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# Some Comments on Labor Dispute Settlement Processes

Paul H. Sanders\*

*"A Strikeless Society on America's Horizon?"*

The question mark at the end of this recent headline on a syndicated newspaper column suggests appropriate skepticism about the substance therein, even though the column reported that the first eleven months of 1973 had been "the most serene labor climate in a decade with manhours lost at a 10-year low."<sup>1</sup> Well before the year-end "energy crisis" and attendant economic dislocations, however, questions such as the following, far from being in the realm of idle conjecture, were becoming increasingly pertinent: Will the travail of this gloomy period be the fullness of time for the emergence of significant new developments in labor peacemaking? Will pervasive fears and drives to satisfy divergent needs in difficult times coalesce the forces moving toward more rational and less costly methods of resolving labor conflicts? Will the necessity of developing legal alternatives for the illegal strike in the public sector (governmental employment) lead to improved methods of peaceful settlement in the private sector?

A number of signs point to affirmative answers to these questions. AFL-CIO President George Meany has said that "a strike doesn't make sense" when a well-established industry and a well-established union can agree to arbitrate wage adjustments in a new agreement in the event their collective bargaining itself does not resolve the particular dispute.<sup>2</sup> In a more recent press release, President Meany declared: "Strikes are expensive. We'd like to see some mechanism that would eliminate strikes because we find that strikes are becoming more and more expensive not only to industry but to those we represent."<sup>3</sup> In March 1973, companies in the basic steel industry and the United Steelworkers of America signed a landmark agreement under which there will be no strike and no

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1. Fritchey, *A Strikeless Society on America's Horizon?*, Nashville Tennessean, Nov. 29, 1973, at 15, col. 1.

2. BNA (1970) Lab. Rel. Yearbook 276.

3. Kagel & Kagel, *Using Two New Arbitration Techniques*, 14 COL. BARG. NEG. & CONTRACTS 351 (1972) (Strike Alternative: Med-Arb).

lockout in disputes over any national (that is, industry-wide) issues in the upcoming contract negotiations. Any national issues, including wages and fringe benefits, that are unresolved on April 15, 1974, will be submitted to a five-member arbitration panel, three of whom will be neutral. The panel will have the authority to decide all issues referred to it by the parties, as well as questions concerning implementation of panel decisions that the parties cannot resolve.<sup>4</sup> Apparently, the parties have thus guaranteed to resolve their 1974 bargaining issues without any industry-wide work stoppage.<sup>5</sup>

In the August 1973 issue of *The American Federationist*, a leading article entitled "Collective Bargaining and Industrial Peace" includes the following:

[A]s the collective relationship matures, the process of collective bargaining will become increasingly one of reasoning and persuasion, and less of economic force. The parties have a distinct interest in resolving their disputes, of course, but they also have an interest in doing so with as little pain or cost as possible and in a manner which will not impair their ability to work together in an amicable atmosphere.

Consistent with this thought is the proposition that if the parties are unable in negotiations to reconcile their differences, it is still part of the design of collective bargaining to devise or employ procedures by which these differences may be resolved without relying solely on the strike or other punitive measures. . . .

It has been proclaimed that without the strike it is not possible to have collective bargaining. This is like saying that in international affairs, if we renounce war we cannot have diplomacy. The precise opposite seems true. In such situations we need more effective bargaining, just as we need more effective diplomacy.<sup>6</sup>

It is not surprising that David L. Cole, Chairman of the National Commission on Industrial Peace and one of the best known arbitrators in the nation, should make such a statement. What is more significant is its appearance in the AFL-CIO Official Monthly Magazine, which lists George Meany as "Editor." While favoring the promotion of voluntary alternatives to strike in the private sector, Mr. Cole makes it clear that "this does not mean that the strike is to be outlawed or permanently discarded. It must be kept available for possible use . . . if either side should take an unusually extreme and obstinate position . . ." Emphasizing his opposition to any form of legislative compulsion, he reasons that strikes cannot be eliminated by the "simple process of outlawing them" and argues

4. *Steelworkers-Industry Experimental Agreement*, 82 LAB. REL. REP. 266-67 (1973).

5. Wall Street J., Oct. 17, 1973, at 21 (advertisement) ("At the invitation of United States Steel . . . I.W. Abel tells how America can become more productive").

6. Cole, *Collective Bargaining and Industrial Peace*, THE AM. FEDERATIONIST, Aug. 1973, at 23.

that you cannot "compel people to work in harmony unless they have the urge to do so."<sup>7</sup>

It may be worth noting that the foregoing indications of a substantial departure from "trial by battle" in private sector "contract-negotiation" disputes do not make express reference to new discoveries in the behavioral sciences or the science of management.<sup>8</sup> Moreover, there are no references to legislative or administrative action. There are, in fact, no open signs of governmental compulsion, "jawboning," or "arm-twisting." The development does not seem to depend upon either a sudden proliferation of super-neutrals<sup>9</sup> or the skill and personality of some individual, gifted peacemaker. The processes carry the familiar titles of "collective bargaining" and "arbitration." All that is really new is the indication of a commitment to a more vigorous, imaginative, and forehanded use of collective bargaining directed to settlement processes as well as to substance, and a willingness to trust the arbitration process for the solution of a contract term or "interest" dispute in the private sector.

