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COMMENTAIRES

RESPONSIVE BARGAINING : FREEDOM TO STRIKE WITH RESPONSIBILITY

S.M.A. HAMEED

Strikes and lockouts are an essential and integral part of the collective bargaining process in North America. A sudden onrush of strikes in the past few years has, however, exasperated the public. Now there are numerous demands that the system be replaced by some form of compulsory arbitration. It is argued in this paper that though strikes have become less effective, lengthy, and costly, largely due to automation, compulsory arbitration will prove even costlier in more than monetary terms. Therefore, what is needed is to reinforce the role and function of strike in a way that our system of free collective bargaining is preserved with as little inconvenience to the public as possible. A system of responsive bargaining may be an answer to this problem in allowing the two parties, labour and management, a complete freedom to strike while, at the same time, remaining ultimately responsible or accountable to the public from an economic point of view.

DECLINING UTILITY OF STRIKES

With technological development the overhead costs of the management increase, thus giving the unions greater strike power. However, it is not long before automation reaches a point that unions become ineffective in stopping production altogether and consequently losing their newly acquired power to inflict heavy losses on the management [1]. This begins the era of dreary, long drawn out strikes where neither party being seriously injured, both parties procrastinate indefinitely. So much for

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[1] See Thomas KENNEDY, « Freedom to Strike is in the Public Interest, » *Harvard Business Review*, July-August, 1970.

private sector. In addition, there is the tertiary or service sector in which a large number of industries are government operated. Here another phenomenon works for prolongation of strikes. Not being subjected to profit losses in the sense the private sector is, the service sector strike often tends to stretch out indefinitely. The increasing length of strikes in Canada is empirically borne out as the average duration of strikes has increased since the war [2].

The worker is no longer the picture of misery he presented during a strike in the early stages of collective bargaining. He is now partially compensated by strike pay, unemployment insurance and may even have enough savings to tide him through the hardship days. Despite these advantages, however, there are the highly automated industries such as the utilities, oil and chemicals which inevitably blunt the strike weapon of the workers, so much so that they may be obliged to submit their disputes for arbitration [3]. The growing public dissatisfaction with the disruption of essential services in hospital and school strikes in Quebec, a six week garbage strike in Vancouver, a nation-wide three week postal strike, a dock strike in Montreal, construction strike in Vancouver, has led to widespread demand for curtailing or altogether depriving the workers' right to strike. This reaction, while it may be justified on grounds of public and private « cost » of strikes, has a distinct disadvantage in the fact of a possible loss of the democratic principle in trying to impose arbitrary settlements. It inevitably leads to control of salaries, prices, and profits. The principle of voluntary settlement, thus destroyed, may in turn lead to « the end of our busisess system. » [4] Another disadvantage of instituting compulsory arbitration is the increased possibility of illegal work stoppages. In Australia where arbitration is compulsory, for example, there have been in some years as many as fifteen times the number of strikes in Canada [5]. Thus it may be argued that the threat of a strike reduces the possibility of its actual occurence. Many settlements are reached in view of a strike ultimatum. In a behavioral context, the first few days of a strike prove cathartic for the frustrated workers, which purge them of their pent up resentments. The air thus cleared, they can approach the bargaining table for a more meaningful and acceptable settlement.

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[2] Although we are arguing here that automation and declining utility of the strikes are responsible for the longer average duration of strikes, Professor Stuart Jamieson attributes it to the two-stage system in Canada. See Stuart JAMIESON, « The Third Wave Labour Unrest and Industrial Conflict in Canada : 1900-1967, » *Industrial Relations Quarterly Review,* Vol. 25, No. 1, 1970.

[3] Thomas KENNEDY, *op. cit.*

[4] *Ibid.*

[5] *Canadian Industrial Relations,* Privy Council Office, 1968, p. 125.

