

## BOOK REVIEWS

**The Government as a Source of Union Power: The Role of Public Policy in Collective Bargaining.** PHILIP ROSS. Providence: Brown University Press, 1965. Pp. xiv, 320. \$6.50.

This book does not have the broad sweep suggested by its ambitious title. It deals with the duty to bargain in good faith imposed on employers by the National Labor Relations Act, as amended. The author, an economist, deals with staples of legal discussion: the antecedents of section 8(5)<sup>1</sup> of the Wagner Act, the legislative history of that section, the pertinent amendments of the Taft-Hartley Act, and the detailed regulation that has evolved from elastic statutory language. The volume is, we are told, based on original research. As to the legislative history and the content of regulation, originality was largely unnecessary. The author seeks, however, to add a new and useful dimension to the typical legal treatment by an empirical inquiry concerning the consequences of enforcing the duty to bargain.

Ross' examination of the legislative history corrects a misapprehension spread by frequent quotation of a statement by Senator David I. Walsh, Chairman of the Senate Committee on Education and Labor, when Senator Wagner's bill was being considered. That celebrated statement, which indicated that the Wagner Act was not to lead to governmental inquiry into the employer's negotiations,<sup>2</sup> has often been invoked to support doubts about the legitimacy of a substantial portion of the regulation based on section 8(5) of the NLRA.<sup>3</sup> But Mr. Ross reminds us that the Senator's statement ignored the contrary principles

---

<sup>1</sup> Section "8(5)" and "8(a)(5)" will be used herein to connote the periods before and after the 1947 amendments respectively.

<sup>2</sup> Senator Walsh declared, *inter alia*: "When employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is to escort them to the door of the employer and say, 'Here they are, the legal representatives of your employees.' *What happens behind those doors is not inquired into, and the bill does not seek to inquire into it.* It anticipates that the employer will deal reasonably with the employees, that he will be patient, but he is obliged to sign no agreements; he can say, 'Gentlemen, we have heard you and considered your proposals. We cannot comply with your request.'; and that ends it." (Emphasis added.) 79 CONG. REC. 7660 (1935).

<sup>3</sup> See pp. 89-96, citing *inter alia*, CED INDEPENDENT STUDY GROUP, *THE PUBLIC INTEREST IN NATIONAL LABOR POLICY* 81-82 (1961); Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401-02, 1406-07 (1958); Cox & Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389 (1950). Ross' criticism of Cox is, however, overdrawn; Cox in his later article recognized the ambivalence of the legislative history, see 71 HARV. L. REV. 1401, 1405-07, but resolved it differently from Ross.

developed under earlier statutes and was not representative of the pertinent legislative history.<sup>4</sup> Thus, Senator Walsh himself made statements implying a larger role for government.<sup>5</sup> Furthermore, Senator Wagner had declared that the duty to bargain as defined by the first National Labor Relations Board, established on the basis of a Joint Resolution, was to be incorporated into section 8(5).<sup>6</sup> That Board's reference to the settled principle that "the employer is obligated by statute to negotiate in good faith with his employees' representatives; to match their proposals, if unacceptable, with counter-proposals; and to make every reasonable effort to reach an agreement,"<sup>7</sup> pushed the government into the conference room and was plainly at odds with Senator Walsh's limiting declaration. Although the same point has been made by earlier commentators,<sup>8</sup> Ross' elaborate and forceful case is a useful corrective of recent discussions that have ignored or minimized the ambivalence of the legislative background.

Ross' exposition of Board doctrine is, on the whole, less useful than his discussion of the legislative history. It has the quality of a pedestrian hornbook, summarizing the law without pinpointing the difficulties that have divided the Board, courts and commentators. It fails to consider whether particular decisions take account of the realities, and the diversities, of industrial relations. It fails also to identify significant turning points in the development of regulation. It does not raise the familiar question whether the spirit of the Supreme Court's approach to the employer's duty has carried over into its delineation of the reciprocal duty of the union.<sup>9</sup> It passes over in silence recent and controversial issues, such as the legality of Boulwareism,<sup>10</sup> or the em-

---

<sup>4</sup> Pp. 75, 83.

<sup>5</sup> Various reasons for Senator Walsh's inconsistencies are explored in Miller, *The Enigma of Section 8(5) of the Wagner Act*, 18 IND. & LAB. REL. REV. 166, 183-84 (1965).

<sup>6</sup> See p. 81. But Senator Wagner had also emphasized the parties' freedom to withdraw if their conditions were not met. See 79 CONG. REC. 7571 (1935).