The intensification of governmental mediation effort and study with greater emphasis on "preventive mediation" undoubtedly has also been a part of the recent scene. As early as 1926, however, the Railway Labor Act<sup>10</sup> envisaged that all of these ingredients—vigorous bargaining, mediation, and voluntary arbitration—would be operative in contract-term dispute settlement.<sup>11</sup> To the uninitiated, at least, acceptance of arbitration and rejection of the strike weapon as the means of resolving a contract dispute might

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7. *Id.* at 24.

8. The extensive literature setting forth new insights in industrial psychology and managerial science undoubtedly contributed to the creation of the climate in which these new developments in labor dispute settlement are occurring. Discussions of human nature and theories of management (X and Y) in D. MCGREGOR, *THE HUMAN SIDE OF ENTERPRISE* (1960); the "need hierarchy" advanced in A. MASLOW, *MOTIVATION AND PERSONALITY* (1954); and employee motivation in F. HERZBERG, B. MAUSHER & B. SNYDERMAN, *THE MOTIVATION TO WORK* (2d ed. 1959) should prove most stimulating to any person involved in labor conflict resolution. See also Herzberg, *One More Time: How Do You Motivate Employees?*, in *HOW SUCCESSFUL EXECUTIVES HANDLE PEOPLE—TWELVE STUDIES ON COMMUNICATIONS AND MANAGEMENT SKILLS* 82 (1970) (Harvard College publication).

9. See *Conflict Resolution and the Superneutral*, 61 *GOV. EMP. REL. REP.* 521-23 (1973).

10. Railway Labor Act §§ 1-201, 45 U.S.C. §§ 151-88 (1970).

11. As stated in § 1(a), the main purpose of the Railway Labor Act is to avoid any interruption to commerce or the operation of any carrier. 45 U.S.C. § 15(a) (1970). To accomplish this, the Act establishes a series of steps that the parties to a labor dispute must follow to settle their differences. Beginning with collective bargaining, *id.* § 152, the steps progress through mediation under the National Mediation Board, *id.* §§ 152 Ninth, 155; voluntary arbitration, *id.* § 155; and possible Presidential intervention, *id.* § 160.

seem to deserve little comment, since no-strike clauses and grievance arbitration, which involve "rights" under collective agreements, usually are provided in such agreements.<sup>12</sup> The manner in which the Steel Industry Pact is being publicized and scrutinized<sup>13</sup> demonstrates, however, that this surface impression is inappropriate.

The concern reflected in some of the quoted materials for voluntary, mutually acceptable action in the use of the arbitration process is not universal by any means. In fact, there is considerable support where government employees are concerned ("public sector") for imposing a final settlement by means of the arbitration process, whether or not consented to by the parties, if other settlement procedures fail to resolve the dispute.<sup>14</sup> Some state statutes so provide and the trend in this direction is not likely to be reversed.<sup>15</sup> Within the portion of the private sector covered by the National Labor Relations Act,<sup>16</sup> there does not appear to be any substantial sentiment on the part of either labor or management for any such "compulsory" or "legislated" arbitration.<sup>17</sup> On the other hand, railroad and airline management, who are covered by the Railway Labor Act,<sup>18</sup> have urged legislative imposition of final and binding decisions in disputes regarding contract terms.<sup>19</sup>

In the push to establish peaceful methods of settling contract negotiation disputes, particularly in the promotion of arbitration, some statements appear to suggest that all "labor conflict" should be deplored and that the adversary atmosphere can and should be banished from labor-management relations. For example, a recent full-page advertisement of the United States Steel Corporation<sup>20</sup>

12. See *Grievances and Arbitration*, 51 COL. BARG. NEG. & CONTRACTS 261 (1972); *Basic Patterns in Union Contracts*, 77 COL. BARG. NEG. & CONTRACTS 1 (1971).

13. See, e.g., Notes 4 & 5 *supra* and note 20 *infra*.

14. A comprehensive discussion will be found in Howlett, *Contract Negotiation Arbitration in the Public Sector*, 42 U. CIN. L. REV. 47 (1973).

15. *Id.* at 65-69.

16. National Labor Relations Act § 2(2), 29 U.S.C. § 152(2) (1970). This section of the Act limits application to the private sector by excluding from the definition of employer "the United States or any wholly owned Government corporation, . . . or any State or political subdivision thereof . . ."

17. "On the whole, however, labor and management are clearly against such measures." D. BOK & J. DUNLOP, *LABOR AND THE AMERICAN COMMUNITY* 236 (1970).