NO LEGAL PROCEDURE FOR SHORTENING THE LENGTH OF AN « ORDINARY » STRIKE

In the North American context, strike is legally recognized, but, paradoxically the law seems to suggest that it is better not to have any strikes. The bias and emphasis here is to minimize the occurrences of industrial disputes. To achieve this end the instituted legal procedure in Canada is to delay the occurence of a strike through a two-stage compulsory conciliation system and a supervised vote on the Conciliation Board award with appropriate time intervals between various stages of these proceedings. Once the strike becomes legal, both in theory and practice, it could continue indefinitely. Public interest disputes constitute a notable exception to this prolongation, since they are handled under emergency powers of the government. In essence, then, for all the ordinary disputes, the legal procedure virtually ends with the beginning of a legal strike. Labour and management may break off negotiations during a strike and may not see one another for days, without being subjected to legal constraints and without even inflicting serious losses upon one another. A strike, thus continuing, may achieve no meaningful direction towards a speedy settlement. But there is no defined procedure in labour relations law which may shorten the length of a strike. That government interference in a legal strike is repugnant to the tenants of free collective bargaining is the rationale for this legal stands. This stand, though legitimate and defensible some three or four decades ago when automation had not reduced the effectiveness and utility of strikes needs to be reexamined today since the public is subjected to long and purposeless strikes. The law which safeguards the workers' right to strike does not, at the same time, protect the freedom of the public to obtain goods and services while the strike is on. Conceptually and philosophically this is an untenable position. If the law must guarantee complete freedom for strike and lockout it must, at the same time, guarantee corresponding compensation to the public for having suffered inconvenience and hardship during the strike. Sermonizing the public on forbearance with magnanimity during a strike because « strikes are good for our system » is of little value unless accompanied with adequate compensation. If the proffered compensation can also make the strikes short and effective we have achieved a dual purpose. This would be in public interest and, at the same time, vindicate the law from responsibility for causing public inconvenience.

MAKE THE BARGAINING RESPONSIVE

The system of collective bargaining as practised here, in North America, has served the labour, management and public faithfully since the passage of the American Wagner Act and the Canadian Order-in-Council 1003. With the exception of certain modifications made immediately after the Second World War, the system has remained basically unchanged. By and large, the concepts and practices in the industrial relations system have remained confined to the interaction among labour, manage-

ment and government. The industrial relations system has not developed as an integral part of the society. For a long time, labour-management relations were considered a strictly bi-lateral affair which could brook no interference from anyone, not even the government. After World War II, however, government intrusion led to its gradual recognition as part of the system. Now the stage seems set for the inclusion of a fourth actor, namely the public or society at large, to complete the bargaining circle.

The labour-management disputes in the form of strikes and lockouts sometimes affect the public more than they affect the respective parties. This naturally leads to public involvement in labour-management disputes. Labour and management being a small part of the social system, it follows logically, must remain ultimately responsible and accountable to the very society in which they function. The concept of collective bargaining which visualized labour and management in isolation must change because the freedom to strike can only survive if it becomes responsive to the public. The question arises, then, what should be the mechanics of a system of responsive collective bargaining ?

THE MECHANICS

So far this paper has put forth three arguments [6]. First, because of automation, the utility and effectiveness of strikes has declined. This has led to purposeless and lengthy strikes which prove exasperating for the public. Secondly, there is no provision in labour relations law which can reduce the length of an « ordinary » strike. Thirdly, it is important that the strike and lockout action of the labour and management must be accountable to the public. This accountability must be in the form of economic or financial compensation. The mechanics of the system of responsive bargaining as outlined in the following section, attempts to capture the spirit of the above arguments,

MID-STRIKE CONCILIATION BOARD (MSCB)

In Canada, the dispute settlement procedure under federal and provincial laws exists only in cases where public interest is threatened. If it is determined that a certain dispute is indeed a public interest dispute it could be subjected to one of several procedures, namely, a higher level conciliation or mediation, some form of arbitration, inquiry commission, or special legislation. An « ordinary » dispute, however, does not call for any settlement procedure, unless by its definitive flexibility it could be regarded as a public interest dispute. When an

6 The ideas contained in this section are inspired by earlier writings on this subject, notably Gérard DION, « The statutory Strike Formula, » *Relations Industrielles,* April, 1969.

