June 1921

American Legislation for the Adjustments of Industrial Disputes

Carl. I. Wheat

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Business Organizations Law Commons, and the Labor and Employment Law Commons

Recommended Citation

Carl. I. Wheat, American Legislation for the Adjustments of Industrial Disputes, 27 W. Va. L. Rev. (1921). Available at: https://researchrepository.wvu.edu/wvlr/vol27/iss4/4
AMERICAN LEGISLATION FOR THE ADJUSTMENT OF INDUSTRIAL DISPUTES*

By Carl I. Wheat**

THE LIMITS OF EFFECTIVE STATE ACTION.

I. WHERE WE STAND.

Strangely enough, as we have seen, the literature dealing with governmental efforts to aid industrial conciliation and arbitration and to adjust strikes and lockouts is meagre indeed. But a sufficient number of students have turned their attention to these matters to have produced a certain body of opinion, from which, in addition to the personal researches included in this study, the inevitable conclusion must be drawn that, as yet, state intervention in labor disputes in the United States is largely a failure.

In no single instance has governmental adjustment of industrial disputes proved a conspicuous success; and only in Massachusetts has the method known as arbitration formed any important amount of the total work, although the boards are almost invariably constructed with this function predominating in the minds of the legislators. Thus, in only a few instances is the construction of the agency such as to make mediation—the most successful field of effort for these bodies—truly practicable. A board of three persons, representing three different domains of human endeavor, cannot successfully accomplish such mediation, yet most of the state boards are thus constructed. Visions of arbitration, and the desire for industrial peace at any price, without any real

---

* This is the third of a series of articles on this subject. They consist of chapters from a forthcoming book which is to be published as one of the new series of Harvard Studies in Administrative Law. In addition to the installments published in the Law Quarterly the book will contain chapters on the subject matter indicated by the following titles: The Administration of American Statutes; Development in America During the War with Germany; The Experience of Other Nations; Extra-Legal Movements toward Industrial Peace; Proposals for Improvement.

** Member of the Los Angeles, Calif., Bar.
understanding of the fundamentals of industrial relations on the
part of legislators, have combined to bring about this undesirable
state of affairs. Even in the few states in which, as in Pennsyl-
vania, New York and Illinois, the construction of the agency has
been such as to make the mediatory function easy, the success of
state intervention in industrial disputes cannot be said to have
been great. It is evident that there are serious handicaps not yet
overcome.

And yet there seems to be a continued faith in this legislative
method of ending strikes and lockouts. Three new boards were
created in 1919; and in 1920 South Dakota put mediatory powers
into the hands of her labor commissioner, while Kansas plunged
deeply into the field of compulsory arbitration and Nebraska en-
acted a constitutional amendment giving new and vast powers to
the state government. Thus, after forty years of almost univer-
sally unsuccessful experiments, our state legislatures continue the
merry game of unconsciously hoodwinking both themselves and
the public regarding the principles of industrial relations. The
fact that most of these agencies have been created during the ex-
citement attending the aftermath of great strikes and industrial
disorders gives a hint of the mental atmosphere in which most of
the laws have been passed. Indeed, only by the recognition that
good motives and energy in administration may often suffice to
remedy the defects of a poor piece of legislation; can we explain
the even partial success of several of these boards. In no single
instance, so far as is discoverable, has one of these laws been passed
after a thorough survey of industrial conditions, or a really care-
ful study of results in other states.

The unsettled conditions existant during the early post-war
period caused widespread demand for further legislation to min-
imize strikes. But here also the same methods were used, and in
no less than five different states legislators wished simply to copy
the Kansas Industrial Court law within a few months of its en-
actment, and before any possible estimate of its ultimate success
or usefulness could have been made. Some persons have attempt-
ed to lay such hasty action to the hysteria which was prevalent
just after the armistice, but it appears rather to be merely an-
other example of what has been going on during all these years.
Copy-cat legislation is a common American phenomenon—unfor-
tunately not confined to industrial relations.
However, much faith is at present being put in the non-legisla-
tive methods of avoiding or adjusting industrial disputes. Among
these methods are included the various forms of collective bar-
gaining including ordinary trade union bargaining, the shop-com-
mittee movement, the proposals for joint-councils in industry and
those newer forms of bargaining, as illustrated by the work of the
Amalgamated Clothing Workers of America. Naturally, the em-
phasis upon these various methods varies with the position of the
observer. Thus, in general, employers have put their faith in the
shop-committee movement, although trade-unionists have been al-
most uniformly critical. In like manner, most employers would
criticise the organization and methods of the Amalgamated
Clothing Workers, though to a large element among the workers
this new unionism seems to point the way out. Notwithstanding
these varying points of view, the fact remains that in industry
itself is to be found a renewed effort to evolve machinery which
will solve the problem of adjusting industrial disputes.