<sup>7</sup> Houde Eng'r Corp., 2 N.L.R.B. (old) 35 (1934). The policies of the predecessor Boards were explained during the hearings and were not specifically questioned. See Miller, *supra* note 5, at 184.

<sup>8</sup> See BERNSTEIN, THE NEW DEAL COLLECTIVE BARGAINING POLICY 103-06, 129-30 (1950); BOWMAN, PUBLIC CONTROL OF LABOR RELATIONS 118-23 (1942); Fleming, *The Obligation to Bargain in Good Faith*, in PUBLIC POLICY AND COLLECTIVE BARGAINING 60, 61-62 (Shister, Aaron, & Summers eds. 1962); Findling & Colby, *Regulation of Collective Bargaining by the NLRB*, 51 COLUM. L. REV. 170, 182 (1951).

<sup>9</sup> Compare NLRB v. Borg-Warner, 356 U.S. 342 (1958), with Local 24, Int'l Bhd. of Teamsters v. Oliver, 358 U.S. 283 (1959). Compare NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956), and NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963), with NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477 (1960).

<sup>10</sup> "Boulwareism," although not easy to summarize, is an approach to collective bargaining used by General Electric that emphasizes company determination of employee desires, company adherence to a "fair offer," and extensive company communication with

ployer's duty to bargain about decisions with respect to "subcontracting" in its multifarious forms,<sup>11</sup> plant relocation or the sale of assets. Similarly, there is not a word about such issues as the legality of lockouts and related bargaining pressures condemned by the Board but recently legalized by the Supreme Court.<sup>12</sup> Mr. Ross has described, rather than analyzed, the Board's administration of sections 8(5) and 8(a)(5). Given the difficult issues involved, the dearth of dissent or doubt in a seventy page treatment is striking.

His acquiescence may result from his primary interest, which is in the effect of Board doctrines. He sought by empirical investigation to answer this question: "What is the practical meaning of the duty to bargain?"<sup>13</sup> He accordingly examined all meritorious section 8(a)(5) cases filed in seven regions during 1960,<sup>14</sup> consisting of five cases that led to a formal Board order and sixty-seven cases that were informally settled. Mr. Ross unfortunately does not name or cite the cases that led to a formal order or explain that omission, which obviously hampers a check of his methods.

His discussion of those five cases suggests that in three of them the enforcement of section 8(a)(5) might have protected a union with majority support and might have led to a collective bargaining agreement; in two of them, enforcement did not produce an agreement. In the first group, two of the cases involved violations of section 8(a)(3) as well as section 8(a)(5). Hence, it is not clear whether the enforcement of the former section, coupled with the power of the union (the Teamsters in one case) might have led to, or have preserved, agreement through collective bargaining.<sup>15</sup> In any event, the conclusion, that the enforcement of section 8(a)(5) sometimes leads to (or is followed by) a collective bargaining relationship and sometimes does not, is not surprising.

Ross' examination of the sixty-seven settlements and the subsequent short-run bargaining history persuades him that the filing of refusal to

---

employees concerning the company's employment policies. See *General Elec. Co.*, 150 N.L.R.B. No. 36, 57 L.R.R.M. 1491 (Dec. 16, 1964); cf. NORTHROP, *Boulwareism* (1964); Note, "*Boulwareism*": *Legality and Effect*, 76 HARV. L. REV. 807 (1963).

<sup>11</sup> See *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203 (1964); Note, *Employer's Duty to Bargain About Subcontracting and Other "Management" Decisions*, 64 COLUM. L. REV. 294 (1964).

<sup>12</sup> See *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965); *NLRB v. Brown*, 380 U.S. 278 (1965).

<sup>13</sup> P. 182.

<sup>14</sup> P. 183.

<sup>15</sup> One of those cases indicates that employers with long established bargaining relationships may violate § 8(a)(5) by proposing a package designed to "remove the union as an effective representative of the employees." P. 189. The Board's approach to such cases underscores the familiar tension between good faith bargaining and freedom of contract, a tension that Ross does not squarely confront.

bargain charges usually induces the charged employer to engage in good faith bargaining. He urges, moreover, that the effectiveness of the bargaining duty is shown by the fact that in only thirteen cases (19%) was a collective bargaining relationship not established or resumed.<sup>16</sup> The significance of that figure, as Ross acknowledges,<sup>17</sup> depends on the forces at work in individual situations. An important variable in those situations was, of course, whether they involved a newly established union or an established bargaining relationship. Although Ross indicates the number of cases falling in each of those categories,<sup>18</sup> he fails to pinpoint the percentage of new relationships covered by agreements reached after the Board's machinery was invoked. Since new relationships are likely to be more fragile than established ones, that omission may result in an overstatement of the effectiveness of the Board's machinery.