18. Railroad management is covered by Title I of the Act, Railway Labor Act §§ 1-11, 45 U.S.C. §§ 151-61 (1970), while airline management is covered by Title II, Railway Labor Act §§ 201-07, 45 U.S.C. §§ 181-87 (1970).

19. Note 17 *supra*. See also *Final Report of the Ad Hoc Comm. to Study National Emergency Disputes*, ABA SECTION OF LABOR RELATIONS LAW (1966).

20. Wall Street J., Jan. 3, 1974, at 9 (advertisement).

proposes that a "Declaration of Interdependence" be signed in connection with the dedication of an "American Productivity Center." "By this act," it is declared, "we will recognize that labor and business can no longer continue their adversary relationship, that all of us are inseparably linked in the productivity quest."<sup>21</sup> In addition, an advertisement for a current arbitration seminar asserts:

Labor conflict hurts. Management knows it. The unions know it . . . [and] so does the consumer. And today fewer people on either side of the fence are willing to live with it.<sup>22</sup>

It is not helpful thus to reject broadly the concept of an "adversary relationship." While the purpose undoubtedly was constructive, the suggestion that "labor conflict" necessarily is detrimental and that "living without it" is both desirable and readily achievable, is neither realistic nor fundamentally constructive.

The context of the seminar advertisement quoted above shows that what is being described as hurtful is not disagreement between the employer and organized employees, but rather the conflict-resolution process used to bring the disagreement to an end. The strike and arbitration are alternative settlement mechanisms. Although it might be thought that an agreement to submit an unresolved dispute for binding decision by a third party terminates the "labor conflict" on the particular matter, it is more instructive and, hopefully, constructive to view the conflict as a continuing one, pending an accepted conclusion of the dispute. "Conflict" is no more a "dirty word" than "change," and change inevitably involves conflict. While it may paralyze and destroy, conflict may also provide the occasion for achieving new forms of excellence for all concerned. Some conflict will be recognized as positively desirable, and, conversely, the absence of it will indicate an unhealthy or moribund state. The adversary process is an essential ingredient in an arbitration proceeding just as it is in a court of law.

Conflict over compensation and conditions of employment is, in fact, inevitable in the employment relationship, whether or not the employees are unionized. Necessarily then, effective procedures for resolving such conflict will be an essential condition for viable operation of the enterprise, whether or not the employees have a collective-bargaining representative. The promise to marshal collective strength and to supply more effective representation in such

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21. *Id.*

22. Advertisement of American Management Associations, *A Seminar: Arbitration: Preparing and Presenting Your Arbitration Case.*

conflict resolution is the basic "stock in trade" of labor organization drives. If a union is chosen, it becomes legally obligated to provide fair representation<sup>23</sup> and to deal with the employer at arm's length.<sup>24</sup> To choose collective bargaining, therefore, is to opt for the adversary process on behalf of all in the unit with regard to compensation and working conditions.<sup>25</sup> Physical violence, economic punishment, and vituperative language have no inherent or necessary relationship to this process. The adversary feature can, and should, add thoroughness and fairness to the operation of the conflict-resolving process and, by contributing to its effectiveness, serve public as well as private purposes. Desirable as it is to recognize mutuality of interest and to promote labor-management harmony and cooperation in certain areas, nothing will be gained by glossing over the existence of an intrinsic "labor conflict" and the positive need for the continuation of a vigorous adversary approach to acceptable resolutions of such conflict.

At one time I too assumed that an analysis which placed emphasis on "conflict" and "adversaries" was not the most fruitful approach in a discussion stressing labor dispute settlement. Writing in 1947, prior to the enactment of the Labor-Management Relations Act<sup>26</sup> in that year, I said:

[I]t would be possible to analyze the measures taken by the parties to labor disputes in terms of economic strategy, physical tactics, psychological warfare, and political maneuvering. It is possible, in fact, to view the whole body of labor law in terms of the judicial and legislative process which from time to time alters the relative strength of the parties, now giving a potent legal weapon to one side or the other, and again rendering legally ineffective a device used by one of them. Analyses along such lines, although they have some utility and are appealing because of the dynamic character of the subject-matter, overemphasize the 'struggle' aspect of labor relations and distort out of all recognition the economic function performed by the enterprise in which the employment is carried on and the relationship that must exist between employer and employee in carrying out that enterprise with the maximum of benefit to the parties and the general public. If one of two parties, engaged in an enterprise in which there is mutuality of interest, wins a 'battle' over the other, the probability of success of the enterprise will be lessened in proportion to the damage inflicted.<sup>27</sup>

23. See, e.g., *Syres v. Oil Workers Union Local 23*, 350 U.S. 892 (1955) (per curiam) (National Labor Relations Act); *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944) (Railway Labor Act). See generally *THE DEVELOPING LABOR LAW* 726-56 (C. Morris ed. 1971).

24. See, e.g., Labor-Management Reporting & Disclosure Act (Landrum-Griffin Act) § 2, 29 U.S.C. § 402 (1970); Morris, *supra* note 23, at 726-56.