Although there seems to be some slackening in the rush with
which employers went over to the shop-committee idea at the close
of the war, these committees are still holding their own in many
large establishments, and are making slow gains in efficiency, or-
ganization and power. The growth in numbers of such agencies
will in all probability, be slower from now on than it was for a
time, but they have now become solidly rooted in several indus-
tries, and are assured of a continuous and useful existence. Mean-
while, the work of developing joint-councils moves on apace in
other industries. Thus, in the printing trades, the International
Joint Conference Council representing both employers' associa-
tions and the unions, approved in August, 1920, a new agreement
providing for annual wage adjustments all along the line, recog-
nizing the cost of living as the basic factor in fixing wages, and
creating a national board and local boards of arbitration. Also
the longshoremen have re-subscribed to the plan of adjustment
that was worked out during the war, agreeing to abide by the ru-
lings of the national and local adjustment commissions.

Thus, since the state has failed to provide satisfactory machin-
ery for eliminating industrial disorder, industry itself is building
as best it may a structure of joint-conference and joint-action
which may well prove to be a way of solution. In the clothing
industry the very disorganization on the part of capital—acting
in multitudinous small shops and factories, and reduced to anarchy by the very fierceness of its competition—has forced the workers to take upon themselves the duty of providing the organization and control which is needed. No one plan will work for all industries, but much is being done at this very moment, and of course the first essential is a frank meeting of minds across the bars of industry. The employer who refuses to meet his workmen in their chosen organization is not forwarding the cause of industrial peace, and sooner or later his attitude will make for war. On the other hand, the union which always keeps a chip on its shoulder, and seeks through militancy to replace good sense is also a war-maker. These attitudes the new machinery now growing up within industry is helping to eliminate.

II. IS THERE A WAY OUT?

Judge Lindsay, of Denver, once said that the great Colorado strike of 1914 was "A symptom of national wrong which has broken out in Colorado at one time; in Michigan, West Virginia and Pennsylvania at other times; will continue to break out until you go deeply into fundamental questions concerning rights of property and the rights of humanity." Indeed, so long as causes exist which breed revolt in the minds of men, or which make them feel a sense of injustice—whether such a feeling is warranted or unwarranted—the industrial kettle will continue to bubble over when the pressure becomes too great. Thus, anything which will act as a safety-valve is of value—such as shop-committees, joint-conferences, and even state mediation agencies—but so long as conditions exist in any industry which make for discontent among the workers, there will be strikes.

It is perhaps a national tendency in America to seek relief from difficulty in a panacea. Luther Burbank is quoted by a recent writer as having said that, of all the characteristics of thousands of people who come to see him at his Santa Rosa ranch, the most striking is their desire to see a miracle, and this desire is present in very high degree whenever the subject of industrial relations is under discussion.

Perhaps it is well to inquire, before we attempt to cut this Gordian Knot, whether we would really wish to put an end to strikes altogether. Surely we would wish to make impossible or at least
unnecessary many of the strikes which are now listed in our statistics; surely we should seek to eliminate any sort of industrial disorder which takes the form of violence or riot, but strikes in the past have often made for progress, and a healthy quarrel has often led each party to respect the other in a higher degree, and has thus led to better relations. The demand of the American Federation of Labor for the right to strike does not mean that union labor is in favor of frequent strikes—for it has constantly opposed them in well-organized industries—but it is rather a desire that the safety-valve be left in working order; and after eliminating the many useless strikes and lockouts, there still remains an irreducible residuum of so-called matters of principle. Such matters of principle are the causes of our bitterest industrial conflicts. They include particularly such questions as the open shop, and recognition of the union. When such a principle is at stake only exhaustion on the part of either party will bring an end to the conflict, unless the state steps in and, by law, enunciates the principle which shall control.

Another matter of importance in this connection is the practical impossibility of absolutely prohibiting anything of this nature. For centuries our statutes have forbidden burglary, yet breaking and entering is common today; for generations we have prohibited murder, yet every year men are hung for that crime. In the problem of industrial relations, as in the problem of crime, the only sure way to success lies in the attempt to seek out the causes of the difficulties in question and to eliminate them. Mere prohibition of the symptom can never be of real value in removing the cause. The problem is one of seeking the causes of strikes and lockouts, of probing into all possible recesses in the hope of discovering methods of furthering industrial peace by eliminating these causes, and, as in the case of disease, if the cause be removed, the symptom will usually disappear. Unless our efforts are to continue to be what they have been in the past—merely mustard plasters on the aching stomach of industry—we shall have to get down to fundamentals and cease on the one hand the attempt to prohibit strikes, and on the other the blind faith in arbitration as a panacea which will bring the peace which we so often want at any price. As yet our conciliation and arbitration laws have but barely scratched the surface, have presupposed a state of industrial warfare, and have not attempted to provide substitutes for
strikes or lockouts. Professor Ballantine has succinctly stated the problem as follows:

"The right to strike is, under our present industrial system, a necessary safeguard and remedy. It is as vain to hope for the total elimination of strikes or lockouts, as for the total elimination of the necessity of self-defense and other forms of self-help. But this hostile, dangerous and wasteful method of enforcing demands ought to be used only as a last resort. If so, some earlier resort must be provided. Society is under an obligation to provide some alternatives to this trial by battle, and to make some remedies available for the civilized appeal to reason, instead of the primitive recourse to arms."

