

BOOK REVIEWS

Collective Bargaining: Negotiations and Agreements. By Selwyn H. Torff.
New York: McGraw-Hill, 1953. Pp. ix, 323. \$5.50.

Any book on the subject of collective bargaining must be appraised in terms of what it seeks to convey, why, and to whom.

Mr. Torff states that his purpose is "to describe and analyze in both an objective and a constructive manner the process of collective bargaining as it functions in the United States today." His method "is to set forth the issues which commonly arise in the course of collective bargaining; to expound and analyze the positions, contentions, and viewpoints of employers and labor unions on these issues; and to explain the various ways in which these issues are resolved. No attempt is made to 'sell' the reader on the merit or lack of merit of any such contention, viewpoint or solution to a problem."

As to the "why" and "whom," Mr. Torff states: "This volume is intended to be neither a management polemic nor an expanded version of a union handbill. It is intended to give the uninitiated layman or student an uncolored version of the subject matter and workings of the American collective bargaining process; at the same time, it may prove of some value to the representatives of employers and employees engaged in the collective bargaining process by facilitating a better understanding than has heretofore prevailed of the nature of the respective contentions and issues raised by each.

The volume is divided into four parts: "Collective Bargaining Negotiations and Agreements—Introduction"; "The Negotiation of 'Non-Economic' Issues"; "The Negotiation of 'Economic' Issues"; and "Administration and Enforcement of Collective Bargaining Agreements."

The subject matter conforms literally to the title. Within the area indicated, there is very little of substance that has been omitted except a discussion of the function of mediation and conciliation. It is regrettable that Mr. Torff gives only passing mention to this subject, since mediation and conciliation are important techniques for making collective bargaining "a more efficacious instrumentality of public policy," an end which Mr. Torff stresses. This omission may be forgiven, however, in view of the net contribution which the author has made to the literature in this field.

Mr. Torff has warned the reader that he is dealing with things as they are, rather than as they should or will be. There have been, quite naturally, some developments in the law and practice of labor relations since he completed his work, particularly those resulting from recent decisions of the

National Labor Relations Board. Aside from those decisions, at least one development worthy of mention has occurred, namely, the evolution of voluntary arbitration machinery to settle organizational or jurisdictional disputes within and between the AFL and CIO, portending the removal of a major source of friction in industrial relations. The full impact of this development cannot yet be appraised.

What impresses me most about this book is its comprehensiveness, its detail and, with notably few exceptions, its objectivity. I should have guessed that an undertaking of this sort would have required at least two volumes of the same size. There is no issue, broadly speaking, arising in collective bargaining which Mr. Torff has failed to cover with sufficient detail so that the nature of the issue, the problems involved, and the positions of labor and management may be understood. This success is explained by an unusual ability to go to the heart of the matter involved and to state the proposition concisely and clearly. This ability in turn results from a thorough mastery of the subject matter plus a knack of communication which the most expert teacher could only envy.

To illustrate, Chapter 11 treats the subject "Hours of Work and Overtime" in nineteen pages (pp. 149-68). Mr. Torff begins by pointing out the relation between collective bargaining and the Fair Labor Standards Act in this area. He then discusses the distinction between "overtime" pay and "premium" pay; types of overtime pay (weekly overtime, daily overtime, Saturday and Sunday overtime, sixth- and seventh-day overtime, holiday overtime, overtime for work outside scheduled hours); time not worked as "hours worked"; and miscellaneous problems (definitions of "work week" and "workday," prevention of work guarantee, anti-pyramiding clauses, distribution of overtime, whether overtime work is optional or obligatory). The discussion embraces problems known by negotiators, mediators and arbitrators to be complex and difficult. To a large extent, perhaps, these problems have been met. More current problems are covered with the same thoroughness in Chapter 16—"Employee Benefit Plans" (pp. 237-71)—and in other chapters.