There are, moreover, other difficulties in assessing Ross' overall statistics. Some of the cases involved elusive issues, such as the legality of unilateral action in the context of established bargaining relationships,<sup>19</sup> while others involved outright refusals to recognize a majority union. The invocation of Board machinery in the latter group of cases is more likely to be necessary for establishing some kind of bargaining relationship whereas in the former group of cases the Board's intervention is likely to determine the details of, rather than the existence of, the relationship; for established relations are likely to endure because of mutual acceptability, the compulsion of power, and the entire range of statutory protections. Statistics that scramble both types of cases obscure that vital point.<sup>20</sup>

A second difficulty with Ross' assessment of the settled cases arises from the variety of charges they involved. Thus, in addition to charges based on section 8(a)(5), those cases dealt with charges based on sections 8(a)(1) and 8(a)(3). Furthermore, some of those cases also involved strikes and violence. As already suggested, Ross' assessment of the operational significance of section 8(a)(5) was, accordingly, complicated by the formidable problem of separating the impact of that section from the impact of the rest of the statute and the economic power resulting from

---

<sup>16</sup> P. 183.

<sup>17</sup> *Ibid.*

<sup>18</sup> P. 184.

<sup>19</sup> *Ibid.*

<sup>20</sup> In connection with the different impact of the duty to bargain on new and established relationships, it is worth noting that commentators, who questioned the Board's expansion of the bargaining duty and who in turn are criticized by Ross, would have read § 8(5) as at least requiring recognition of unions with majority support—a requirement that usually is of significant assistance to newly established unions. See Cox, *The Duty To Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1409, 1413-14 (1958).

legally protected organization. The author, although aware of that difficulty,<sup>21</sup> appears consistently to understate it.

An additional difficulty with the author's assessment is that the "practical meaning of the duty to bargain" cannot be determined by focusing exclusively on cases involving breach of that duty. That difficulty the author ultimately highlights, as a general proposition,<sup>22</sup> but he nowhere takes account of the constraints imposed on law-abiding companies who adjust or seek to adjust their behavior so as to meet the uncertain and fluctuating demands of the law. A determination of the elusive "practical meaning" of any law plainly calls for an inquiry into the burdens imposed on good men, as well as the sanctions visited on evil-doers.

Such a determination in the context of the duty to bargain should confront the following questions, among others: What burdens has section 8(a)(5) (as distinguished from union power) imposed on management's seeking to relocate, to sell out, to buy instead of make components, to reduce "excessive wages," to protect confidential information, and generally, to work out with the union arrangements responsive to distinctive operational needs? Furthermore, it is necessary to consider whether nonmeritorious charges of violations of section 8(a)(5) have been exploited as tactical maneuvers and whether such exploitation has been encouraged by the looseness and instability of Board doctrine.<sup>23</sup> Finally, the expansion and the refinement of the bargaining duty has naturally added to the Board's overloaded and slow-moving docket. Hence, assessment should also confront the issue of whether the Board's regulation of the details of the bargaining process in situations where overall good faith existed and, indeed, comprehensive agreement resulted, has not diverted time and energy from essential statutory purposes to peripheral matters. Unfortunately, Ross' search for the "practical meaning" neglects the foregoing issues.

In his "Evaluation of the Duty to Bargain," with which he concludes his work, Ross goes beyond the statistics of Board cases in examining the

---

<sup>21</sup> P. 262.

<sup>22</sup> P. 265.

<sup>23</sup> Ross reports that in the twelve year period of the Wagner Act the percentage of nonmerit charges was 55.4, whereas for the fiscal year 1962 the corresponding percentage was about 69; furthermore, he implies that there has been a similar increase in nonmerit charges of violation of § 8(a)(5). P. 250. He also finds that since the enactment of the Wagner Act, there has been a fundamental acceptance of legal requirements by the employers. Pp. 251, 254, 262. Hence, any increase in nonmeritorious § 8(a)(5) charges would appear to reflect the increased complexity of the law, a greater willingness of unions deliberately to exploit § 8(a)(5) charges as bargaining maneuvers, or the application of more stringent standards of proof. Ross, however, treats the foregoing figures as indicating a greater degree of employer compliance. Although I do not dispute that conclusion, the change in proportion of meritorious cases scarcely supports it.

