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Technological Change and the Right to Strike Changements technologiques et droit de grève

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Résumé de l'article

La convention collective régit seulement une partie des relations entre les travailleurs couverts par cette convention et l'employeur. Certains conflits d'intérêt non sujets à la convention peuvent parfois se régler volontairement à l'intérieur des cadres de la négociation. Cependant il en est d'autres pour lesquels il n'y a pas de solution ou que l'une des deux parties refusera de négocier en se basant sur la doctrine des droits résiduels ou la convention elle-même. Ceci peut causer de la frustration chez les travailleurs et conduire à poser des actes illégaux. Ce problème a suscité récemment une importante controverse dans l'opinion publique et a été mis en évidence lors du débat sur les changements technologiques à la suite de l'introduction des locomotives diesels par les chemins de fer. Les syndicats ont insisté sur le droit de négocier ces questions pendant la durée de la convention ou pour limiter le droit de la direction d'apporter de tels changements pendant la durée de la convention si de tels changements ont un effet négatif sur l'emploi ou sur les conditions de travail. La direction a fortement refusé ces deux approches et a prôné le statu quo à ce sujet.

Diverses mesures ont été proposées pour régler ce problème. Certaines l'ont été à la suite de recherches effectuées par des groupes non engagés dans ces problèmes. Le projet de Code canadien du travail contient toute une partie longue et compliquée qui reflète un changement de politique à cet égard au niveau fédéral. Le gouvernement de la Saskatchewan a aussi apporté des changements dans sa politique.

Le Code canadien du travail permet la négociation collective pendant la durée de la convention si le Conseil des relations de travail juge que le changement technologique proposé touche les conditions de travail ou la sécurité d'emploi d'un nombre important d'employés. En plus, si ces négociations n'aboutissent pas, on peut légalement recourir à la grève. L'employeur peut se protéger en donnant un avis de changement pendant la période normale de négociation avant que la convention ne soit signée. Ceci fournit au syndicat l'occasion de négocier les effets probables des changements annoncés.

L'Équipe spécialisée en relations du travail a proposé que les parties puissent inclure, à la signature de la convention, une clause de réouverture concernant les conversions industrielles. Dans un tel cas, la négociation et la grève seraient permises pendant la durée de la convention. Le juge Freedman a recommandé que si, suite à une demande syndicale un arbitre décide que les effets d'un changement proposé sont majeurs, l'employeur ne pourrait pas effectuer ces changements avant les nouvelles négociations. Sa recommandation ne comprend pas le recours à la grève comme le prévoit le projet de Code et comme le faisait le Rapport de l'Équipe spécialisée. M. Jean Marchand, ancien ministre de la main-d'œuvre, suggère que si l'employeur décide d'introduire des changements influençant les droits des employés, la convention devrait automatiquement expirer et de nouvelles négociations devraient être faites. Le professeur Paul Weiler propose que l'obligation de négocier ne devrait pas se terminer avec la signature de la convention, mais devrait continuer d'exister pour tous les problèmes qui ne sont pas déjà couverts par l'accord.

Les recommandations de Weiler et Marchand détruiraient à toute fin pratique la doctrine des droits résiduels. Le Code du travail révisé protégerait cette doctrine pour des changements mineurs mais l'abrogerait dans des cas importants tels que définis par le Conseil des relations de travail. L'Équipe spécialisée, pour sa part, respecte la doctrine des droits résiduels mais autoriserait les parties à en négocier la portée dans les cas de conversion. La proposition Freedman transférerait, dans les changements majeurs, les droits résiduels au syndicat.

Une modification de la proposition de l'Équipe spécialisée incluse dans le Rapport de la Commission d'enquête sur l'industrie de la construction en Nouvelle-Écosse (1970) propose qu'on maintienne les dispositions légales actuelles mais que les parties soient libres, pendant la période normale de négociation, de s'entendre pour enlever en partie ou totalement les contraintes imposées dans les négociations par la loi et d'y inclure le recours à la grève.

Cette dernière proposition est préférable, car elle laisse aux parties les décisions sur les matières négociables ainsi que les contraintes de la doctrine des droits résiduels. En plus elle évite l'intrusion de l'appareil bureaucratique comme le Conseil des relations de travail et les arbitres.

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Technological Change and the Right to Strike

H.D. Woods

A collective agreement covers only part of the relationship between the employees covered by the agreement and the employer. Some conflicts of interest not covered by the agreement may be resolved voluntarily by negotiation from time to time, but there remain conflicts of interest in which either no resolution can be worked out on one party, the employer, supported by the residual rights doctrine and the agreement, refuses to negotiate. The issue has become a matter of great public controversy in Canada in recent years and was highlighted by the technological change debate.

INTRODUCTION

The signing of a collective agreement establishes a set of standards and rights and obligations involving employees, the union, and the employer, but it does not settle all issues which may arise during the life of the agreement. Issues of interpretation and application of the agreement can be resolved by reference to the grievance procedure, and arbitration if necessary, but there remains the problem of conflicts of interest over matters which are not covered by the agreement.