« ordinary » dispute becomes a public interest dispute, is not known [7]. The length of the strike may be one determining factor, but ultimately it remains a political decision. Here one may put forth the main contention of this paper that the lack of instituting a defined and comprehensible procedure and leaving the matter to a political decision make the industrial relations practices vulnerable and open to abuses.

Under a system of responsive bargaining there would be a continuation of well understood procedures from the very inception of a strike up until the final settlement. The pre-strike conciliation will be linked up with the procedure to be followed during the strike. Especially, then, there is need for a legislative procedure for labour and management to meet under a newly constituted Mid-strike Conciliation Board, three days after the strike has begun. These three days must provide the essential ventilation or cathartic period for the workers. Furthermore, a three-day-period is short enough not to cause the public serious inconvenience. It could be made longer or shorter, depending on actual experience.

It is preferable not to have the Conciliation Board members serve on the MSCB [8]. It may save time, however, to appoint the MSCB at the same time as the Conciliation Board is appointed. If a settlement is reached before or during the first three days of a strike the MSCB is automatically dissolved, if not it will start functioning on day four of the strike [9]. Its two basic functions are, first to bring the parties back to the bargaining table and second, what is more important, to work out at the start of each negotiating day (from and including day four of the strike) an amount of compensation for the public to be paid equally by

[7] The Task Force on Labour Relations made the following observations which indicate the dilemma and vagueness in instituting a comprehensive procedure : « First, it is extremely difficult to say with certainty or conviction in advance of actual events in what industry or service and at what time resort to economic sanctions ought to be curtailed. Second, the length of a strike or lochout frequently is a critical factor in making such an assessment. Third, there can be no one policy or procedure that works with uniform success. Fourth, flexibility of approach is essential lest the parties build the existing policy of procedure into their strategies. Fifth, a determination that a given stoppage of work ought to be terminated is essentially a political decision. Sixth, the political element in a potential emergency dispute is an inducement to the parties to drive the dispute beyond any procedural device for settlement and into the political arena. Seventh, circumstances may be expected to arise in the eventual course of industrial conflict in which disobedience to and defiance of the law will not be forestalled by that law. » *Task Force on Labour Relations, Ibid.*, p. 170.

[8] The members of the MSCB will have a different mandate, therefore it is advisable to constitute a new body.

[9] The MSCB will continue to function till a final settlement is reached, After the settlement, it will submit a report to the Industrial Relations Board of the province or to the Canadian Labour Relations Board at the federal level. It will also submit a financial report to the Department of Internal Revenue.

labour and management and deposited in a Strike Compensation Account (SCA).

THE SCALE OF COMPENSATION

The Conciliation Board award of the wage rate [10] should be treated as a bench-mark to calculate the differentials for the respective labour and management positions, as they stand, when MSCB brings them back to the bargaining table. The amount of compensation should be assessed on the differentials on a rising scale, i.e. one per cent per employee for day four of the strike, two per cent on day five, and so on. The amount of compensation should be calculated for each day and the chairman of the MSCB should be responsible for informing both parties at the start of the negotiations. Since the amount of compensation is calculated on the differential between the Conciliation Board award and the respective positions of the parties, there will be an incentive for each party to narrow the differentials : management would benefit by increasing their offer and labour by lowering their demand. This arrangement would exert an extraneous pressure on the parties to bargain in « good faith. »

When presented with the calculated compensation, each party would realize what the payment of this compensation means in settlement terms, i.e. their positions may be automatically altered. For example, each successive day of the strike brings on increasing compensation payment : for the management it involves financial burden without having raised the offer from A to B (see the chart below) and for the labour it means reduced gains even if the settlement was made at C. Therefore, by not altering their original positions, management incurred an expense of AB and labour forfeited the concession equal to CD.

C	Labour's last demand.
D	No change in labour's demand but the amount of compensation has reduced labour's likely gains, if the settlement was made at C.
F	Management's new offer.
E	Conciliation Board award.
B	No change in Management's offer but the amount of compensation has raised management's financial burden.
A	Management's last offer.

