNITED STATES 69 (1967).

⁹ See U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, 1963 HANDBOOK OF LABOR STATISTICS TABLE 130 (1968).

majority of employer-employee settings, the collective bargaining process is the most dignified and equitable method for groups of employees to secure a reasonable level of employment benefits.¹⁰ Because it is a necessary part of the process, the work stoppage is accepted as the economic price which we pay for an efficient, yet equitable, system of wage and benefit adjustment. (Of course in nations where concern for human dignity and economic justice have not gone much beyond the stage of oratory, work stoppages are prohibited by law. The Soviet Union and Spain, for example, are among those nations outlawing work stoppages.)

The function of the work stoppage, according to the classic theory of collective bargaining, is to provide both the economic leverage for the parties to resolve their differences and the crisis atmosphere needed to assure that they will negotiate with efficiency and in good faith. More specifically, the work stoppage provides the parties with a yardstick for measuring, at least in rough terms, the value of a settlement as compared with the continuation of the economic crisis. Since the parties have a fair idea of work stoppage costs, they can weigh them against the probable costs or gains involved in the terms proposed by the other side. Part of the negotiating process, accordingly, consists of each party trying to persuade the other that its cost of continued strife is less than the other's. The threat or existence of a work stoppage also provides the parties with a deadline for reaching agreement in order to avert the costs of the stoppage, thus creating the crisis atmosphere in which the negotiators are less likely to waste time in ritualistic pretensions but instead will seek a formula for settlement.¹¹

The function of the work stoppage in collective bargaining, then, is much like the function of warfare in international negotiations. It is a crude and brutal device for focusing attention on a dispute, yet for this very reason, the negotiators are more likely to seek and find a negotiated settlement because they are impelled by a mutual desire to avoid such an unsophisticated mode for making their differences felt as well as known. The threat or

¹⁰ See, e.g., the statements of Congressional policy in Section 1 of the National Labor Relations Act, as amended, 29 U.S.C. § 157 (1964).

¹¹ C. STEVENS, *supra* note 3, at 45-52; R. WALTON & R. MCKERSIE, *supra* note 4, at 30-34, 57, 232.

existence of a work stoppage, like war, acts essentially not as the means for resolving the conflict between the parties, but rather as the mainspring in propelling the negotiation process.

Since no one likes a work stoppage—except, occasionally, competitors of the affected company—why not devise a way to bargain collectively without the strike or lockout? This, it would appear, is what the G.M.-U.A.W. target bargaining device attempted to do. Almost everyone agrees that the goal is a worthy one. The disagreement is over the possibility of achieving it.

COMMON SUGGESTIONS FOR IMPROVING THE COLLECTIVE BARGAINING PROCESS

If a substitute for the work stoppage is to be developed, it will have to provide the crisis of a deadline and a yardstick for measuring the worth of alternative courses of action, yet not burden the parties and the public with economic hardship. The remedies commonly proposed, however, do not move in this direction.

One device, mediation, aims at improving the communications between labor and management. Occasionally it also adds the force of the mediator's personality to the existing pressures. At best, then, mediation does not supplant the role of the work stoppage in collective bargaining; it merely supplements it. The device of the fact-finding panel is much the same as mediation, but because it is more formal and usually more public, it has psychological attributes which add to its effectiveness in some situations and detract from it in others.

The third, and probably most frequently mentioned remedy, is arbitration. At best, arbitration substitutes the indirect social and economic damage resulting from the arbitrator's sometimes ineptly drawn settlement formula for the direct damage caused by a work stoppage. At worst, proposals for greater use of arbitration in resolving collective bargaining deadlocks can mean the total abandonment of the bargaining process, substituting the arbitrator's judgment for the mutual consent of the parties. If the parties know in advance that arbitration is imminent, they may be less likely to compromise during negotiation, fearing that the arbitrator will use a solution which draws a mean between the points at which the parties stopped bargaining.

At least one proposal for replacing the work stoppage does meet the theoretical criteria of an ideal substitute—it is the no-strike strike. A device of this nature was suggested by Professor Neal Chamberlain in the early 1950's.¹² The Federal Mediation and Conciliation Service refers to the device as the Dunbar Plan in honor of the use of the no-strike strike by Dunbar Furniture Company.¹³ Though there are a number of variations, the basic concept of the no-strike strike is that both parties submit to a direct pecuniary loss as a substitute for the direct and indirect financial burdens of a work stoppage. At the same time, the parties agree to forego the actual stoppage of work as a collective bargaining weapon. Under this approach, when bargaining begins, each side agrees that production and employment will be maintained regardless of the progress or lack thereof in negotiations. However, either side may invoke the work stoppage substitute arrangement at any time during negotiations. That substitute arrangement will, for example, require the employees to donate a predetermined percentage of their take-home pay to a charity of their choice while the employer similarly makes a predetermined financial sacrifice in addition to meeting his full payroll. Such a work stoppage substitute contains enough mutual injury to impel the parties to seek its avoidance via good faith collective bargaining. It also gives the parties a scale for measurement in the calculus of weighing alternative courses of action. On the other hand, despite the invocation of this work stoppage substitute, the employees continue to enjoy their job security plus a portion of their employment benefits, and the employer maintains his going business operation with all sources of management, supply and distribution intact. Both sides also save the expense involved in storing economic resources preparatory to a work stoppage. The public, too, benefits greatly from such a plan.