First it should be noted that the collective agreement covers only a part of the relationship of the parties. In day-to-day operations innu-

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merable small conflicts of interest emerge and may be settled by discussion between employees or union representatives and the employer or his representatives on the spot. The collective relationship is a living, changing process which cannot be fully encased in the collective agreement. The agreement covers those matters which the parties are prepared to recognize as establishing a system of definable rights and obligations. The rest of the relationship involves a multitude of things which require non-contractual accommodations if administration is to be effective. Anyone with experience in industrial relations will recognize the existence of an informal process of accommodation which is not necessarily linked with the formal contents of collective agreements and the procedures provided by it. Indeed some of the informal arrangements at times may be inconsistent with the contents of the collective agreement itself.

Aside from both the issues settled by the collective agreement and the informal accommodations affected by the parties, there are clashes of interest which do not fall within the scope of the clauses of the agreement and the dispute settlement procedures contained therein, nor do they lend themselves to easy resolution by informal accommodation. These include union demands or employer counter demands which were not conceded when the agreement was signed. Also included are issues which were not on the bargaining table at all before the signing of the agreement, some of which become apparent only after the agreement is signed. Both of these, and particularly the latter, may cause serious damage to industrial relationships.

Issues which have been negotiated without becoming part of the union contract because the parties do not reach agreement, may in a sense be considered « settled » for the time being when a general contract is signed. Their very exclusion is part of the settlement. These are the kinds of issues which will probably be on the bargaining table at the next renegotiation period. If one of the parties feels very strongly about them they can be a source of serious strain on the relationship, until resolved.

New issues which have not been included in negotiations are menacing to the relationship because they are usually unexpected and pose a new threat to some existing right or interest. Such issues are the product of the dynamics of the system itself which in all probability will become increasingly important as the tempo of change rises. Illustrations are disturbances in the labour market caused by, for example, the resort to unanticipated forms of sub-contracting, the introduction of new production technologies, and re-engineered job functions not expected by the unions

and the employees they represent, and work assignments which seem to violate past practice, and so on.

There is no sure way of resolving these issues since it is to be expected that arbitrators would usually rule that they are not in violation of the contract since they are not covered by it, even with a very liberal interpretation of the arbitrator's role. They are conflicts of interest and the arbitrator is normally not authorized to determine such conflicts. They represent the kind of issue which really calls for negotiated settlements. But the unions' right, under Canadian law, to insist on negotiation terminates for the time being with the signing of the agreement, and in the usual case it cannot legally resort to the strike threat. To do so would, in most Canadian jurisdictions, be a violation of the collective agreement or of the law or both.

Interest conflicts arising during the life of an agreement which have particularly become the centre of public controversy during the past two decades are those related to the employment impact of technological change. At least this is the impression gained from a study of the published statements of the unions and employers organizations, although the problem of dislocation is clearly much more widely based than on technological change alone, unless a very broad definition of technological change is accepted. In any case, organized labour is confronted with the problem of dislocation of the employment of those it represents in collective bargaining, whether it can be traced directly to the introduction of technological change or not.

It should not be necessary at this stage of the debate to make the case that employment disruption does take place, nor that technological change or industrial conversion is a cause of such disruption. Whether employment in the economy as a whole is decreased or increased by technological innovation is a matter for concern to those responsible for planning national manpower policies and programs, but it has little relevance at the micro level, where collective bargaining functions. Clearly specific jobs of particular employees do disappear and do confront displaced employees with personal crises concerning work and income.

A relevant question, however, is whether or not the problem of dislocation is an appropriate issue for collective bargaining. If it is, a second question presents itself; viz, how can the problems flowing from change best be brought within the scope of collective bargaining? This involves questions of the appropriate bargaining unit, the structure of unions themselves, the level of responsibility to be assumed by public authority,

and the inter-relationships among employers, unions, and government agencies.¹ In economic terms the question is who is to bear the social and economic costs of technological change. In the context of business decisions the employer will be inclined to pass the cost back to the labour force through layoff or dismissals. Unions, in their role as protector of the interests of those they represent, will be inclined either to restrain the employer from introducing technological change, or to force the employer to agree to various remedies designed to compensate the adversely affected employees, or to assist them in their adjustment. Unions also incline toward political settlements by putting pressure on governmental agencies to come to the rescue of the redundant workers. Whether governments will join with the unions and assist in imposing the cost of change on the employers, or protect the employer interest and leave the burden on the displaced workers, or assume a public responsibility by providing remedial programs for the displaced workers, will depend on the political climate and the power equations which influence political decisions. Even when it is accepted that the solution calls for a sharing of the responsibility by government, employer, and employee, there is no agreement as to the relative share of responsibility that should be born by each. In addition to the question of the relative responsibility to be shared, there is also the problem of the mechanisms that will be used to ensure that they each will in fact assume their respective burdens.

