
The Folklore of Featherbedding

Henry Kaiser

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

Recommended Citation

Henry Kaiser, *The Folklore of Featherbedding*, 3 DePaul L. Rev. 169 (1954)
Available at: <https://via.library.depaul.edu/law-review/vol3/iss2/2>

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.

THE FOLKLORE OF FEATHERBEDDING

HENRY KAISER

FEATHERBEDDING is not a word to be found in the standard dictionaries. It is a slang word,¹ an opprobrious reference to various forms of human reaction to technological advancements.² It is a contemptuous, fighting word to those who purport to believe that economic waste is not to be tolerated in our modern industrial society. It is used indiscriminately to describe a multitude of activities that are said to prevent the use of more efficient methods or to secure the employment of useless and unnecessary labor.³ Ordinarily the epithet

¹ The word "featherbedding" is given as an example of "union slang" in Mencken, *The American Language: Supplement II*, 776 (1948), and is defined there to mean "getting pay for work not done."

The word is listed under both "labor union activities" and "railroad work" in Berry and Van den Bark, *The American Thesaurus of Slang* 494, 728 (2d ed., 1953). It is there defined to mean "requiring the management to put an extra man on a job where he is not needed in order to spread available work."

The word is also listed in Horton, Ripley and Schnapper, *Dictionary of Modern Economics* 125 (1948), as "A term of opprobrium applied to the practice of employees who limit their maximum production for personal or union reasons."

In a recent newspaper account of "featherbedding" and other activities of unions in the New York City entertainment business, the following definitions are given: "'Featherbedding' is the technique of forcing an employer to hire men for whom there is no real job. 'Padding' means using more men than are needed. The 'schmear' is the custom that makes it seem advisable for an employer to pay a gratuity to an employee in excess of wages." *New York Times*, p. 13, col. 1 (Feb. 8, 1954).

² Two recent studies of anti-featherbedding legislation define the word as follows: "Featherbedding is a form of resistance to technological change, a phenomenon as old as civilization itself." Aaron, *Governmental Restraints on Featherbedding*, 5 *Stan. L. Rev.* 680 (1953).

"Featherbedding is a method of creating or spreading employment by unnecessarily maintaining or increasing the number of employees or the time used to complete a particular job." Note, *Featherbedding and Taft-Hartley*, 52 *Col. L. Rev.* 1020 (1952).

³ At least nine forms of activities by unions to make work for their members have been identified: (1) limiting daily or weekly output; (2) indirectly limiting the speed of work; (3) controlling the quality of work; (4) requiring time-consuming methods of work; (5) requiring that unnecessary work be done or that work be done more than once; (6) regulating the number of men in a crew or on a machine, or requiring the employment of unnecessary men; (7) requiring that work be done by members of a given skilled craft; (8) prohibiting employers or foremen from doing

MR. KAISER is a member of the firm of Van Arkel and Kaiser, in Washington, D.C., and is an attorney for the American Federation of Musicians. He received his B.A. from the College of the City of New York and his LL.B. from the University of Wisconsin.

is applied only to the actions of organized labor, though the concept behind it admits of no such limitation.⁴ But whatever its intended scope, featherbedding is a symbol that tends to impede intelligent consideration of the social and economic impact of technological change and to produce punitive legislation of a most unrealistic nature.

Around the featherbedding symbol has developed an elaborate folklore. Always the emphasis is upon extreme situations, upon a "parade of horrors," wherein individuals are paid for doing no work or where the work performed has no discernible value to the employer or to society. Such instances are said to be patent forms of economic waste that drain millions of unnecessary dollars from supine employers. And these employers are described as weak-kneed, possessing little knowledge of their own business, and lacking "both the shrewdness for dickering with union officials and the patience to study their own contracts."⁵ So great is said to be the economic waste that the public interest demands that these employers, who are either ineffective or collusive in their relations with unions, be protected from the featherbedding demands of union negotiators. The processes of collective bargaining are not to be trusted. The featherbedding demands of unions, it is concluded, must be outlawed if we are to enjoy an efficient economic system wherein men are paid only for the necessary work that they actually perform.

But before we concede the desirability of outlawing featherbedding and legislating efficiency, certain assumptions, implications and repercussions of the prevailing folklore deserve examination. At the outset, it may be categorically asserted that productive efficiency is by no means the exclusive or even the most desirable value of our society. Some, for example, doubtless consider and can statistically prove that

journeymen's work; and (9) retarding or prohibiting the use of machines and labor saving devices by pursuing policies of obstruction, competition or control. Slichter, *Union Policies and Industrial Management* 166 (1941).