In the past the methods provided for the abolition of strikes and lockouts have been deficient in exactly this particular—they did not provide some other method by which the parties to industry might secure justice. If we do not provide a court, men will always seek their ends by self-help, and in the problem before us the chief concern of the state should be to provide a substitute for the strike. The only sure method is to attack the difficulty at its source, and not to seek by arbitration and the like, to cover up this difficulty by an artificially produced peace, which often carries within it the seeds of future conflict.

In considering the problem of the fundamental causes of industrial controversy, we must not forget the danger that lies in trying to simplify too greatly the difficulties before us. Was it not Mr. Justice Holmes who, when asked why the law was complicated, replied that it was because "Human life is complicated"? One should not fall into the error of thinking of society as less complicated than it is. Many of these matters cannot be simplified, and the problem of industrial relations strikes deep into the life of every individual concerned with industry. It is frequently difficult to seize upon the exact causes of any particular strike. Very often such a condition arises merely because no safety-valve has been provided. A certain natural unrest which it is often difficult to define seems to pervade the human race.

Yet, notwithstanding this vague feeling in the worker's mind, it is usually possible to discover certain main causes for the breaking of the machine where no safety-valve has been provided.

These causes in the case of strikes, when summed up in a composite group, make up the causes of the so-called industrial unrest about which we have heard so much. The deep-seated rivalry, in which the strike or lockout is but an incident, is the real problem.

Perhaps the most well-considered American statement of the causes of industrial unrest is that made during the war in the report of the President’s Mediation Commission. This Commission stated that it is “to uncorrected specific evils and the absence of a healthy spirit between capital and labor, due partly to these evils and partly to an unsound industrial structure, that we must attribute industrial difficulties which we have experienced during the war.” The Commission lists the following as among the most potent causes of industrial unrest:

(A) Lack of a healthy basis of relationship in industry, due at bottom to “the insistence by employers upon individual dealings with their men,” and employer opposition to labor organizations. This failure to equalize the parties in adjustments of inevitable industrial contests is the central cause of our difficulties.

(B) Absence of continuous administrative machinery for adjusting the inevitable difficulties, thus making force the sole outlet.

(C) Lack of “collective negotiation” as the normal process of industry. This causes a lack of knowledge and appreciation on the part of each party for the problems and difficulties of the other party.

(D) Certain specific grievances. These, “when long uncorrected, not only mean definite hardships; they serve as symbols of the attitude of employers and thus affect the underlying spirit.” Among these most important are questions of hours and wages.

The Commission went on to say that “Repressive dealing with manifestations of labor unrest is the source of much bitterness, turns radical labor leaders into martyrs and thus increases their following, and, worst of all, in the minds of the workers tends to implicate the Government as a partisan in an economic conflict.” Acts of violence against workers are, says the Commission, “Attempts to deal with symptoms rather than causes.” In addition, the derangement of the labor supply, with much migratory labor
and heavy labor turnover, is mentioned as a condition in American industry which accentuates the grievances mentioned above.\footnote{\textit{Report of President's Mediation Commission,} Jan. 1918.}

Another important list of the causes of strikes and of industrial unrest appeared in the final report of the second President's Industrial Conference, dated March 6, 1920. This conference states that "Unrest today is characterized more than ever before by purposes and desires which go beyond the mere demand for higher wages and shorter hours." It continues:

"Aspirations inherent in this form of restlessness are to a greater extent psychological and intangible. They are not for that reason any less significant. They reveal a desire on the part of workers to exert a larger and more organic influence upon the processes of industrial life."\footnote{\textit{Report of President's Industrial Conference,} 6.}

The causes of industrial unrest are many. Among others they include the rise in the cost of living, unrestrained speculation, spectacular instances of excessive profits, excessive accumulation and misuse of wealth, inequality in readjustments of wage schedules, release of ideas and emotions by the war, social revolutionary theories imported from Europe, the belief that free speech is restricted, the intermittency of employment, fear of unemployment, excessive hours of work in certain industries, lack of adequate housing, unnecessarily high infant mortality in industrial centers, loss of personal contact in large industrial units and the culmination of a growing belief on the part of both employers and employees that a readjustment is necessary to a wholesome continuity of their united effort.\footnote{\textit{Ibid.}, 5.}