It should be noted that collective bargaining does not usually create jobs. Job creation is a function of managerial decisions regarding the level of economic activity management chooses to reach, as well as of the mix of labour and other productive agents chosen. Consequently, if technological change threatens to eliminate some jobs, the most the unions can do is to block the introduction of change and thereby protect the existing job holders. However, there is one way in which a union might create jobs ; that is by lowering wages to the point where management might find it profitable to expand employment. Naturally, such action by a union would be unpopular among those whose wages are lowered.

What then, if any, is the role of collective bargaining. With respect to the problem of technologically created redundancy the *Task Force Report* has this to say : ²

¹ See Arthur A. KRUGER, « Human Adjustment to Technological Change : An Economist's View » ; *Relations Industrielles*, Québec, Vol. 26, No. 2, April 1971.

² *Canadian Industrial Relations*, Ottawa : Privy Council, 1968, p. 118.

« Until recently the task of finding an adequate response to this challenge was left largely to collective bargaining. Unions were left with a choice of attempting to resist, to compete with or to control change or to choose some combination of the three. Historically, there are examples of resort by unions to the two former alternatives, but for the most part obstructionism has proved futile, particularly as a long run tactic. Unions today generally accept the change as inevitable and even derisible concomitance of the existing socio-economic-political system and concentrate their efforts on cushioning its impact on their members.

« The labour movement has met with varying degrees of success in attempting to use collective bargaining for this purpose. In most cases unions have won full seniority protection, so that junior employees are the first to be affected by displacement. However, unions have sometimes demanded and won such narrow and confining seniority units that they have diminished the security afforded senior workers. Through collective bargaining most unions have also won the right to grieve on wages and conditions established on new or restructured jobs. In a few cases they have secured a voice in the initial setting of those wages and conditions.

« The labour movement has also won some procedural and substantive concessions in other areas. Procedurally, numerous collective agreements now provide for a measure of advance notice and consultation. Substantively, there are even more agreements that include retraining, relocation, income maintenance, severance pay, early retirement, or similar types of provisions that offer some relief to those dislocated.

« While acknowledging the role that collective bargaining can play in this area, it is important to recognize its limitations. First is the limited coverage of trade unionism. For the majority of workers who do not benefit from collective bargaining, it does not afford any possible protection. Second are the varying degrees of protection afforded different workers who are covered by collective bargaining. Some benefit from elaborate schemes, others are afforded no protection whatever. Third is the inequitable and uneconomic nature of some of the provisions which have been negotiated. For example, most severance pay plans are based on years of service, with benefits often bearing no relationship to the relative needs of those affected. Individuals with the same seniority usually receive the same compensation despite the fact that some may move directly to equivalent jobs while others may never find regular work again. Last is the fact that collective bargaining cannot create employment. It can at best only serve to preserve obsolete jobs by sanctioning unnecessary work practices, or to reshuffle job holders through such measures as early retirement plans designed to induce older workers to retire so that younger workers will not be displaced.

« Given the limitations of collective bargaining in this area, the question remains, what should be done? A combination of public and

private policies is needed to provide a framework for dealing with change, these should be flexible enough to take care of the individual problems that arise, and efficient enough to ensure that the benefits of change are not consumed in the effort to cope with the adjustments.

« The Task Force accepts the following principles. First management should be protected in its freedom to make changes which in themselves, are not in violation of a collective agreement. Second, workers should be protected by an expanded arsenal of public and private programs designed to facilitate their movement among jobs and localities without undue cost to themselves. Third, a union should be free to take action to induce management to negotiate a plan to solve the consequences expected to follow from the proposed changes or to delay the changes themselves, or to negotiate and strike over the right to strike on the issue during the life of an agreement.

« In keeping with these three principles, we would give priority to public policies to meet the following needs. First is a pressing need to place more emphasis on education for adjustment at all levels in the school system in order to ensure maximum human adaptability. Second is a need to maintain a high level of employment so that other jobs are available for those displaced by industrial conversion. Third is a need for an active labour market policy designed to facilitate mobility between jobs through improved information, counselling, upgrading, retraining, relocation and income maintenance programs. Fourth is a need to develop as many transferable fringe benefit plans as possible in order to minimize the sacrifice which workers have to make when they move from job to job. Fifth is a need to expand community dislocation programs designed to facilitate either the redevelopment of communities threatened by adverse industrial shifts or the movement of idled resources to other localities where they can be employed. »

I have quoted rather fully from the report of the Task Force because I believe there has been much public misunderstanding of these sections ; indeed they seem to have been largely ignored, perhaps because of the fear that the recommendations regarding opening of the collective agreements was likely to produce a chaotic situation. More will be said on this later, but in the meantime it is well to note that the Task Force places the highest priority on public policies and programs designed to preserve as much employer freedom as possible and at the same time to impose on public authorities and institutions the major responsibilities of retraining and improved labour market operations. Solutions via collective bargaining were given a decidedly secondary and assisting role.