25. See National Labor Relations Act § 9(a), 29 U.S.C. § 159(a) (1970) (representative chosen by majority is exclusive representative of all employees in a unit); note 24 *supra*.

26. Labor-Management Relations Act (Taft-Hartley Act) §§ 201-503, 29 U.S.C. §§ 141-97 (1970).

27. Sanders, *Types of Labor Disputes and Approaches to Their Settlement*, 12 *LAW &*

It was a mistake to conclude that the mutuality of interest between the employer and his employees would justify dismissing or downgrading the conflict, or "struggle," aspect of the relationship. The truth is that these two aspects—conflict and mutuality of interest—must continue to coexist in an appropriate balance. My statement about the development of labor law accurately stressed the "conflict" context and relationship. As subsequent legislative<sup>28</sup> and administrative<sup>29</sup> action have demonstrated, this concept in fact provides the essential basis for any general theory of labor relations law in this country.

In the area of labor dispute settlement, an understanding of the nature of labor conflict and the patterns of conflict development and escalation should be useful in understanding and utilizing the processes that lead to final settlement. All of these processes amount to successive steps in, or continuations of, conflict resolution efforts. As has been well said: "If you desire peace, understand war."<sup>30</sup> The statement, however, is devoid of moral content. It offers no suggestion of limits on strategy and tactics nor any indication about the substantive basis of the "peace," apart from the fact that it embodies a resolution of the conflict accepted by the involved parties. In our federal labor law, such matters may be discussed in connection with the implications of the mutual obligation to engage in good-faith bargaining<sup>31</sup> and the employer's obligation not to discriminate<sup>32</sup> against employees who engage in "protected concerted activities."<sup>33</sup> Strangely enough, the actual resolution of labor conflict—the achievement of labor peace—does not seem to be of major consequence in the midst of what may well be an over extensive

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CONTEMP. PROB. 211, 212 (1947).

28. *E.g.*, Labor-Management Relations Act (Taft-Hartley Act) §§ 201-503, 29 U.S.C. §§ 141-97 (1970); Labor-Management Reporting & Disclosure Act (Landrum-Griffin Act) §§ 1-611, 29 U.S.C. §§ 401-531 (1970).

29. The responses of the National Labor Relations Board to subsequent wants are many and varied. Examples of developments include treatment of employer "no-solicitation" rules and lockouts. *See generally* Morris, *supra* note 23 at 84-5, 539-56.

30. Motto of the Institut Francais de Polémologie.

31. National Labor Relations Act §§ 8(a)(5), (b)(3) & (d), 29 U.S.C. §§ 158(a)(5), (b)(3) & (d) (1970).

32. National Labor Relations Act §§ 8(a)(1) & (3), 29 U.S.C. §§ 158(a)(1) & (3) (1970).

33. National Labor Relations Act § 7, 29 U.S.C. § 157 (1970), provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."



regulation of the bargaining process.

The term "labor conflict" should refer to a condition of opposition in desire related to assumed needs in the area of compensation and working conditions. It cannot be restricted to situations where one or more parties in their efforts to resolve the conflict are acting illegally or are legally utilizing a strike or lockout as a privileged economic weapon to pressure a desired settlement. Conflict resolution behavior should be viewed as including not only the orderly, the peaceful, and the rational, but also the disorderly, the violent, and the irrational. As the quotation beginning "Labor conflict hurts"<sup>34</sup> indicates, the persistent problem is to find methods of conflict resolution that will minimize the hurt to both the parties in conflict and consumers, and that all concerned can "live with." Apart from commanding good-faith bargaining between employers and the representatives of employees, the National Labor Relations Act, our most important federal law, provides little substance in solving this central problem. It is true that the Railway Labor Act, promising perhaps more than it has achieved, goes into detail about dispute settlement procedures.<sup>35</sup> Moreover, "precatory words" on settlement are expressed in section 201 of the Labor-Management Relations Act.<sup>36</sup> On the whole, however, our federal labor statutes, regulations, and the reports of their implementation reflect the ambivalence between "war" and "peace," with the attention usually centered on the former.

One explanation for the lack of emphasis on labor conflict resolution is that "peace at any price" assuredly is not our national policy in the labor relations field. Our laws create conflict. The promulgation and protection of "employee rights," such as those set forth in section 7 of the National Labor Relations Act,<sup>37</sup> will provide the support that results in the surfacing of conflict that otherwise would have been unobserved and, perhaps, non-existent. More importantly, the major thrust of our laws has been to restrain and "defuse" the excesses of labor conflict—diverting it from physical

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34. See note 22 *supra*.

35. See note 11 *supra*.

36. Section 201(b) provides that "the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation and voluntary arbitration to aid and encourage employers and the representatives of their employees to . . . make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes." 29 U.S.C. § 171(b) (1970).