The Canadian National Industrial Conference, held in September, 1919, publishes in its report a list of the chief causes of unrest as given by the Royal Commission appointed to inquire into Industrial Relations in Canada, as follows:

"1. Unemployment and the fear of unemployment. 2. High cost of living in relation to wages and the desire of the worker for a larger share of the product of his labour. 3. Desire for shorter hours of labour. 4. Denial of the right to organize and refusal to recognize Unions. 5. Denial of collective bargaining. 6. Lack of confidence in constituted government. 7. Insufficient and poor housing. 8. Restriction of free speech.\footnote{\textit{Ibid.}, 5.}
tions upon the freedom of speech and press. 9. Ostentatious display of wealth. 10. Lack of equal educational opportunities.”

Many other conferences and individuals have attempted to state these “causes.” To Mr. Edward A. Filene, of Boston, for instance, the most important causes of unrest are “the aspiration for self-expression through representation in the control of conditions of work and in management, and the demand for real and not counterfeit wages.” Mr. Henry Kimball Loud, of Detroit, on the other hand believes the increased cost of living because of the changing value of the dollar to be the main cause of the present industrial unrest. Dean Roscoe Pound, in his article on Liberty of Contract, speaks of the failure of legislatures to enact laws protecting workmen, and the action of courts, in many instances, in declaring such legislation, when enacted, to be unconstitutional. Forbidden to seek relief either by means of legislation, or by other peaceful means, the worker turns to force as the only way out. Carl G. Mote lists among other things as the actual causes of most of the strikes and lockouts in this country the following: the right to organize, the limitation of apprentices, wages, hours, working conditions, sympathetic strikes, and jurisdictional disputes.

Such, in brief, are the main causes of strikes and of unrest, according to the leading thinkers along these lines in this country and Canada. If there is any way in which the unfortunate symptoms of industrial disorder are to be eliminated, it will only be by way of prevention through removal of such causes, following the cue given by modern medicine. Once the cause is known, it seems that all that is needed to produce a cure is to eliminate such cause. It will be necessary, however, to arrive at a new point of view and to get away from the old idea of arbitration, and indus-

---

7 H. K. Loud, “Industrial Unrest Caused by the Changing Measure of Value,” ibid., 143.
8 18 Yale L. J. 454, 474.
9 Industrial Arbitration, 13 et seq.
10 In his report on “Strikes and Lockouts in the United States, 1916, 1917, 1918, and 1919,” prepared for the Federal Board of Labor Statistics, Mr. Edwin L. Whitney lists as the “principal causes” of such difficulties, questions involving wages, hours, recognition of the union, general conditions, discharge of foreman demanded, or discharge of employees resisted, employment of nonunion men, questions regarding agreements, sympathy, jurisdiction, and combination of such causes. Of these strikes and lockouts by far the largest proportion arose over the question of wages and recognition of the union, often combined with others. “Sympathy” and “Jurisdiction” represent very small elements in the total. Monthly Labor Rev., June, 1920, 204.
ADJUSTMENT OF INDUSTRIAL DISPUTES

trial-peace-at-any-price. Patch-work will no longer suffice, nor can mere state boards of arbitration or other artificial devices be trusted to lessen, in any very great degree, the unrest which surrounds us. If our forty years of experiment have taught anything, it is that merely permissive and voluntary machinery of the types yet evolved is not, and probably cannot be, successful in eliminating strikes and lockouts. And if such machinery has had a passable success in some states in the function of mediation, it has not been able, even by this method, to adjust the more violent controversies, such as those of the Lawrence textile workers, the Michigan copper miners or the coal miners of Colorado. These state-created boards might, if well constructed, serve to avoid a very large proportion of strikes and lockouts, but not until the deep-seated causes are removed can we expect to see unrest cease. Any machinery is probably better than none, save as it serves as a model for legislators of other states, but no machinery which merely seeks to mediate or arbitrate after the trouble has begun can be truly effective.

The inevitable conclusion is that some sort of continuous machinery, operating upon all potential disputes while they are still in embryo is the most important necessity before us, and here, as in other fields of human endeavor, voluntary and internal mechanism is better than external interference, even by the most generous and public-spirited of agencies. If the right spirit can be created between the parties to industry half the disputes which now arise would never come into being. This new spirit of industrial relations is the goal, and no machinery which the state may devise can hope to attain it alone. What the state can do is to establish the rules of the game, the principles and standards upon which the industrial relations of the future are to be built, and the rest will inevitably follow.