Before examining certain proposals for dealing with technologically induced redundancy, I wish to draw attention to certain provisions already existing in Canadian labour relations laws which I believe have been almost

entirely or were totally ignored by those who have participated in the public debate. The conventional wisdom regarding strikes during the terms of an agreement is that they are illegal. This is generally true and both Federal and Provincial labour laws prohibit the resort to economic force over disputes arising during the term of agreement. These laws also provide for final and binding settlement of disputes of interpretation and application by arbitration or other-wise as a quid pro quo for the denial of the right to strike and lockout. But there is an exception. Section 128 of the Canada Labour Code reads :

« Sec. 128. (1) Except in respect of a dispute that is subject to the provisions of subsection (2),

(a) no employer bound by or who is a party to a collective agreement shall declare or cause a lockout with respect to any employee bound by the collective agreement or on whose behalf the collective agreement was entered into, and

(b) during the term of the collective agreement, no employee bound by a collective agreement or on whose behalf a collective agreement has been entered into shall go on strike and no bargaining agent that is a party to the agreement shall declare or authorize a strike of any such employee.

(2) Where a collective agreement is in force and any dispute arises between the parties thereto with reference to the revision of a provision of the agreement that by the provisions of the agreement is subject to revision during the term of the agreement, the employer bound thereby or who is a party thereto shall not declare or cause a lockout with respect to any employee bound thereby or on whose behalf the collective agreement has been entered into, and no such employee shall strike and no bargaining agent that is a party to the agreement shall declare or authorize a strike of any such employee until the bargaining agent of such employees and the employer or representatives authorized by them on their behalf have bargained collectively and have failed to conclude an agreement on the matters in dispute, and either

(a) a Conciliation Board has been appointed to endeavour to bring about agreement between them and seven days have elapsed from the date on which the report of the Conciliation Board was received by the Minister, or

(b) one of the parties has requested the Minister in writing to appoint a Conciliation Board to endeavour to bring about agreement between them and fifteen days have elapsed since the Minister received the said request and

(i) no notice under subsection 134 (2) has been given by the Minister, or

(ii) the Minister has notified the party so requesting that he has decided not to appoint a Conciliation Board. »

Shorn of its legal jargon the Section appears to a layman to mean that if the parties to a collective agreement include a re-opener clause in a particular provision of the agreement, the resort to strike or lockout on a re-opened clause during the term of the agreement is perfectly legal, if the parties have met the conciliation requirements of the law. In other words, there already exists in the Canada Labour Code a provision by which the negotiating parties may opt out of the strike and lockout prohibition by specifying that either party may open up identified clauses for re-negotiations during the life of an agreement. This same provision is found in the labour relations laws of five provinces also³. The conventional wisdom appears to be wrong, therefore, with regard to the Federal jurisdiction, Nova Scotia, Manitoba, Newfoundland, New Brunswick, and Quebec, and to be right with respect to British Columbia, Alberta, Saskatchewan, Ontario, and Prince Edward Island. I wish to emphasize, however, that the right to set aside the prohibition of the strike, during the term of a collective agreement, already exists in the Federal jurisdiction and five provinces. I suggest that this privilege of striking on re-openers has been included in the new (the Federal) Bill 183 in the combination of Clauses 147(2) and 180.

With this as background it will be useful to examine the various proposals which have been advanced for dealing with collective bargaining as an instrument for resolving some of the problems of dislocation associated with industrial conversion.

THE TASK FORCE REPORT

« We recommend that the negotiating parties have power by mutual agreement to opt out of the restraint on the strike and the lockout and the requirement to establish machinery for the settlement of disputes resulting from the permanent displacement of personnel occasioned by industrial conversion arising during the period when an agreement is in force⁴ ».

³ *Nova Scotia Trade Union Act*, Section 23

Manitoba Labour Relations Act, Section 26

Newfoundland Labour Relations Act, Section 23

New Brunswick Labour Relations Act, Section 21

Québec Labour Code, Section 95

The first four provinces use language identical with or close to that of the Federal Statute. The Quebec Code uses different language, but it means the same thing. It reads, « It is forbidden to strike during the period of a collective agreement, unless the agreement contains a clause permitting the revision thereof by the parties . . . »

⁴ *Canadian Industrial Relations*, *op. cit.*, p. 195.

It is difficult and perhaps improper for one not trained in the mysteries of the law to know precisely what a given statute means, but it is hard to avoid the conclusion that the Task Force proposal recommends little more, if anything at all, than what exists in the provision already quoted and discussed. It may be that the opting-out clause in the Federal statute could be applied only to a substantive provision in the agreement. If that be so, the Task Force proposal goes a little farther since it would be necessary only to include a clause in the agreement that provided for negotiation of displacement or redundancy issues if they should arise after the collective agreement is signed to permit the parties jointly to set aside the strike prohibition. Certainly, a charge that the Task Force recommended the opening up of collective contracts to industrial warfare by agreement of the parties to so open them, means very little in the light of the existing permission in the law.