37. 29 U.S.C. § 157 (1970).

violence and economic coercion into the very serious “war game” we call collective bargaining, while retaining limited privileges to pressure agreement with economic weapons. To many, the only purpose of playing a game is “winning,” which means overcoming your adversary. Having ritualized and, hopefully, civilized labor conflict, most of our labor law is concerned with “rules of the game.” We thus combine the adversary process of the law and an adversary system in economics—an arrangement in which ethical and moral problems will proliferate.

While our laws contemplate the settlement of disputes by the collective-bargaining process and achieve considerable success in this respect, there is nothing that positively commands settlement, much less a “just,” mutually-acceptable, conclusion. At the federal level, we have vast amounts of material informing us of the legal requirement to bargain in good faith—the minimum limits of the obligation.<sup>38</sup> There is very little in our laws beyond exhortation<sup>39</sup> to provide guidance or incentive with respect to the means of achieving the affirmative purpose of collective bargaining—to make and maintain agreements concerning wages, hours, and conditions of employment, as well as to resolve disputes over the application of such agreements. We should be able to provide a more substantial legal structure to teach and support the basic lesson of successful bargaining, which is to provide pay-offs to protect the reasonable interests of conflicting parties and all concerned—“let everybody win.” It is perhaps too much to hope that we could dismantle some of our laws and administrative machinery that impede “free collective bargaining.” We need fewer law enforcers and more broad-gauged, skillful mediators (superneutrals, if you prefer) with a dominant commitment to the achievement of viable resolutions of labor conflict in the national interest. Considering the occasions for our major strikes and the economic waste and other costs of work stoppage, it makes little sense at this stage of our national development to allocate our attention and our federal resources, administrative activity, and personnel in the way that we do between the “war” and “peace” sides of the ledger. We appear to be at a juncture where intensive, knowledgeable, and imaginative bargaining, coupled with massive mediation efforts along the lines suggested by David Cole,

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38. *See, e.g.*, Labor-Management Relations Act (Taft-Hartley Act) § 204(a)(1), 29 U.S.C. § 174(a)(1) (1970); Railway Labor Act § 2 First, 45 U.S.C. § 152 First (1970).

39. For example, § 2 First of the Railway Labor Act simply states that “[i]t shall be the duty of all [involved in a labor dispute] to exert every reasonable effort to make and maintain agreements . . .” 45 U.S.C. § 152 First (1970). *But see* Chicago & N.W.R. Co. v. United Transp. Union, 402 U.S. 570 (1971).

could well achieve a break-through in the peaceful solution of contract disputes and the establishment of constructive patterns and standards of wide significance. We can hope that the opportunity will not be lost.

Notwithstanding the role played, responsibility involved, or the substantive result desired, understanding and skill in the resolution of labor conflict is furthered by precision and thoroughness in identifying and analyzing the basic substantive conflict (opposition in desire related to assumed need in the area of compensation or working conditions) and behavior (including all steps or processes of escalation or de-escalation) that lead or could lead to an accepted conclusion. In such identification and analysis, it will be of major importance to recognize and separate clearly the substantive aspects of the conflict from the organizational power struggle and personality aspects (the people, individually and in organized groups). Labor conflict will involve not only subject matter such as wages or compulsory overtime, but also power over subject matter within and between groups and the personalities of the various "players." The locations and organizations of power, as well as the personalities, will vary tremendously from one employment relation to another. Supports and restraints in the legal structure have no necessary carryover from one conflict to another. Very seriously, the subject matter may be the least important aspect of a particular conflict. The personality and power struggle aspects of labor conflict undoubtedly explain the general reluctance of the parties to use voluntary arbitration to settle "interest" or contract-term disputes, as well as the continuing opposition to legislatively imposed arbitration.

As if the problem were largely an intellectual one, discussions of labor dispute settlement have all too frequently ignored the escalation processes of conflict resolution and, assuming the existence of a matured dispute (perhaps with a peaceful, or even violent, work stoppage in progress), have centered on "approaches" to a peaceful resolution of the substantive conflict.<sup>40</sup> In my 1947 article, I listed and briefly defined "all of the usual approaches" in the following order:

- (1) Discussion and negotiation
- (2) Conciliation
- (3) Mediation

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40. See, e.g., Blumrosen, *Civil Rights Conflicts: The Uneasy Search for Peace in Our Time*, 27 *ARB. J.* (n.s.) 35 (1972); HOWLETT, *supra* note 14; SANDERS, *supra* note 27.