In order to avoid compensation payments, however, one or both parties may alter their positions to come closer to Conciliation Board award, E. It is conceivable that after X number of strike days, the management may make a wage offer higher than E (i.e. F in the chart given

[10] It will be difficult to convert the Conciliation Board award on non-wage issues into dollar terms. Although items of fringe benefits, hours of work and even job security demands have a price tag.

above) in which case it would not pay any compensation and moreover receive an amount proportionate to the difference between E and F., from the compensation paid by the labour, or from its own compensation payment made from day four of the strike onwards to the day the « new offer » is made.

Depending on the number of employees involved in a strike and the nature of differential between the Conciliation Board award and the respective positions of the parties, the compensation payment could increase in such proportions that after a strike period of between ten to fifteen days, both labour and management could begin to erode their original positions if they do not settle. So long as they are willing to take cuts in favour of the public they would be free to continue their strike and lockout.

DISPOSAL OF THE COMPENSATION PAYMENT

A Strike Compensation Account (SCA) should be maintained by the federal and provincial governments in which should be deposited all compensation payments collected in their respective jurisdictions for a given fiscal year [11]. These funds should be distributed among the tax payers, on a per-capita basis as a compensation for the inconvenience caused to them by various strikes during that year. Every tax payer (including the two parties, labour and management) should receive this payment, perhaps in the form of tax free income, or possibly a tax deduction. That the two parties should be included among the recipients of the compensation payment is due to the fact that they are equally inconvenienced by the unavailability of goods and services as is the bystanding public.

ADVANTAGES OF RESPONSIVE BARGAINING

The system of responsive bargaining as outlined in the preceding pages has the following advantages.

1. It preserves the workers' right to strike which, by itself, is an important emotional outlet for them in allowing them to freely ventilate their frustrations. In recognition of this fact, the first three days of the strike impose no compensation payment on the disputing parties.
2. It places an increasing burden on the parties to settle their dispute speedly, thus making the strike weapon useful and effective.
3. The length of the strike is shortened without any direct government intervention.

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[11] Recovering compensation payment from the management, in accordance with the financial statement of the MSCB, should be no problem for the government. It could pose a problem, as far as the employees are concerned. However, it could be debited to the employees pension fund.

4. The possibility of an indefinite strike is still kept open provided both parties are willing to pay for it.

5. The public receives financial compensation for being inconvenienced throughout the period of strike, exception the first three days.

6. Since the length of the strike is considerably shortened, it becomes possible to permit strikes even in the public sector, requiring no procedure for settling emergency disputes.

7. It disperses the spectre of a costly system of compulsory arbitration.

IMPLEMENTING THE SYSTEM OF RESPONSIVE BARGAINING

Contemporary collective bargaining may be regarded as « an instrument for the pursuit of social and economic justice. » [12] It is equally a mechanism for the allocation of resources in the labour market, but negatively, it is a system which causes hardship to the public through industrial disputes. For its first two qualities it is laudable and must be preserved ; for its last quality (or disqualification) it can erode the very basis of its existence. In Quebec and British Columbia, for instance, the labour unrest is of such magnitude that it may well become an election issue. The public is prone to react negatively to the workers' right to strike. This would be unfortunate and regressive to the development of meaningful labour, management and public relations. Public interest in labour-management relations has consideraly increased due to the mass media. Now it is becoming aware of and sympathetic to the hardship caused to other segments of society through work stoppages. With such tremendous concensus against industrial disputes, it is imperative that the system shows signs of responsiveness to the public. Through a system of responsive bargaining, then, the divergent interests of labour management and the public will be finally reconciled.

Will the proposed system of responsive bargaining work ? Will the parties agree to subscribe to the Strike Compensation Account ? The system will work because it has benefits for the larger segment of the society. Some unions or companies may object to the system of payment. But for that matter many tax payers dislike, resist and even evade the system. Nevertheless, governmnts collect taxes and a vast majority of individuals and corporations subscribe to the system willingly because they witness the social and economic benefits of their contributions. Similarly, strike compensation payment can acquire acceptability if the resultant social benefits are experienced by the society at large. Needless to say that it could have broad electoral support as well. On the other hand, labour and management reluctant to make such payments can reach speedy settlements.

12 *Canadian Industrial Relations, op. cit.*, p. 169.