A proposal based on the same principle of negotiating re-openers and the right to strike during the life of the agreement, but broader in scope was presented to the Nova Scotia government in a report on construction industry labour relations⁵. Nova Scotia is one of the provinces which permits a strike on a contracted re-opener if the required conciliation steps have been taken. The recommendation was that right be retained and that the parties might also agree that certain specified issues or areas not covered by substantive clauses in the agreement could be subject to negotiation and the strike or lockout during the life of the contract. Unlike the present law, bargaining would not be limited to modifying existing substantive clauses. Unlike the Task Force report, bargaining would not be limited to issues associated with technological change or conversion. The parties would jointly determine the territory to be covered.

In effect this proposal would be one which gave the union the right to reduce the residual rights territory by bargaining.

THE PROPOSED BILL C-183

The proposals in Bill 183 concerned with Technological Change are complicated in the extreme.⁶ Stated as briefly as possible the proposed

⁵ H.D. Woods, *Report of the Commission of Enquiry into Industrial Relations in the Nova Scotia Construction Industry*, Nova Scotia Department of Labour, September, 1970.

⁶ *Bill C-183*, Sections 149-153 and Section 180.

legislation provides a definition of technological change ; requires an employer bound by a collective agreement who proposes to effect a technological change that is likely to effect the terms and conditions or security of employment of a *significant* number of his employees, to give notice of ninety days of the technological change to the union holding the bargaining rights ; sets out five classes of information that must be included in the notice ; provides that the government, on recommendation of the Labour Relations Board may make regulations specifying the number of employees or the method of determining what is meant by « significant » ; establishes authority in the Labour Relations Board to enforce the notice requirement by ordering the employer not to proceed with the proposed change for up to ninety days ; authorize a bargaining agent which has received a notice of technological change to apply to the Board for an order granting the agent leave to serve notice on the employer to commence collective bargaining ; instructs the Board to grant such leave when it is satisfied that the proposed change is likely to substantially and adversely effect the terms and conditions or security of employment of a significant number of employees ; forbids the employer to introduce the proposed change until the Board has rejected the union's request to serve notice to commence collective bargaining, or if such a leave is granted, until an agreement has been reached or conciliation requirements have been met and the union has acquired the right to strike.

There are provisions in the proposed law which make it possible for the employer or the employee and union acting jointly to set aside these requirements. An employer can do so by giving the required notice to the bargaining agent prior to the signing of an agreement. Presumably this gives to the union the opportunity to negotiate on the issue before the right to strike is blocked and the employer is protected by the residual rights doctrine once an agreement is signed. Or the parties can jointly set aside the application of these clauses by including in the agreement they sign provisions that specify procedures by which any matters that relate to terms and conditions or security of employment likely to be affected by technological change shall be handled. In the first of these provisions the employer has warned the union and the latter's remedy lies in negotiating the issue and striking if necessary. If it does not choose this rocky road it loses its re-opening rights. In the second case the parties have either resolved the issue by the contents of the collective agreement and no further bargaining during the term of the agreement is necessary, or they have agreed to opt out of legal provisions. In other words they have closed their contract.

This proposal differs from the present Federal Code in one or two important respects. Perhaps most important is the fact that the present law requires the parties at the time of negotiation of a collective agreement to provide for re-openers if the contract bar to negotiations supported by the strike is to be removed, whereas Bill C-183 builds into the law a new system of union rights to intra-contract negotiations subject to the discretion of the Labour Relations Board. The union does not have to bargain into the agreement the right to negotiate and strike on the technological change issue as it would under either the present law or the Task Force recommendation. It does have to convince the Labour Relations Board to grant leave to serve notice to negotiate.

THE FREEDMAN REPORT

Judge Freedman was commissioned to deal with the « run-through » problem associated with technological change on the railways. However, he asserted that his report « is intended to apply not only to run-throughs, but also, wherever it can be applied, to similar situations in general. » ⁷ Paraphrasing and generalizing the report, Judge Freedman recommended that either party should have the right to refer to an arbitrator the question whether a proposed technological change falls within a class of changes which would materially alter the working conditions which were in effect when the collective agreement was negotiated, or within a class of change that did not materially alter these conditions. If the arbitrator decided that the proposed change would not materially change the working conditions, the employer would be free to introduce the changes. However, if the arbitrator ruled otherwise, the employer would be required to withdraw his plan until the next open period, unless, of course, the union were agreeable to negotiate before that date. In other words, the union would have a veto on innovations which caused a material change in working conditions.