- (4) Voluntary arbitration
- (5) Investigation and fact-finding
- (6) Compulsory arbitration
- (7) Court action
- (8) Legislation<sup>41</sup>

The order progressed from voluntary bilateral action between the disputing parties and the increasingly forceful involvement of a third party to compulsion from an apparently independent outside force. The third party involvement in turn moves from that of unilateral advice and assistance to that of dictating a decision which the disputing parties are obliged to accept. I did not suggest that the several processes had to occur in any particular sequence or that they represented completely distinct and compartmentalized processes incapable of being usefully combined in a flexible manner. "Investigation and fact-finding" was described as representing "an extreme degree of third party interference in the dispute between the parties, although it stopped short of forcing acceptance of the findings upon the parties to the dispute."<sup>42</sup> Although the description was accurate in the context in which it was made, it is now clearer that "fact-finding," whether imposed by statute or voluntarily sought, can and should provide increased awareness of interests and pertinent facts, and thus assist conflicting parties directly in resolving their dispute as well as indirectly through pressures generated by public disclosure. The "interference" designation still may be regarded as completely appropriate where voluntary aspects are eliminated.

The discussion of "legislation" as an approach included the following:

Legislation is listed as an approach to the settlement of labor disputes because through legislation certain disputes may be entirely eliminated or procedures may be provided for their settlement. Legislation providing settlement procedures, however, results only in requiring or extending one or more of the approaches previously discussed. . . .

[I]t is possible by legislation to deal with the substance of the employer-employee relationship and, by defining the rights and duties of the parties, to remove certain elements of that relationship from the field of economic contention. . . . Agreement between the parties cannot validly effect any arrangement which would be less beneficial to the employees. Thus through legislation it is possible to take certain matters out of the hands of the parties entirely, or to circumscribe the area within which they can bargain . . . .<sup>43</sup>

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41. Sanders, *supra* note 27, at 214.

42. *Id.* at 216.

43. *Id.* at 218-19.

Legislation, including administrative regulations, could provide standards, restraints, supports, and incentives directed to advancing voluntary settlement, particularly by minimizing fears in connection with agreements to submit disputed contract terms to arbitration. Legislation along such lines also would be important to any compulsory imposition of arbitration as an ultimate solution for contract-term disputes in the public sector.<sup>44</sup> Legislation does not resolve conflict, however, unless the bargaining parties recognize and accept it as producing a viable result.

It is difficult for a "peacemaker" to face up to the fact that escalation aspects, including developmental, organizational, and confrontational, are integral parts of the conflict resolution process. Somewhat comparably, the adversaries involved find it difficult to see desirable "peace" as anything other than vanquishment of, or "unconditional surrender" by, the other side. Analytically and practically, it would have been appropriate to place "self help" or "unilateral action" at the beginning of my list of approaches to labor dispute settlement. Labor conflict begins with a condition of disaffection or opposition in desire with regard to one or more of the "arrangements" covering compensation and conditions of employment. Some self-help efforts to resolve the conflict in a manner acceptable to the disaffected party undoubtedly will precede any other "approach." Measures falling under the "self-help" label may be taken contemporaneously with, or subsequent to, one or more of the other listed approaches, within whatever limits of legality and morality that a conflicting party will recognize. If there is a bargaining obligation, it continues during the self-help period of a strike and mediation efforts often will be in the picture during the same period.

Prior to the initiation of observable self-help measures, a disaffected party will need to make a preliminary decision either to accept the *status quo* or to move toward a more satisfactory arrangement applicable to the subject matter of the conflict. Whether to move for a change and, if so, the choice of supporting strategy and tactics are subjects that lend themselves to a variety of information gathering, intelligence efforts, and sophisticated analyses. A systematic approach to such questions would result in the development of adequate information, the refinement of potential issues, and would involve utilization of existing tools, methods, and insights to aid in interest identification and evaluation, policy analysis, and

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44. Howlett, *supra* note 14, at 67-69.

decision making. In the labor field, the analysis of the interests in conflict necessarily would include and differentiate the substantive, the power struggle, and the personality aspects involved. The following check list suggests the type of analysis that might precede a decision concerning the use of self help in labor conflicts:

- A. Strategies and tactics for behavior modification (of self or others) on an unstructured basis.
- B. Analytical preliminaries (identification, definition, measurement, and evaluation)
  - (1) Of interests and parties ("self" and "other");
  - (2) Of authoritative restraints and "public" reactions (including law);
  - (3) Of resources and allies;
  - (4) Of desired objective and probability of success;
  - (5) Of alternative routes to accomplish objective.
- C. Organizational preliminaries.
- D. Planning preliminaries.
- E. Logistics, strategy, and tactics in operations (including propaganda).
- F. Confrontation and the initiation of dialogue.

While the foregoing check list is not meant to suggest that conflicting parties in the labor field routinely approach the matter of self help in such a thorough and completely systematic a manner, many are doing so. Rather, the point is that an extremely important decision has to be made by a disaffected party at the outset of the conflict resolution process and that decision making on this subject lends itself to thoroughness in information development and analysis, systematic exploration of alternatives, the use of increasingly sophisticated tools and methodologies, and insights and skills from diverse disciplines and professions.