Thus, if the enlightened spirit of the community comes to feel that the old ideas concerning liberty of contract are no longer applicable to present day conditions, and that it is therefore right and just for the state to take whatever means are necessary to equalize the power to contract of employer and worker, it can enact this belief into law by compelling the recognition of labor organizations, and collective bargaining, and, by so doing, it will automatically put an end to those almost innumerable controver-
sies which cluster around these two demands of labor. The bitterest and most violent strikes are usually the result of such controversies. These are the so-called unarbitrable strikes—the strikes in which it is said that a matter of principle is involved—the strikes which can never be eliminated by any machinery save the direct recognition by the state that these aspirations are lawful and proper, and that they should not be hampered. If we thus remove the cause for such strikes, we need not worry over the right to strike, which has so bothered Kansas and Mr. Gompers; and if the public, as the great third party to industry, ever really desires to end the regime of the strike and the lockout, it will have to take some such action. Under the system at present in use industrial disputes are sure to end in strikes in a large proportion of cases, and, as a recent observer puts it:

"Needless energy is wasted, precious time is lost, precious feelings are diverted and disturbed by the necessity of fighting for the acceptance of the principle of collective bargaining instead of working out the means and methods of its application."10

What is here said regarding collective bargaining applies with equal force to other fields of industrial controversy. True, a recognition of this means a long step from the laissez faire days of but a few decades since, but such a step must be taken, and it is in fact already being taken in some quarters. No longer do we hear the lawyer-economist echo Sir Henry Maine’s unfortunate epigram, that our legal history is merely a record of the progress from status to contract—or that human and social happiness lies in the greatest individual self-assertion. If anything is clear in the law of today it is that the tendency is away from this attitude, and that laissez faire is being deserted. Dean Pound lists no less than six categories of cases in which the doctrine of liberty of contract is definitely infringed.11 In its place is appearing a doctrine of the public interest in the welfare of all classes of society by which unequal power to contract will be equalized by the state in certain circumstances.

ONE OF THE FIRST, AND CERTAINLY ONE OF THE MOST PRESSING NEEDS IN PRESENT INDUSTRIAL SOCIETY IS FOR THE STATE, AS THE REPRESENTATIVE OF THE WHOLE PEOPLE, TO RENDER EVERY POSSIBLE ASSISTANCE TO THOSE TENDENCIES IN INDUSTRY WHICH ARE MAKING FOR AN INTERNAL, STOPPAGE-AT-THE-SOURCE METHOD OF SOLVING INDUSTRIAL DIFFICULTIES. DESPITE THE OPPOSITION OF A MINORITY OF AMERICAN BUSINESS MEN, IT SEEMS QUITE GENERALLY ADMITTED THAT THOSE METHODS WHICH COME UNDER THE GENERAL HEAD OF COLLECTIVE BARGAINING ARE OF ADVANTAGE TO BOTH PARTIES—EMPLOYER AND EMPLOYED—AND THAT, WITH SUCH BARGAINING IN USE, A BETTER SPIRIT OF UNDERSTANDING SOON GROWS UP, PROVIDED THE PARTIES DEAL FAIRLY WITH ONE ANOTHER. IF THEY DO NOT DEAL FAIRLY, NOTHING IN THE WIDE WORLD WILL STOP CONTROVERSY, AND NO POSSIBLE BAN WILL BE ABLE TO PUT AN END TO STRIKES.

WHEREVER POSSIBLE, THEREFORE, THE USE OF JOINT-ACTION BY WAY OF COLLECTIVELY AGREEING UPON THE CONDITIONS OF LABOR SHOULD BE ENCOURAGED BY THE STATE. ONE OF THE FIRST MEANS TO THIS END WOULD BE THE ENACTMENT OF LEGISLATION LEGALIZING AND ENCOURAGING THIS METHOD OF VOLUNTARY AGREEMENTS VOLUNTARILY COME TO AND PUNISHING THE REFUSAL OF ANY PARTY TO DEAL COLLECTIVELY ONE WITH ANOTHER. WHAT IS SAUCE FOR THE GOOSE IS SAUCE FOR THE GANDER, AND IF THE ADVANTAGE OF EMPLOYERS' ASSOCIATIONS, AND THE EMPLOYMENT BY EMPLOYERS OF COUNSEL TO ASSIST THEM IN THEIR WORK, IS ADMITTED, THE LEGALITY, AND THE ADVISABILITY, OF EMPLOYEES DOING THE SAME THING MUST BE EQUALLY ADMITTED. THIS LEGISLATION OF COLLECTIVE BARGAINING, AND OF MACHINERY FOR ITS USE, CAN DO NO HARM WHERE THE PARTIES ARE IN GOOD FAITH, AND IT CAN DO THE IMMEASURABLE GOOD OF BRINGING THE PARTIES TO INDUSTRY TOGETHER IN FRIENDLY CONFERENCE—A RESULT WHICH, IN ITSELF, WOULD SERVE AUTOMATICALLY TO PREVENT OR ADJUST A VERY LARGE PROPORTION OF THE DISPUTES WHICH NOW EVENTUATE IN STRIKES OR LOCKOUTS.