The object of the Freedman report appears to be to prevent the employer from introducing major changes, the union not having the usual opportunity to negotiate and strike if necessary, without subjecting the parties to the work-stoppage possibility during the life of the agreement. But the method would have the effect of slowing down the rate of change. The Honorable Mr. Marchand proposed to solve this problem by suggest-

⁷ *Report of Industrial Inquiry Commission on Canadian National Railways « Run-Throughs »*, p. 145.

ing that a management move to introduce a major change would terminate the existing contract and open the door to negotiation for a new contract.⁸

Saskatchewan has recently (1972) enacted legislation⁹ to deal with this issue under the title of the « Technological Change Rationalization Act ». However it goes far beyond technological change as that expression is usually understood by adding to the usual definition « the removal by an employer of any part of his work, undertaking or business ». Not only is technological change covered, but it would appear that contracting out and runaway operations as well. However, time and the courts will no doubt sort out the precise meaning.

A major difference between the Saskatchewan Act and the Federal Act, which it resembles, is that the Saskatchewan law empowers the union to give notice of collective bargaining as soon as the employer gives notice of change while the parties are operating under an agreement. There is no requirement to ask permission from the Labour Relations Board to give such notice as is the case in the Federal law. However, the employer can appeal to the Board to prevent the union exercising this right. In the situations where the employer has given notice of change before the signing of an agreement, or within the notice period for renegotiation of an expiring agreement, the Board is empowered to deny the union's right. However, while in the Federal case it appears that the parties can close the contrast on the issue, in Saskatchewan they cannot. There is no opting out provision. The union cannot, under pressure, or in return for some other concession give up its re-opening right, unless the agreement provides a solution to the redundancy problem. Since the Saskatchewan law does not prohibit a strike during the life of an agreement an impasse in negotiations on a technological re-opener could lead to a strike.

Both with regard to the scope of technological change and the prohibition of opting out the Saskatchewan policy is much more drastic than the Federal.

The Freedman recommendations differ from those of Bill C-183 in important respects. Both protect the employer's right to innovate where the impact on working conditions would be minimal. But Bill 183 re-establishes the strike as the ultimate sanction in major cases while the Freedman recommendation gives the union a veto power. Clearly the union's power to win concessions from the employer during the life of an

⁸ Arthur A. KRUGER, *op. cit.*, p. 297.

⁹ Bill 134 of 1972.

agreement is much greater under Freedman than under Bill 183. This latter attempts to bring the issue under genuine collective bargaining supported by the conventional pressure of the work-stoppage threat.

PAUL WEILER

The most sweeping proposal advanced in Canada in this controversy is that of Professor Paul Weiler.¹⁰ « At the present time, three factors combine to deter effective negotiations about industrial change and its effect on working conditions. In the first place, when the parties enter into a collective agreement their duty to bargain ceases, notwithstanding the fact they have not, in fact, reached agreement about many issues. Second, even if negotiations were to take place they can easily become a charade because the unions have lost, under the statute, their reserve power to enforce concessions. Thirdly, the fact that arbitrators have been forced to uphold the management claim to unilateral, residual rights, makes it harder, psychologically, for management to agree to limitations on these 'rights'.

« The logical solution to these problems is relatively simple, . . . the duty to bargain must be held to continue during the term of a collective agreement in a meaningful way ».

Weiler recommends that the compulsory no-strike clause should be deleted from the statute and its insertion in the agreement should be subject to negotiation by the parties. In effect, Weiler is recommending that we adopt the American position. If that were done, we could get a fairly reliable notion of the probable effect on collective bargaining by studying American experiences.

Weiler has also posed the interesting possibility that the right to negotiate during the term of a collective agreement might, by law, be limited to the issues not covered by the agreement. This, of course, would be a repeal of the residual rights doctrine. The agreement would cover the rights and obligations of the parties and all outside it would be negotiable at anytime. This situation might have the effect of inducing management to seek to extend, rather than limit, the coverage of the collective agreement. Whereas management's security now largely comes from the strike prohibition, coupled with the management residual rights doctrine, with the proposed change, it would best be established in the agreement ;

¹⁰ Paul C. WEILER, *Labour Arbitration and Industrial Change*, Task Force Study, No. 6, Ottawa, 1968.

otherwise management might face a legal strike during the life of the agreement. There would still be a role for the arbitrator, but only on rights disputes under the agreement. However, whereas at present a ruling that a grievance is not arbitrable, under the residual rights doctrine is really a decision in favour of management, under the Weiler proposal the issue would become negotiable and subject to a possible strike since the protection of the residual rights doctrine would have been removed by legislation.

EVALUATION

The evidence supports the view that there is at least a limited role for collective bargaining in the process of resolving the employment and social problems flowing from industrial conversion. This was recognized by Freedman, by the Task Force, by the drafters of Bill C-183 and by at least those employers such as the railways and many others who have included in collective agreements clauses which establish a variety of employee rights and protections if confronted with the insecurities promoted by change. The question is then principally, what form should public policy take to make the best use of collective bargaining, taking into account the conflicting economic and social goals of that fuzzy thing called the public interest. The best I can do is to make a few value judgements on the various proposals and on the attitudes of management and labour.