The major drawback to the no-strike strike, however, is the difficulty encountered in agreeing on the formula for mutual sacrifice. This formula will vary from plant to plant, and likely even from year to year. Accordingly, arriving at the formula requires a major negotiating effort in and of itself. If the parties can

¹² McCalmont, *The Semi-Strike*, 15 *IND. & LAB. REL. REV.* 191 (1962) (a discussion of Chamberlain's proposal and similar suggestions).

¹³ Letter to author from William E. Simkin, Director, F.M.C.S., Dec. 14, 1967.

reach a settlement on the formula for functional equivalency without resorting to a work stoppage while bargaining over it, the benefits should be worth the effort.

COLLECTIVE BARGAINING IN THE AUTO INDUSTRY

Because of its economic prominence and the concentration of its management, the automobile industry rarely operates in a manner which is typical of conduct in other sectors of our economy. Surely one special characteristic of collective bargaining in the auto industry is the stamp of Walter Reuther's influence. The almost total unionization of line employees, the prosperity and general growth pattern of the industry, the relatively high wage rates, the concentration of work force in large plant units, the ability of the industry to guide sales trends through sophisticated promotional techniques, and the widely dispersed ownership of the companies, have all exerted important influence on the shape of the industry's collective bargaining.¹⁴

In the automobile industry, both sides normally approach the bargaining table from a position of strength. In addition, as in all large organizations, the control of both the employers and the union resides largely with the executive personnel, not their constituents—the shareholders and union members. The power of the constituents is at best in the nature of a veto. The executive personnel are reasonably secure in their positions. There is no potent active opposition party appealing to the interests of the general membership of either constituent group.¹⁵ Changes of dynasty do occur in both camps from time to time, but these are rare.

Collective bargaining in the automobile industry has in fact been marked by a higher frequency of work stoppages than normally encountered in other parts of the economy. The parties have traditionally engaged in intensive preparations for such stoppages with the result that the impact upon the participants has been

¹⁴ See generally, J. GALBRAITH, *THE NEW INDUSTRIAL STATE* 265 (1967).

¹⁵ The prolonged effort by the International Society of Skilled Trades to organize skilled workers in the auto industry has met with seemingly impregnable legal barriers plus effective efforts by the U.A.W. to retain the loyalty of its craft members. See, e.g., *General Motors*, 120 N.L.R.B. 1215 (1958); *TIME*, Nov. 3, 1967, at 91. For evidence of similar stability in management's ranks see, e.g., *TIME*, Feb. 16, 1968, at 81 (Semon Knudsen of G.M. goes to Ford as its new President). See generally, J. GALBRAITH, *supra* note 14, at 72-97, 149-65.

substantially cushioned. Ford, for example, entered its 1967 strike with a one month inventory of new cars and a dealers' parts stockpile estimated at \$300 million.¹⁶ The U.A.W's war chest was about \$66 million when the strike began.¹⁷ Despite these intensive preparations and although each company separately negotiates its collective bargaining agreement, as with most aspects of the industry, there is a high degree of parallelism in the results. Thus, once the pattern of bargaining is set in one labor contract, the contracts of the others tend to closely imitate the first and quickly fall into line.¹⁸

Of the above characteristics of collective bargaining in the auto industry, only the frequency of work stoppages is surprising. The battle over the terms and conditions of employment in this industry does not involve a life or death struggle for either side. It is evident that a little more or a little less will still leave the respective parties quite comfortable and secure. Because there is a pattern of parallelism, moreover, the industry can generally pass along to the public the major burden of any changes imposed by a new contract. This does not mean that the parties face no forces of restraint. Automation and its resulting impact on job displacement is a very real threat to employees and the combined forces of foreign competitors and antitrust laws are a cause for management concern. Yet one would expect the industry to resolve these problems, in light of its overall health and power, without resorting to work stoppages.

At least two explanations can be offered for the industry's unexpected reliance on the work stoppage. One is that it has become a slave to its intensive pre-stoppage preparations. As a result, the officials on both sides must do something to justify amassing the enormous amount of assets tied-up in inventories and strike-funds. Likely, the need to justify such conduct serves as much to relieve the consciences of the corporate and union executives as it does to satisfy the scrutiny of their constituents. In a sense, then, the leaders must engage in some work stoppages to demonstrate the wisdom of their decisions in making these pre-

¹⁶ BUSINESS WEEK, Oct. 21, 1967, at 44-45.

¹⁷ Estimates ranged from \$65-67 million. U.S. NEWS & WORLD REP., OCT. 23, 1967, at 82; *Id.* Sept. 18, 1967, at 86; BUSINESS WEEK, Sept. 2, 1967, at 86.

¹⁸ R. MACDONALD, COLLECTIVE BARGAINING IN THE AUTOMOBILE INDUSTRY 5 (1963).

stoppage preparations. This proposition invites speculation that if each side could agree beforehand to reduce the extent of pre-stoppage preparation, the pressure to justify the cost of such activities would diminish and in turn the frequency of stoppages too would be reduced.