Taking as an example the author's discussion of hours of work and overtime, who would be benefited by the presentation, and how? First, an employer and a union negotiating their first contract, without expert advice, would be warned of trouble spots which they should seek to anticipate by way of an oral understanding, or by appropriate contract language, which in many cases is suggested by the text. Must the employee work overtime if so assigned, subject to discipline if he refuses? If overtime is available, must the employer distribute it equally, and, if so, among whom, under what conditions, and subject to what penalty if he fails in his obligation?

Second, the expert adviser, lawyer or otherwise, would benefit by a rapid review of the problems which should be covered by appropriate language;

if a dispute should arise on a particular issue during negotiations or arbitration, he is provided with a thumbnail sketch of the arguments typically advanced by one side or the other in support of its position. He may need to go further, of course—and this is one respect in which Mr. Torff might properly have inserted a caveat—and, for example, examine the past practice of the parties where the contract language is not clear.

Third, the arbitrator, when called on to interpret an agreement, or, in the rare case, to decide what should go into an agreement, would benefit by the perspective gained through Mr. Torff's discussion of the particular issue.

Fourth, the student in labor economics or labor law—perhaps even the teacher—would benefit by an understanding of the complexities which lie beneath a simple textbook statement such as the following: "One of the subjects of collective bargaining negotiations is the matter of hours of work and overtime. Period."

In a seminar for advanced students, of course, or for the expert with his own checklist, Mr. Torff's analysis would be only the taking-off point for a search in the labor services (BNA, CCH, P-H, etc.) for cases dealing with variations on the theme. This facet of the topic is indicated by the caveat mentioned above. For example, assume that a collective bargaining agreement contains a standard "management rights" clause (treated in Chapter 9, pp. 125-31), and a seniority clause (Chapter 8, pp. 102-25) which limits seniority rights of all kinds (layoff, recall, promotions, shift preference, etc.) to employees engaged in a specified occupation within a department. When the agreement was first negotiated, eight years ago, all traffic services (trucking, etc.) were provided by employees in Department 18. As time went on, supervisors in Departments 1, 3 and 5, at various times, went to the union officials and asked for "permission," in writing, to assign a lift truck to the particular department, to be used intermittently by skilled machinists, etc., in moving their tools from one work place to another. In 1954, a layoff occurred in Department 18, while lift trucks were still being operated in Departments 1, 3 and 5, with sufficient regularity that all such work combined would provide a full-time job for a laid-off man. On investigation, the union discovered that supervisors in Departments 9, 11 and 13, without "permission," had obtained and were using lift trucks in the same manner as Departments 1, 3 and 5; that Department 23 was using a man, classified as a janitor, exclusively as a lift-truck operator; that Department 25 was using a janitor seventy per cent of the time as a lift-truck operator; and that Department 27 was using a stock clerk thirty per cent of his time as a lift-truck operator. Further, past practice showed that whenever work previously performed by a particular department was partially assigned to another department, management and the union agreed that the departments would be combined, as to such work, for the purposes of layoff and recall but for no other seniority purposes.

In this situation (an actual unreported case) the union asks that all traffic work be restored to Department 18, and that the laid-off men be recalled and be given back pay. Management points to the "management rights" clause, to the provision limiting seniority rights to an occupation within a department, to the "permission" received from the union in Departments 1, 3 and 5, and to the increased efficiency resulting from the new practice. The union replies that by seeking permission in the first instance, the management had conceded that assignment of traffic work outside Department 18 was otherwise not permissible under the agreement; that the past practice of combining other departments for purposes of seniority should control as evidence of contractual intent; and that the limitation of seniority rights to layoff and recall when departments were combined was a voluntary concession by the union in the particular cases, which it need not extend to the cases in dispute. How should the dispute be (a) settled, or (b) decided by an arbitrator?

For various reasons, I wish Mr. Torff had included such an example. First, it would remove the inference, which might be drawn from his orderly and precise treatment, that the problems discussed arise in orderly and precise contexts. Second, it would stress the importance of factors beyond the contract language, e.g., past practice, which might be important to some arbitrators in determining the meaning and application of contract language. Third, it would test the adequacy of the flat statement (p. 126)—one of the very few wherein Mr. Torff departs from his meticulous neutrality—that "all the rights of management which are not qualified or abrogated by the terms of the collective bargaining agreement continue to reside in the employer." Fourth, it would raise the question as to where the line is to be drawn between rewriting and interpreting or applying an agreement (see p. 317).