objections that have been urged against the Board's approach. He notes first the "inconsistency in the objections that the duty to bargain not only is ineffective but also constitutes an overly effective intervention in the collective bargaining process."<sup>24</sup> He recognizes, however, that the inconsistency is only apparent in that "it is logically possible to assert that the ineffectiveness of the duty to bargain can only be remedied by . . . greater and greater government regulation of the substantive terms of collective bargaining."<sup>25</sup> In rejecting the alleged ineffectiveness, he points to the great increase in union membership in the several years following the enactment of the Wagner Act.<sup>26</sup> While acknowledging that many forces contributed to that increase, he asserts that his previous empirical examination "broadly speaking" leads to the conclusion that it was the impact of the NLRB that induced compliance with public policy.<sup>27</sup>

Such reliance on the whole statute in the context of an appraisal of section 8(a)(5) involves a confusing shift of focus. There is, of course, no reason to doubt that the NLRB (and the courts) induced compliance. But that conclusion tells us very little about the impact of section 8(a)(5) or of the currently expansive duty derived from it. In this connection, it is worth noting that the early surge in union membership occurred prior to the Board's generous expansion of the duty to bargain. And it also is worth noting that Ross recognizes that the statutory protection and remedies against discrimination have been "the heart of the Act."<sup>28</sup> But he also tells us that "the duty to bargain, with all its implications, is the heart of the public policy."<sup>29</sup> Perhaps this apparent inconsistency can be explained away on the ground that the principal objective of regulation was the promotion of collective bargaining. Nevertheless, that explanation does not avoid the difficulty of separating the effect of section 8(a)(5) from that of other statutory protections that appear to be critical to the establishment and preservation of union representation and collective bargaining.

Ross' attempt to surmount that difficulty by recourse to empirical evidence is not convincing. He points, first, to evidence that certified unions succeed in getting contracts in the vast majority of cases.<sup>30</sup> But plainly it is the entire statute and not merely the bargaining section that helps prevent the dissipation of union support after, as well as prior

---

<sup>24</sup> P. 235.

<sup>25</sup> *Ibid.*

<sup>26</sup> P. 238.

<sup>27</sup> P. 239.

<sup>28</sup> P. 242.

<sup>29</sup> P. 262.

<sup>30</sup> P. 251.

to, certification. He relies also on the rise and decline of foremen's unions. His argument appears to be supported by the temporal relationship between the Board's doctrinal changes and increased unionization of foremen. The Board had, at one time, granted foremen all the statutory protections except those flowing from section 8(5).<sup>31</sup> After the Board had eliminated that exception and had required employers to bargain in good faith with foremen's unions,<sup>32</sup> the Foremen's Association enjoyed a sharp increase in membership.<sup>33</sup> But several considerations underscore the need for caution both in drawing causal inferences from the foremen's experience and in applying that experience to the rank and file. Thus, although relying on Larowe's study,<sup>34</sup> Ross does not mention his finding that the successes of the Foremen's Association in collective bargaining were less impressive than its membership gains.<sup>35</sup> Larowe's study also reports that membership in foremen's unions doubled in the year after the NLRB had denied foremen any statutory protection.<sup>36</sup> Plainly, the enforcement of section 8(5) was only one of the important variables affecting the fortunes of those unions.

Other considerations also deserve attention in appraising the general significance of the rise and decline of foremen's unions. It was an article of management's faith that foremen were part of management and should not be unionized. Consequently, in order to achieve and stabilize a new employer consensus, it was especially important that unionization of, and collective bargaining for, foremen should have been given a clear legal and moral mandate. Plainly, such a mandate could not be derived from the Board's internal division and shifting positions.

Despite the difficulty of generalizing from the tangled history of foremen's organizations, it seems clear that their loss of statutory protection was a critical cause of the decline of their unions. But it does not follow that their loss of rights under section 8(5), as distinguished from their loss of the whole bundle of statutory protections, was crucial. The history of foremen's unions is even less persuasive with reference to Ross' principal contention that section 8(a)(5), as "currently interpreted," is a major factor in the preservation of collective bargaining for nonsupervisory employees.

Beyond those questions of historical interpretation are deeper difficulties. Ross tends to treat both "collective bargaining" and "the duty to

---

<sup>31</sup> See *Soss Mfg. Co.*, 56 N.L.R.B. 348 (1944); Larowe, *A Meteor on the Industrial Relations Horizon: The Foremen's Association of America*, 2 LABOR HISTORY 259, 282-84 (1961).

<sup>32</sup> *Packard Motor Co.*, 61 N.L.R.B. 4, 64 N.L.R.B. 1212 (1945), *aff'd*, *Packard Motor Co. v. NLRB*, 330 U.S. 485 (1947) (four Justices dissenting).

<sup>33</sup> Pp. 261-62; Larowe, *op. cit. supra* note 31, at 286.