Another explanation for the auto industry's continued reliance on work stoppages is that they have become an important device through which the leaders on each side demonstrate to their constituents, and to themselves, that they are not about to sell out their electorate or fold under the pressures of bargaining. Accordingly, the work stoppage may serve as a device by which executive virility is displayed. Under this analysis, because of the tradition of pattern bargaining, once a serious stoppage has taken place with respect to any of the major members of the industry, the need for further stoppages is eliminated. After the first major stoppage, all can demonstrate that they are skilled, tough, dedicated negotiators by using the strike settlement as a base point for their own contracts.

Even taking the above view of the role of work stoppages in auto industry bargaining, in all fairness to the management and union executives it must be noted that both groups bore personal financial losses as a result of the forty-nine day strike at Ford in 1967. It is reported that the strike's impact on quarterly earnings left Ford officials without the usual handsome quarterly bonuses. Similarly, U.A.W. officials reportedly took a twenty-five percent salary cut during the term of the strike.¹⁹ However, the extent of these sacrifices is somewhat overshadowed when compared with the estimated loss of \$200 million in wages and at least \$2 billion in gross national product attributed to the 1967 Ford strike.²⁰

WAS TARGET BARGAINING REALLY EFFECTIVE AT G.M.?

From the foregoing, one can conclude that the target bargaining technique used by General Motors and the U.A.W. in 1967

¹⁹ U.S. NEWS & WORLD REP., Nov. 13, 1967, at 86. The author clearly recalls reading of the union salary cuts but is unable to locate the source.

²⁰ Ford officials estimated the impact on GNP at \$2 billion. BUREAU OF NATIONAL AFFAIRS, 1967 LABOR RELATIONS YEARBOOK 97. Government and university economists made estimates running as high as \$4 billion. NEWSWEEK, Nov. 20, 1967, at 85; N.Y. Times, Oct. 23, 1967, at 65 col. 4. Of course, it is impossible to determine how much of that loss was permanent and how much was absorbed by accelerated activity in early 1968.

was not a functional substitute for a work stoppage. The work stoppage in the industry's 1967 bargaining round had already taken place in the Ford negotiations where the contract pattern was set. Nevertheless, the correlation between the increased pace of bargaining and the arrival of the G.M.—U.A.W. target date does suggest that the target date had some sort of influence on bargaining. But, if so, why did it fail to produce results a few months later in negotiations with American Motors? A touch of cynicism supplies the answer. The target date set by G.M. and the U.A.W. was just ten days before Christmas. The executives who were charged with negotiating responsibilities for both the company and the union could assure themselves of a Christmas holiday with their families only by reaching agreement on or about the target date. Otherwise, in order to prove to all concerned that they were dedicated, hard-working spokesmen for their respective positions, the negotiators would have had to engage in at least some bargaining during Christmas week.

AN ALTERNATIVE PROPOSAL FOR BARGAINING WITHOUT STOPPAGES

But let us not be too skeptical respecting the value of this target bargaining experience. With the application of a little imagination, it may yet provide the insight for revolutionizing the process of collective bargaining.

Whereas the work stoppage effectively stimulates vigorous, good faith bargaining because of its impact on the people who are ultimately affected by the collective bargaining agreement—that is, the shareholders and union members—target bargaining shifts the emphasis to the operatives in the collective bargaining process. Is this not a major break-through? Think of the savings to be gained by shifting the costs of keeping the machinery of collective bargaining in motion from the numerous affected parties (shareholders, workers and public) to that very limited group which has the responsibility of actually negotiating the terms of agreement.

Let us explore the possibilities of this break-through in our understanding of collective bargaining. The key to success is to design a process under which the cost of keeping the bargaining

machinery operating is shifted to the negotiators. Such a design could function as follows. In exchange for adopting a new bargaining procedure, the parties will agree at the outset to forego use of the work stoppage. Then, at the commencement of negotiations the negotiators will be flown to a major hotel in the Virgin Islands. They will be permitted to negotiate for as little as four hours a day, four days a week. All expenses will be paid by their principals. If, after two weeks, they have not reached agreement, they will be flown to New York where they will be lodged at one of the medium priced hotels, again all expenses paid. At this point, however, the minimum bargaining schedule is expanded to an eight hour day and a five day week. If, after two weeks, they do not reach agreement, they will be taken to Albany, New York. This time they travel by bus and will be accommodated at a boarding house. At this point they will be placed on a minimum negotiating schedule of ten hours a day, six days a week. Finally, if this does not bring agreement after two weeks, the negotiating teams will be transferred by train to Buffalo, New York where they will be placed aboard a cramped, rusty houseboat and set afloat in the polluted waters of Lake Erie. Provisions will consist of three cases of peanut butter and twenty gallons of strong coffee. To top everything off, the negotiators will be required to remain at the place of last accommodation until the collective bargaining agreement is ratified.

Can collective bargaining exist without the work stoppage? Of course it can. All that is needed is a little imagination and a few adjustments in the rules of the game.