As a means of forwarding this purpose the state, through its various agencies, may assist in every way the formation of joint-committees for bargaining and discussion. To do this it must consciously foster unionization of some sort, for without organization on both sides there can be no such bargaining and dis-
cussion. Assistance should be rendered to all who would accept it, and the state Department of Labor should publish bulletins dealing with the best methods, and with the results of experiments in various industries. The main aim should be to have some sort of machinery in working order, such as the clothing workers and the printers are evolving—and the very presence of such machinery will, as we have seen, tend to eliminate a very large percentage of strikes by preventing disputes from becoming acute. Such preventive machinery, within industry, is able to destroy disputes in embryo, whereas no public or outside agency can ever be brought into action until a dispute of some sort has arisen.

A corollary of the proposition that the state must assist as far as possible the development of voluntary and internal machinery for collective bargaining and joint agreement in industry, is that the field of state action must always be delimitated by that of private, intra-industrial action, and as the latter grows and expands the former must step out of the field and not seek to interfere, save as its laws develop the elemental rules of the game. A spirit of paternalism rather than paternalism is most important.

The first step in the creation of better industrial relations in so far as the state may act at all is, therefore, the assistance with all the means in its power of voluntary methods of creating good feeling between employers and employed. Without trade agreements, reached through some sort of collective bargaining—whether through the agency of trade unions, shop-committees, or other machinery—anarchy, such as that in which we live today in an industrial sense, is inevitable.

B

But action by the state in encouraging such agreements, even when methods of conciliation are provided within the industry in question, does not end the function of the state with regard to industry in general. There will always be an unorganized fringe in which the anarchical conditions of today will exist. In that unorganized or imperfectly organized fringe the state may well use to the full its powers of mediation whenever disputes arise. It may well assist in the organization of labor in such cases, for only through organization is collective bargaining and industrial

---
agreement possible, and thus, little by little, the state may become the agency for increasing the area of agreement and internal machinery. As we have seen, even in the case of the present state boards of arbitration, the function of mediation has proved a useful one, and in the hands of trained and energetic administrators a public agency for this purpose might be made of great service. The function of such an agency would be mediation rather than arbitration, save on the rare occasions when it might be asked to serve as umpire between parties to a dispute. How rare these occasions will probably be is to be gleaned from the experiences of our state boards.

C

It must be admitted, however, that mediation, even when utilized in connection with the most efficient of agencies, will not suffice to prevent such violent industrial difficulties as those of the Colorado mines in 1914, the Lawrence textile mills in 1912 and 1919, and the Denver street railways in 1920. No state board of arbitration could put a stop to these by mediation, for in these disputes, say the parties, there was a matter of principle at stake. Now, this matter of principle is usually a refusal on the part of the employer to accede to a demand for recognition of the union and collective bargaining, although, notwithstanding the opinions of such employers, the great majority of employer opinion, and the almost unanimous opinion of economists and students of industrial relations is to the effect that a refusal of this sort should not be allowed. These great strikes usually occur in industries so closely connected with the welfare of the community as to be properly included among those affected with a public interest. Certainly, industries which deal in transportation, or the manufacture of food, fuel or clothing, are in such a class, and they are conceded to be within the field of public control. They are what some recent economists have termed the key industries. It would not be out of place, and indeed it would be thoroughly consistent with the trend of such control, to force such industries to accept the principle of labor organization, and of collective bargaining. Here the state could well go farther than mere assistance. Regulation of this character, properly enforced, would put an end to the causes of most of these great strikes, and would have prevented
most of the strikes of the past two decades which were accompanied by violence.

Surely such a result is worth any small disadvantage to which a few employers might be put in the way of losing their present autocratic control of their businesses. If such action is not taken by the state force must continue to rule.

Much has been said of the rights of the public as the third party to strikes and lockouts. It was Gilman who said of this public, "It is a vast majority, usually silent, but always affected injuriously by even the peaceful stoppage of ordinary production of the comforts of life." When the strike or lockout involves any of the necessities of life its influence is often enormous, varying with the immediate need for the products affected. Most suggestions for state action in view of this paramount public interest have in the past, as we have seen, centered largely around an appeal to enlightened public opinion, the state itself furnishing the tribunal for investigation by which such opinion is to be enlightened. But as yet this force has not, in practice, proved to be of great avail, and "the public be damned" has been the answer of both parties in many a disastrous strike or lockout.