<sup>34</sup> P. 260 n.58.

<sup>35</sup> Larowe, *supra* note 31, at 286.

<sup>36</sup> *Id.* at 277-79.

bargain" as monolithic terms. As a consequence, his appraisal, like his empirical inquiry, does not confront the problems raised either by the mushrooming of regulatory detail or by specific components of regulation, such as the line of cases requiring bargaining before certain business decisions are made.<sup>37</sup> Those cases raise the question whether the existing law should be used, or should be modified, to create what may loosely be viewed as a system of codetermination in this country. The effect of current doctrine, as distinguished from that of economic power, in imposing such a system is a difficult question, and there is a substantial risk that preoccupation with legal puzzles may obscure the deep seated tendency of established unions, legal compulsion on employers aside, to expand their challenge to managerial control. But insofar as the law governing bargaining affects the area of joint discussions or decisions, the law has implications for industry's capacity to respond to change and to provide fuller employment and for the union's capacity to protect its constituents and its institutional interests against the shock of change. Thus, the law of bargaining impinges on large issues, such as the structure and efficiency of industry and the allocation of the burdens of change. Ross' appraisal does not even articulate such issues even though they lie behind a good deal of the controversy that swirls around the NLRB.

Nor does he deal adequately with the tensions between the Board's elaborate regulations and the underlying statutory objective of promoting a system of private decision making.<sup>38</sup> It is true that Senator Walsh's limiting ordinance could scarcely have been observed if the integrity of the representation process and the duty to recognize the majority representative were to be supported by law, as distinguished from union power. It is also true that once the negotiating room is opened to government regulation there is no clear stopping point. But the familiar difficulty of drawing lines scarcely warrants uncritical acceptance of either each new administrative marking or the total mass of regulation that has evolved. On the contrary, that difficulty coupled with the parthogenetic quality of each new rule is, or should be, a reminder of the risk that regulation may obstruct or smother the process that it purports to safeguard. That danger has, as Ross recognizes, moved a roster of responsible critics, generally sympathetic to collective bargaining and the union movement, to call for the total elimination of the duty to bargain. Ross dismisses their criticism somewhat cavalierly. He implies that their concern makes sense only if, like some die-hard employers of the thirties, they are against collective

---

<sup>37</sup> See authorities cited note 11 *supra*.

<sup>38</sup> See Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1416; Wellington, *Freedom of Contract and the Collective Bargaining Agreement*, 14 LAB. L.J. 1016 (1963).

bargaining.<sup>39</sup> That not so oblique *ad hominem* begs such important questions as whether the existing body of regulation is compatible with the diverse needs of an infinite variety of bargaining relationships, with the need for regulation that is and appears to be even-handed and reasonably predictable, and with an enterprise system that still depends on the discipline of the market. Ross, without confronting such questions, concludes that the Board's bargaining rules are workable and have not imposed "undue strain."<sup>40</sup> Plainly, so general an endorsement, unsupported by pertinent empirical or analytical considerations, is only a statement of personal faith.

Mr. Ross has usefully reminded us that analysis and appraisal should grapple with the operational consequences of doctrine, and, what is less routine, has not wholly ignored his own precept. But his effort might have been even more useful if he had paid more attention to the problems that elude Board statistics and that are obscured by approaching "collective bargaining" and the "bargaining duty" as if they were simple unitary concepts. On that level of abstraction, a love affair with the Board is easy, and Ross has fallen hard. Love for an object of study is pleasant but for a long time has not been considered helpful to analytical work.

BERNARD D. MELTZER\*

---

## Facts for the Law Maker: Three Recent Studies

**Arrest: The Decision to Take a Suspect into Custody.** WAYNE R. LA FAVE. Boston: Little, Brown & Co., 1965. Pp. xxxiv, 540. \$10.00.

**Automobile Accident Costs and Payments: Studies in the Economics of Injury Reparation.** ALFRED F. CONARD, JAMES N. MORGAN, ROBERT W. PRATT, JR., CHARLES E. VOLTZ & ROBERT L. BOMBAUGH. Ann Arbor: University of Michigan Press, 1965. Pp. xxviii, 506. \$12.50.

**The Pretrial Conference and Effective Justice.** MAURICE ROSENBERG. New York: Columbia University Press, 1964. Pp. xiv, 249. \$6.50.

It is a tradition of long standing in Anglo-American law to make broad surveys available to the legislatures whenever major factual prob-

---

<sup>39</sup> P. 264.

<sup>40</sup> P. 265.

\* Professor of Law, The University of Chicago Law School.