It may be helpful at this point to comment upon the cause of conflict and some human characteristics relating to its development and resolution. Human beings, individually and in organizations, will act to satisfy perceived needs. It appears that all of us consciously and unconsciously make arrangements (establish relationships and create or adapt systems and institutions) to fulfill and protect that with which we identify. Although such behavior in a particular need area may include rigorous analysis and careful planning, rationality may be completely non-observable. In any event, we can expect a strong sense of interest in, and an emotional attachment to, the need-satisfying "arrangements" established or felt to be required. Since it is characteristically "human" to have exagger-

ated conceptions of self interest, it is not surprising that overly-protective "arrangements" frequently will be considered necessary or at least desirable, even though their original purpose may have diminished in importance or ceased to exist. We want "buffer zones" to protect us against our fears, and maintaining that "buffer zone" tends to become an independent value. We want broad areas of freedom from restriction in which to achieve fulfillment, or what we at one time thought was needed for fulfillment. "Arrangements" so motivated inevitably will overlap, and be contradictory to, the comparable desires of others. When conflict is defined as opposition in desire with respect to these "arrangements" to meet felt needs, its inevitability and pervasiveness in the labor relations field is obvious.

The self-help check list set forth above has no necessary legal or moral content nor does the indicated analysis in any way suggest the decision that will be reached by a particular party involved in labor conflict. The outlined approach is as consistent with the most exaggerated protection of self interest as it would be with a maximization of the interests of an adverse party or some other interest represented by neither of the conflicting parties. The outline does suggest, however, that the identification, definition, delimitation, measurement, and evaluation of all interests significantly related to the conflict is an aid to rational decision making by the representative of any such interest. What will be done with relatively complete knowledge and thorough analysis involves a decision in which ethical and moral considerations will be equally as important as judgments concerning ultimate need satisfaction and practicability. There is no indication that in the last analysis such judgments can be made by a machine, although they may be aided significantly by electronic data processing.

Self-help measures in labor conflict may range from the use of raw power pushed to the uttermost to unilateral development and insistence upon a carefully-balanced proposal believed by a partisan to meet adequately the needs of the proponent as well as those of the adversary and other interested parties. Basic approaches to self help are literally "poles apart." At one pole we have what might be called Game Plan Alpha, which is organized and managed on the basis that the self interests of the particular party should be served with minimum or no regard for the interests of the adversary or others not represented in the particular conflict; that "enemies" should be rendered powerless or destroyed; and that the adversary and those felt to be allied with him should be punished as need be

to secure the objective desired by the acting party.<sup>45</sup> At the other pole, what might be designated Game Plan Omega, is organized and conducted on the basis that the interests of the acting party should be duly recognized and protected in order to meet his reasonable needs; that this should coexist, however, with a balanced protection of the reasonable interests and needs of the adversary and others concerned; that, in fact, recognition and protection of the legitimate interests concerned to the maximum extent consistent with reasonable recognition and protection of self interest of the acting party will prove most beneficial to him. Thus Game Plan Omega neither rejects the vigorous adversary protection of partisan interests nor calls for the abdication of self interest. Recognizing a larger mutuality of interest, it places upon each party in the conflict situation a duty to minimize harm to himself and others in this larger community and to search for that accommodation of legitimate interests, whether or not represented, that would not only reduce costs associated with narrow concepts of self protection, but also maximize the production of greater value for all concerned.<sup>46</sup>

There is much wandering between the above poles in the labor field and a particular party, normally committed to Omega, may switch to Alpha because of the nature of the interest involved and the perception of a fundamental threat to that interest. On the larger conflict scene, what might be characterized as a debate between adherents to Alpha and adherents to Omega has been going on for centuries among philosophers, theologians, historians, military strategists, political scientists, economists, behaviorists, and others.<sup>47</sup> We may have reached the point, however, where there is no longer an option, assuming one has existed. It seems increasingly evident that Alpha must lead to zero and that, as Toynbee would say,<sup>48</sup> survival depends upon the sort of a response that would be clustered around the Omega pole.

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45. For the systematic development of what is here denominated "Game Plan Alpha" see the references to "agonology," "science of struggle," and the works of Kotarhinski in Fisher, *Contrasting Approaches to Conflict*, in *CONFLICT: VIOLENCE AND NONVIOLENCE* 183 (J. Bondurant ed. 1971).

46. M. K. Gandhi's thorough analysis and development of what he called "satyagraha" is briefly described in Margaret Fisher's article, *supra* note 45, at 186-91, which illustrates its identity with what is here dubbed "Game Plan Omega." For a comparison of "agonology" and "satyagraha" in parallel columns see Fisher, *supra* note 45, at 190.

47. See generally Fisher, *supra* note 45.

48. A recurring theme running through the works of Arnold Toynbee is that the decline of a civilization results from the inability of its leaders to respond creatively to new challenges. See generally A. TOYNBEE, *STUDY OF HISTORY* (1934-54).