Finally, such a case would test Mr. Torff's position (pp. 303, 317) that "acceptability to the disputants is no test for an arbitrator to use in deciding a case arising under an agreement limiting his functions to interpreting and applying the terms thereof."¹ Mr. Torff here departs from his usual approach—"Some people feel this way, others the opposite way, for these reasons"—by his stern admonition against regarding arbitration as anything but a "judicial" process. He overlooks his own well-stated proposition that "labor arbitration serves the public interest by affording a peaceable alternative to the strike and lockout tactics which might be resorted to in an effort to force the settlement of grievances" (p. 315). In that sense, it is at least arguable that a "good" arbitration award, like a "good" strike settlement, should be one which is mutually acceptable. Even more important, private voluntary arbitration should be conducted as the parties to the contract desire. If they wish their arbitrator to combine mediation and decision-making, they are entitled to that procedure. If they wish their arbitrator to "just decide, and

¹For the opposite view, see Simkin, *Acceptability as a Factor in Arbitration under an Existing Agreement*, reviewed in 5 *Stanford L. Rev.* 863 (1953).

let the chips fall where they may," they are so entitled. The important thing is to have the arbitrator's course charted in advance. Most arbitrators can and do accommodate themselves to either approach. Curiously enough, among those who insist that the arbitrator must take a "judicial" attitude, there are a number whose concept of "judicial" is fulfilled by scrutinizing the prior awards of a prospective arbitrator to calculate his "batting average," i.e., to see what proportion of his awards have gone to management or labor, rather than to examine the logic or fairness of his reasoning in dealing with particular cases. I do not for a moment suggest that Mr. Torff is included in that number. There is no trace of duplicity in his book.

There are other points, mostly minor, where Mr. Torff's statements may be questioned. For example, in stating the arguments on the question of a "permanent umpire system" versus an "ad hoc" method, he lists, as one of the objections to the former, the argument that the parties may "find themselves saddled with an arbitrator of permanent tenure in whom they have lost confidence." This argument overlooks the common practice of inserting in the "permanent" umpire's contract a provision permitting termination of the appointment at the option of either or both parties. If one party makes the choice, that party "buys up" the contract; if both concur, they share the cost.

Mr. Torff deplures, with some justification, the tendency of government to intervene in labor disputes, thereby discouraging collective bargaining. He fails, however, to stress the fact that in a period of war or near-war, as in the Korean crisis, a choice has to be made between the demands of national security and the values of free collective bargaining. The real problem is to determine the point at which national security requires intervention, the kind and degree of controls needed at the moment, and the earliest point at which controls may be relaxed or removed. There is no justification for the critic—and again this does not apply to Mr. Torff—who is outraged because the government does not have enough steel bullets to supply our forces in Korea and at the same time is concerned because the government is intervening to prevent or settle a strike in an industry which supplies the steel to make those bullets.

In this connection, Mr. Torff adopts, rather mechanically, the charge that the Wage Stabilization Board departed from the established government policy of "neutrality" on the issue of "union security," by its recommendations in the 1952 steel case. To begin with, the implication that the Board attempted to foist a union shop on an open-shop industry is misleading. Union security clauses take various forms, including the closed shop, under which only union members may be hired; the full union shop, under which all must join within a prescribed period, and all must remain members; the modified union shop, under which prior non-member employees need not join, but all others must become or remain members, perhaps with an oppor-

tunity to "escape" at stated intervals; and maintenance of membership, under which no employees need join, but any who do must remain members, with an opportunity to "escape" at stated intervals. To the advocates of the "right to work" concept, all variants are objectionable, since all involve "compulsory unionism."