No estimate can be formed of the proportion of large strikes which would have been adjusted peaceably had an impartial investigation, followed by publication of the results, been carried on, but it is probable that only a relatively small proportion could have been adjusted. In the first place, public opinion is not a force that can be counted on to act save where it is directly and immediately affected. As stated in another connection, the public will condemn, usually irrespective of the justice of the question involved, a strike of street-railwaymen which makes it walk today, but it will remain apathetic when the strike is merely in certain textile mills and the nearest approach to public disaster that can be contemplated is the danger of having to go naked next spring.

12 N. P. Gilman, Methods of Industrial Peace, 277.
14 Of this appeal to public opinion one of the most far-seeing observers of present industrial relations has said: "The plan (compulsory investigation) is open to several objections. It forbids a strike, pending the period of investigation; and, in the words of a trainmen's leader, 'a strike vote after thirty days is just about as much good as a piece of liver that old.' In other words, it deprives the men of their most effective weapon without substituting a guaranty that their demands shall receive authoritative consideration. Public opinion as a court of last resort may be right in the long run; but it may be misguided temporarily. And, moreover, the Canadian plan fails to provide that permanent and expert service of trained and impartial intelligence which so complicated a set of relationships demands. Special boards for each case, as it arises, result in the same disqualification of the well-informed in proportion to their experience, which is the bane of the present arrangement." William Z. Ripley, "To Prevent Industrial War," 7 New Republic 12, 13.
ADJUSTMENT OF INDUSTRIAL DISPUTES 327

Only in the very few absolutely disastrous situations—as a coal strike in mid-winter, or a railway strike—can public opinion be counted upon to take any position at all, and then instead of seeking abstract justice, or taking the position of "A plague on both your houses," it usually condemns the strikers because they seem to be the immediate cause of public discomfort.

Notwithstanding this apathy of that great bulk of society which we term the public in all save the few strikes which mean immediate disaster, the textile strike may quite presumably entail an eventually more far-reaching difficulty than that on the street-railway, and a strike of copper miners may so seriously affect the prices of this necessary article of commerce as to bring on widespread suffering. In these cases, the public surely has a great interest, and aside from any consideration of public opinion, it has been generally admitted that the state may well here exert its power to force an early discontinuance of conflict. The anti-strike measures of which so much has been heard during the past two years, were directed in most cases against strikes or lockouts in essential industries, and the Kansas Court of Industrial Relations Act expressly limits the operation of the act to such industries. In view of the fact that most of the seemingly unarbitrable strikes of the past two years have been very largely strikes for recognition of the union, and in view of the very general acceptance of collective bargaining as an effective method of keeping the peace, is it not at least logical to suggest that in such industries as may be termed "affected with a public interest," such bargaining should be allowed and even fostered on both sides? If this is so, the function of the state in such cases would be to see to it that such rights are not violated.

As has been said, it is not possible utterly to abolish the use of self-help in industry—at least under the present organization of society. Strikes will therefore continue to occur occasionally no matter what may be done, but the methods above outlined should go far to eliminate the causes of the larger proportion of them.

D

Since, however, the mere present peace between labor and capital is not our true aim, and since what we are really seeking is the
utmost social good in the long run the methods utilized to bring peace must not themselves be those of force. In the past the state has never attempted to study the underlying causes of industrial unrest; it has contented itself with dealing with the symptom. The state must stop this attempt to cure the strike by forbidding it or attempting blindly to regulate it, and must get down to the solid business of discovering the underlying bases of readjustment. "A civilization eager for its own security," says a recent writer, "Must insist on a critique of all aspects of industrial life." Such a critique the state is most fitted of all agencies to attempt. Thus one of the most important functions which the state, and no other agency, can successfully perform is that of data-gathering and statistic-forming. An expert statistical body to collect, collate and publish facts and studies of the cost of living, wages, conditions of labor, and the like, is indispensable in our modern community. If we are to acquire the scientific knowledge upon which alone the foundation of a common law for industry can be based; if the state wishes to build such a basis of law for the field of industry, it must have the facts on which to do so. The various bureaus of labor statistics in many states are doing excellent work along this line, but any state agency which is erected for the purpose of furthering collective bargaining, and preventing strikes and lockouts, must have at its beck and call a trained staff of investigators who can give any given problem their attention and can quickly gather the data desired. Such a method has been feebly attempted in those states which have provided for expert assistants to act in conjunction with their state boards of arbitration, but the future demands an agency even more closely connected with the permanent body. Only by the means of such scientific study can the state get away for the old-fashioned split-the-difference method of solving industrial disputes, and inaugurate an era of industrial justice administered according to law.