The suggested ingredients of information and analysis needed for rational decision-making and action of a self-help nature can be carried over with relatively minor adjustments as a particular labor conflict moves into the negotiation (bilateral) stage. In fact, essentially the same systematic approach to the development of pertinent facts and evaluation of interests will be of obvious value in settlement efforts as third parties become involved as mediators, fact-finders, arbitrators, or some combination of such roles.<sup>49</sup> Alterations may occur not only in the substance of a dispute, but also in its power organization and personality aspects as "players" change and third parties become involved in various capacities. Nevertheless, a continuing focus on the interests to be served and the needs to be satisfied, and a continuing refinement and critical examination of such matters as interest identification, delimitation, measurement, and evaluation, should provide the raw material for fruitful dialogue. By uncovering and pointing up realistic limits on interests and needs, these methods set the stage for that creative conflict which can be directed toward an optimum accommodation of not only the legitimate interests of the parties, but also those interests ("public" or otherwise) not represented at the bargaining table.

In discussing labor dispute settlement involving contract terms, there is no point in taking the spotlight away from the joint and several responsibility of the parties at the bargaining table to "exert every reasonable effort to make and maintain agreements"<sup>50</sup> consistent with their community of interest, their separate interests, and those other "public" interests entitled to consideration. Neither the parties nor the public should be given the impression that principal reliance can be placed on third parties or "government" itself for viable resolution of labor conflict once the identity of the bargaining parties is established. As already indicated, legislation might be of benefit in pressuring bargaining parties into "trying harder" to carry out their responsibilities, such as by agreeing voluntarily to submit contract-term disputes to arbitration if they are otherwise unable to achieve a viable settlement. The notion, however, that "passing a law" or the adoption of a novel gimmick somehow will provide a magic or suitable alternative to responsible bargaining is fallacious. Assisted by counsel, the bargaining parties know or can discover more about their problems and the possibilities for accommodation of competing interests within their operation than any

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49. See Kagel & Kagel, *supra* note 3.

50. See note 39 *supra*.

outsider. They should not be "let off the hook" or given the impression that either party can do better elsewhere than he can at the bargaining table with imagination, effort, and perseverance. Mediators can add a useful dimension to communication by assisting the parties in uncovering and organizing pertinent facts or by providing useful data and different approaches to known facts. Moreover, they can help "fractionate" overly broad issues into more manageable portions and do much to smooth the personality and power struggle aspects of the dispute. The broad-gauged mediator with a dominant commitment to achieving a "liveable" resolution of labor conflict in fact can in numerous ways be of tremendous assistance to the parties in carrying out their responsibilities.<sup>51</sup> Whether he does it by pushing, pulling, leading, or discreetly threatening will no doubt depend on the exigencies of the particular situation. The "conciliator with a club," acting to enforce a law narrow in scope, is, and will likely continue to be, important in the current scene; but the basic job of accommodating all legitimate interests in a liveable labor settlement is not likely to be aided by such a person and the use of the word "neutral" in his case is not very accurate.<sup>52</sup> In fact, the basic job is made more difficult as we pass another special law and send out government servants who see their program as the center of the labor relations universe and act accordingly. There is a problem of balance and accommodation between our several statutes in determining what the law is to begin with. This, of course, complicates the responsibilities of bargaining representatives in achieving balance and accommodation within the operation of an enterprise.

The responsible bargaining representatives are in the best, and perhaps the only, position to achieve optimum accommodation and balance of the several competing interests and "superneutrals" are needed to assist in the exercise of this responsibility and opportunity. Nevertheless, "super self-helpers" and "super negotiators" along with their "super counsellors" are of even more importance and the neutral achieves excellence as he helps these others fulfill their function in a truly creative fashion.

The position of the arbitrator is not as different from the me-

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51. For extremely helpful insights on mediation and its relationship to the public interest see Nicolau & Cormick, *Community Disputes and the Resolution of Conflict: Another View*, 27 *ARB. J.* (n.s.) 98 (1972), and *Conflict Resolution and the Superneutral*, note 9 *supra*. See generally W. MAGGIOLIO, *TECHNIQUES OF MEDIATION IN LABOR-DISPUTES* (1971); W. SIMKIN, *MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING* (1971).

52. Compare Nicolau & Cormick, note 51 *supra*, with Blumrosen, *Civil Rights Conflicts: The Uneasy Search for Peace in Our Time*, 27 *ARB. J.* (n.s.) 35 (1972).

diator as it might seem. The same development of needs, interest identification and evaluation, refinement of precise issues, and organization of pertinent facts doubtless will be very much involved in the arbitration of a contract-terms dispute. The arbitrator must, as best he can, achieve for the parties what, perhaps, they should have achieved for themselves or at least achieved with the assistance of a skillful, knowledgeable, broad-gauged mediator. As David Cole has expressed it, the desirable and realistic criterion in interest arbitration is: "What would it have been reasonable for the parties to have agreed upon under the prevailing facts and conditions?"<sup>53</sup> If the arbitrator does not produce a viable resolution of the conflict with his award—one that the parties will accept and "live with"—then the conflict remains and the processes of resolution must continue.

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53. Cole, *supra* note 6, at 24.