Beginning in 1944 the form of union security common to the steel industry was maintenance of membership. A few steel companies had union-shop agreements with the Steelworkers, and some had union- or closed-shop agreements with other unions. Under any of these forms of union security, if a member were expelled from the union for *any* reason, he risked loss of his job. In 1947, Congress limited this risk to failure to tender dues and initiation fees, and further safeguards were enacted against arbitrary union action. This made the union shop more palatable, so that, by 1952, the trend was toward some form of union shop broader than maintenance of membership.

This background is important in weighing Mr. Torff's statement—that the Wage Stabilization Board, in recommending a union shop, had departed from the government's traditional policy of "neutrality" on the issue of union security. The statement is clearly erroneous. First, the War Labor Board had commonly directed maintenance of membership, which is, as previously explained, a form of union shop. Maintenance of membership in the steel industry resulted from such a directive. Second, the War Labor Board directed a union-shop and even a closed-shop clause, if contained in a previous agreement, despite the employer's unwillingness to renew the clause. This situation is perhaps distinguishable, but Mr. Torff's statement is made without qualification. Third, on the eve of the Wage Stabilization Board's recommendation in the steel case, a special government fact-finding board appointed to consider a dispute over "union security" in the railroad industry, recommended a union shop, although there had been *no* form of union security in that industry previously. Therefore, the Wage Stabilization Board acted with ample precedent. Mr. Torff's description of the present status of union security in the steel industry as a "greatly watered down" union shop, even if accurate, is beside the point. The Board's recommendation did not urge any particular form of union shop; it allowed the maximum of freedom in bargaining in that regard. The recommendation got the parties off dead center. They bargained, and came up with an agreement which settled the controversy. And, judging by outward appearances, labor relations in the steel industry since have been more stable than ever before.

I happen to believe that labor-management relations, in terms of mutual understanding and respect, are perhaps in a healthier state than at any time in our history. Mr. Torff evidently does not agree. I regret that he did not, perhaps in a separate part of his book, give us his appraisal of the entire collective bargaining process, with some suggestions for improvement, to allevi-

ate what he describes as "the suspicion and hostility that currently characterize and permeate American labor relations" (p. 4). Where he has undertaken such an appraisal in a particular phase ("Evaluation of the Grievance Procedure," pp. 300-302), he has shown understanding and courage. Despite this omission, his contribution is most constructive and helpful, even, or perhaps especially, to us lawyers, despite no more than a few scattered footnotes. As a labor-law teacher and arbitrator, I am happy to have this book in my library.

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The Psychology of the Criminal Act and Punishment. By Gregory Zilboorg, M.D. New York: Harcourt, Brace & Co., 1954. Pp. 141. \$3.50.

This book on the psychology of criminal acts and punishment proceeds from a simple psychological premise: society's reaction to crime is explained by a fundamental conflict, "the eternal struggle between the striving to punish and the yearning to understand and forgive."¹ But the whole complex of facts concerning crime and punishment, psychiatry and law, cannot be explained or understood on the basis of an "eternal" psychological struggle. This view is romantic, not scientific. Neither contemporary research, nor general history, nor the history of law, nor the history of psychiatry afford any proof of it. The progress of criminal law has certainly not taken place on any such subjective basis. In this book the broad, concrete social and economic historical forces are suppressed—or perhaps repressed. Divisions within society either do not exist or are explained by divisions "within one and the same person."² The purely subjective approach puts social problems in a false focus.

The author contrasts two quotations from Mr. Justice Holmes. In the one Holmes praises science;³ in the other he refers to the necessity of punishment.⁴ The author finds between the two quotations "not only a flagrant contradiction, but a true confusion."⁵ Holmes's stand, however, is very clear. It is the author who is confused when he seeks solutions "in the inner psychology of the problem." He sees emotional problems where there are social problems. Primarily legal decisions do not express individual emotions, though these may enter incidentally. Fundamentally, legal decisions represent social forces and interests. The whole overemphasis on psychology as the basic consideration is misleading, and serves to divert attention from the social environment in which all psychological forces operate. The author of this book

¹ P. 4.

² Pp. 4-5.

³ P. 5.

⁴ P. 6.

⁵ P. 7.