ORGANIZED BUSINESS

Generally, organized business supports the status quo which involves a legalistic contract conception of the collective agreement, supported by the residual rights theory in arbitrations. In practice this means that a union would be required to negotiate to finality when the contract is opened by its termination. Since change is introduced by management, the union will not be in a position to have foreknowledge of impending changes and will, therefore, not be in a position to engage in very meaningful negotiations in some circumstances. Those who support this position are in practical terms setting low limits to the usefulness of collective bargaining as a problem-solving instrument in this particular area, or are rejecting it altogether. In my opinion it is an untenable position because it runs away from the very real problem that exists.

FREEDMAN RECOMMENDATIONS

The veto granted to the unions under the Freedman recommendations, understandably supported by the unions, is in my view unsatisfactory. It

has the opposite effect from the status quo position of employers. As already pointed out, that stand tends to force collective bargaining back to the contract negotiations period when the union suffers the great disadvantage of trying to negotiate about an unknown future. In the Freedman plan the tendency would be to delay negotiation until the next open period and to delay the introduction of change as well. I suggest that the status quo is too favourable to management, and Freedman is too restraining on management. What is needed is a system which brings negotiations into line with knowledge of the realities, and in some instances this will be within the life of the agreement. The provisions in Bill 183, in Weiler, in the Saskatchewan law, and in the Task Force recommendations all attempt to do this. But which offers the most acceptable solution? None of them is perfect, but I suggest that there are major faults at least in Bill 183 and in the Saskatchewan law, which should be avoided.

BILL C-183

I have the following criticisms of Bill C-183. First it introduces an undesirable role for bureaucratic procedures. Management would not know what it could or could not do, nor would a union have any certainty until the Board ruled on its application for authority to serve notice of collective bargaining. There would be the customary time delays and the frustrations associated with such delays. One could expect considerable litigation over the exercise of the Board's jurisdiction, further delays and further frustrations. And there could be an insidious emergence of a catalogue of bargainable and non-bargainable issues as the Board and the Courts moved from case to case, especially since every case would require a Board decision. More important, the Board would perhaps be playing a role that would overlap with grievance arbitration, a result that should be avoided in the interest of preserving the integrity of the system.

The Saskatchewan policy, at least in the first instance, avoids the bureaucratic cumbersomeness of the federal bill, by establishing that the union's right to re-open are available until taken away. This should eliminate much of the delays implicit in the Federal provision. Nevertheless, bureaucracy can be revived by a defensive application to the Board by the employer.

More dangerous to stability is the provision to prohibit opting out. This means that the technological change issue ceases to be a trade-off item. It ruptures the principle of package bargaining and it may force employers to choose between strangulation or built-in uncertainty.

On these grounds I would reject the Bill 183 and the Saskatchewan solutions. If the interposition of the Board into the bargaining relationship can be avoided, and the legitimate role of collective bargaining still be played, it should.

THE WEILER PROPOSAL

Weiler is sound in logic. The barrier to negotiated solutions rests in the reserved rights doctrines supported by the prohibition of the strike during the life of an agreement. But is the answer to be found in going over to the American system? Personally, I have no great fear that the utter disaster predicted if that should be done will in fact happen. I have no evidence that American employers have been unable to cope with the problem. The very high percentage of agreements which incorporate a no-strike pledge and arbitration, suggests that the system is workable. Be it noted that the negotiation of no-strike and binding arbitration clauses have the effect of establishing management residual rights by agreement of the parties.

However, at least in the next few years, I suggest that it would be wise to proceed with some caution. The parties are used to the closed contract. Even in those jurisdictions where the strike can be re-instated through agreed re-openers, it appears to have been almost never used in this legitimate way — there are fairly frequent illegal wildcats but that is another matter. Perhaps in the long run the American arrangement could be introduced ; in the short run it might be confusing.

THE TASK FORCE RECOMMENDATIONS

As might be anticipated, I support the Task Force Recommendations, not because I believe they are the final answer, but because they represent the smallest change from existing legal provisions consistent with the need to open a door to possible negotiations during the life of an agreement. I would in fact go a bit beyond the Task Force Recommendations and urge that the parties should be free to opt out of the legal barrier on the strike and lockout on any basis they might wish. I would not limit the area as the Task Force does to industrial conversion issues, nor as the present law does, to issues already provided for in the agreement, but with a re-opener. If the parties merely include in their agreement a clause that states any particular matter is negotiable and subject to strike action during the term of the agreement the law should recognize this as setting aside the present barriers to such action.

This proposal should be satisfactory to the unions, since it gives them the right to strike for the right of intra-contract negotiations, and intra-contract strikes. It should be welcomed by the employers because it gives them a series of bargainable options. It should bring joy to labour relations boards who would be protected from the threat of an almost intolerable burden contained in Bill C-183, and it should calm the nerves of Ministers of Labour and their Deputies for dumping a very difficult issue back into the collective bargaining arena where it belongs. Incidentally, it makes the life of conciliators more pleasant by providing negotiable alternatives to play with.