Perhaps most important among all the possible functions of the state in its relation to the employer and his employees—certainly the most pressing need at the present time—is a body of common rules, principles and standards which may serve as the basis for

ADJUSTMENT OF INDUSTRIAL DISPUTES

"a common law for industry." The need for scientific study as a basis for the erection of these principles has been considered in the paragraph above. Behind the ordinary decisions of courts lies an age-old background of law; behind the arbitrator in an industrial dispute lies nothing but a vague fear and dislike of industrial conflict. Before we can get away from the mere "end" of peace, and before we can raise our dealings with industrial disputes from the stage of primitive law, we must furnish the norms by which a higher "end" may be sought.

The development of such an industrial code is directly in line with the modern tendency of our law. As Dean Pound has said, "Progress in law has taken the form of continual recognition of a wider circle of interests and continual securing of more interests," and today the "end" of law is coming to be recognized as the "social interest in the individual life, the claim of every individual to a full moral and social life, to a human life, and the interest of society in recognizing and securing it."

In this connection the suggestions of Mr. Dean Acheson are of the utmost importance. To Mr. Acheson the principal need seems to be that of recognizing and enforcing by means of the ordinary legal machinery those rights which our to-be-formed industrial code would give to the parties in industry. With such a recognition and enforcement of rights in use, he feels that no state body would be needed to assist in the furtherance of better industrial relations.

Before the courts can attempt such work, however, society must furnish them with the norms and standards of decision, and this can only come about by a conscious effort to furnish the industry "a major premise of law." If the state, through its court of law, furnishes means whereby either party to a labor controversy may bring the enlightened spirit of the community to bear upon the other party, it must, therefore, develop an industrial code. Mr. Jett Lauck, who was Secretary of the National War Labor Board, feels that, in addition to developing such a code, an administrative body is needed to enforce it.

What this industrial code should contain is a matter for study and investigation on the part of trained students, but among the

---

general requirements, if the prevention of industrial disputes is
to be furthered, are: recognition of the social value of labor or-
organization, and protection of both worker and employer in his or-
organization; recognition of the need of every worker for greater
security in his employment—thus releasing him from the grind-
ing fear of unemployment; recognition that the interest of society
as well as of both parties to industry demands the equalization of
contracting power by the adoption of collective bargaining machin-
ery of some sort; and recognition of the right of both labor and
capital to a living wage from the industry and a share in the con-
trol of such industry. In furnishing the norm to these industrial
relations between its citizens, as it does in the other relations of
their lives, we find the true place for state action.

For generations, the courts, with regard to industrial relations,
have been beating around a bush of legal verbiage, but if the present
conception of sovereignty is to obtain in the future in competition
with the newer developments of industrial life, the law must come
out into the open and recognize that certain rights exist in the
employer-employee relation. This can only be accomplished by
public interest on the part of legislators, for the development of
such principles as a result of force brought to bear by a small
fraction of the population—as in the case of the Adamson eight-
hour law—is unthinkable. In the past, legislation regarding
strikes and lockouts has been, as we have seen, almost altogether
the direct result of great strikes, usually those in which violence
predominated. But with the increased needs of this post-war pe-
period, and the critical conditions which are every day forcing them-
selves upon the consideration of law makers, it is to be hoped that
no great industrial crisis will be necessary to force the standard
of justice as measured by a chancellor-arbitrator’s foot out of the
sphere of industrial relations. A beginning has been made in the
Transportation Act of 1920, and it is possible that some such in-
dustrial code may be the result of the present demand for indus-
trial relations courts which has been heard so strongly during
the past year.

Although the only thing that can be counted upon to give real
promise of any definite betterment of industrial relations is the
development of such an industrial code, it does not follow that the state should sit by and tacitly encourage the present industrial anarchy while awaiting the birth of such a code. On the other hand, further efforts to solve the problem of strikes and lockouts by means of state boards of arbitration, constructed along the old lines, would appear useless and abortive. Although we may believe that wars will not end until all men become Quakers, and that strikes will not be forgotten until all men are angels, we may, however, still consistently go forward with the work of developing machinery and principles which will make strikes as well as wars unnecessary in the ordinary instance. The next section is, therefore, taken up with a brief outline of certain machinery which would seem to offer a feasible means for reducing the number of open industrial conflicts. In so far as our Constitution allows it, the enforcement of the industrial code should be put in the hands of courts of law, but in order to further the cause of industrial peace even more than would this simple expedient, the government must furnish a body to do what the state boards of arbitration have imperfectly attempted to do in the past.

Under our federal system of government the national government can and should handle all those matters which come under the head of interstate commerce. It can also provide mediatory bodies for the assistance of the states, as is partially done at the present time by the conciliation service of the Federal Department of Labor. A national Bureau of Industrial Relations, with functions similar to those of the state bureaus, as outlined below, would be the culminating point in such a system. This bureau might at least informally be made the board of appeal from the state bodies. Its lead in the matter of developing a set of principles to govern industrial relations would undoubtedly be followed by the states, and it should be composed of men of the highest integrity and understanding of the problems involved.

(To Be Concluded)