I should repeat, however, that the major responsibility for the solution of the problems posed for workers confronted by change must rest with governments. Employment and manpower policies should be geared to providing insurance that the burden of the costs of change will not be borne by the labour force alone. If this responsibility is not accepted by governments collective bargaining will be confronted with an impossible task. Rather than performing a role of smoothing out transitional problems of adjustment it will be asked to assume the basic task of labour force reallocation. In a trade-off between finding satisfactory adjustment for displaced workers and the introduction of change, employers might find the comparative cost factor favouring the status quo, in which case a general lower level of efficiency might be the price.

Changements technologiques et droit de grève

La convention collective régit seulement une partie des relations entre les travailleurs couverts par cette convention et l'employeur. Certains conflits d'intérêt non sujets à la convention peuvent parfois se régler volontairement à l'intérieur des cadres de la négociation. Cependant il en est d'autres pour lesquels il n'y a pas de solution ou que l'une des deux parties refusera de négocier en se basant sur la doctrine des droits résiduels ou la convention elle-même. Ceci peut causer de la frustration chez les travailleurs et conduire à poser des actes illégaux. Ce problème a suscité récemment une importante controverse dans l'opinion publique et a été mis en évidence lors du débat sur les changements technologiques à la suite de l'introduction des locomotives diesels par les chemins de fer. Les syndicats ont insisté sur le droit de négocier ces questions pendant la durée de la convention ou pour limiter le droit de la direction d'apporter de tels changements pendant la durée de la convention si de tels changements ont un effet négatif sur l'emploi ou sur les conditions de travail. La direction a fortement refusé ces deux approches et a prôné le statu quo à ce sujet.

Diverses mesures ont été proposées pour régler ce problème. Certaines l'ont été à la suite de recherches effectuées par des groupes non engagés dans ces problèmes. Le projet de Code canadien du travail contient toute une partie longue et

compliquée qui reflète un changement de politique à cet égard au niveau fédéral. Le gouvernement de la Saskatchewan a aussi apporté des changements dans sa politique.

Le Code canadien du travail permet la négociation collective pendant la durée de la convention si le Conseil des relations de travail juge que le changement technologique proposé touche les conditions de travail ou la sécurité d'emploi d'un nombre important d'employés. En plus, si ces négociations n'aboutissent pas, on peut légalement recourir à la grève. L'employeur peut se protéger en donnant un avis de changement pendant la période normale de négociation avant que la convention ne soit signée. Ceci fournit au syndicat l'occasion de négocier les effets probables des changements annoncés.

L'Équipe spécialisée en relations du travail a proposé que les parties pouvaient inclure, à la signature de la convention, une clause de réouverture concernant les conversions industrielles. Dans un tel cas, la négociation et la grève seraient permises pendant la durée de la convention. Le juge Freedman a recommandé que si, suite à une demande syndicale un arbitre décide que les effets d'un changement proposé sont majeurs, l'employeur ne pourrait pas effectuer ces changements avant les nouvelles négociations. Sa recommandation ne comprend pas le recours à la grève comme le prévoit le projet de Code et comme le faisait le Rapport de l'Équipe spécialisée. M. Jean Marchand, ancien ministre de la main-d'œuvre, suggère que si l'employeur décide d'introduire des changements influençant les droits des employés, la convention devrait automatiquement expirer et de nouvelles négociations devraient être faites. Le professeur Paul Weiler propose que l'obligation de négocier ne devrait pas se terminer avec la signature de la convention, mais devrait continuer d'exister pour tous les problèmes qui ne sont pas déjà couverts par l'accord.

Les recommandations de Weiler et Marchand détruiraient à toute fin pratique la doctrine des droits résiduels. Le Code du travail révisé protégerait cette doctrine pour des changements mineurs mais l'abrogerait dans des cas importants tels que définis par le Conseil des relations de travail. L'Équipe spécialisée, pour sa part, respecte la doctrine des droits résiduels mais autoriserait les parties à en négocier la portée dans les cas de conversion. La proposition Freedman transférerait, dans les changements majeurs, les droits résiduels au syndicat.

Une modification de la proposition de l'Équipe spécialisée inclue dans le Rapport de la Commission d'enquête sur l'industrie de la construction en Nouvelle-Ecosse (1970) propose qu'on maintienne les dispositions légales actuelles mais que les parties soient libres, pendant la période normale de négociation, de s'entendre pour enlever en partie ou totalement les contraintes imposées dans les négociations par la loi et d'y inclure le recours à la grève.

Cette dernière proposition est préférable, car elle laisse aux parties les décisions sur les matières négociables ainsi que les contraintes de la doctrine des droits résiduels. En plus elle évite l'intrusion de l'appareil bureaucratique comme le Conseil des relations de travail et les arbitres.