⁴ Policies which restrict output or the adoption of more efficient methods or which require the employment of unnecessary manpower frequently are adopted by management. Moreover, it has been said that nonunion men tend to restrict production more than unionists since they do not operate under collective agreements which usually come to public notice and hence are subject to public condemnation. Leiserson, *The Economics of Restriction of Output*, in Mathewson, *Restriction of Output Among Unorganized Workers* at 160, 163 (1931). See, in general, Stern, *Resistances to the Adoption of Technical Innovations*, in *Technological Trends and National Policy* 39 (National Resources Committee, 1937).

⁵ *New York Times*, p. 1, col. 4 (Feb. 8, 1954).

production-wise it is efficient to have employees work conscientiously for sixty hours a week at fifty cents an hour. Fortunately, however, we find other, conflicting values more attractive. That these may entail a degree of economic waste cannot be gainsaid. But such waste is, plainly, a small price to pay for the preservation of the more important and enduring desiderata of a civilized democracy.

Nor is the economic waste of featherbedding necessarily a conscious, evil objective that is irresponsibly sought by those who practice it. Such activities may reflect something far more justified than a naked desire by individuals to obtain money without working or to stand in the way of mechanical progress. Thus a demand for the performance of "useless" labor may be a crude means of requesting shorter hours or a spreading of employment opportunities. Opposition to improved equipment or more efficient methods may constitute an untutored desire for continued employment or earnings. These and other "featherbedding" demands, moreover, almost invariably occur under circumstances where workers are being forced to bear the total, immediate impact of technological improvements. When society fails to soften the shock of technological displacement it is not surprising that workers react individually or through their unions to demand a more gradual introduction of new machinery or to request compensation for the displaced individuals.

Featherbedding, thus, is ordinarily a form of adjustment to the hardships and dislocation which new machines and techniques so frequently create. It may be that invention and technological change produce more jobs and higher pay over the long course of time.⁶ And it may be that the efforts of workers to offset technological displacement by make-work demands have little lasting effect and fail to produce any substantial improvement in their employment opportunities. But workers who are threatened with occupational obsolescence cannot be expected to concern themselves with the long-run con-

⁶ It is difficult to measure accurately the effects of labor saving devices upon the total employment picture. There is considerable opinion to the effect that technological improvements result ultimately in greater employment. Slichter, *Union Policies and Industrial Management* 575 (1941); Yoder, *Labor Economics and Labor Problems* 124 (2d ed., 1939); Marx, *Mechanization and Culture* (1941). And it is argued that the labor-displacement effect of these improvements is ultimately balanced by such compensating factors as reduction of prices and development of new industries. Douglas and Director, *The Problem of Unemployment*, c. x (1931). But the Temporary National Economic Committee concluded that technological improvements do create unemployment and, by inducing business concentration, hinder operation of the compensating factor of reduced prices. Anderson, Lorwin and Blair, *Technology in Our Economy* 220 (TNEC Monograph 22, 1941).

sequences of technological improvements. They do not worry about the ultimate effectiveness of their efforts to maintain their employment security. Understandably they react instinctively to the threat of immediate displacement.⁷

This human reaction, this desire for job-preservation, often has benefits which are worth preserving despite the economic waste that may ensue. Maximum hours and minimum wage legislation, unemployment insurance laws and governmental efforts to facilitate the mobility of labor are among the ways in which our governments recognize those values and seek to alleviate the immediate ill-effects of work displacement. In a real sense such laws involve economic waste. But that waste is more than counterbalanced by the human values which are thereby recognized and preserved. And to the extent that so-called featherbedding activities represent those same values and supplement social legislation in areas where it is not effective, the resulting economic waste and lack of pure efficiency are worth the price.

Some of the values or reasons which may lie behind so-called featherbedding demands have been well summarized by one labor leader as follows:

Sometimes these demands arise from the need for doing a competent job; a carpenter or plumber will demand a helper to conserve his time and produce a better job. Sometimes they involve considerations of industrial safety; a road crew will demand, over the employer's protests, that some one be stationed with a flag to warn traffic, or miners may demand inspection of the premises, or longshoremen will demand stationing of a lookout, and the like, for the simple reason that their lives are threatened if these steps are not taken. Sometimes it is a demand for some measure of leisure; the 8-hour day, the 5-day week, the paid holiday, the vacation with pay, and pension plans are all concerned with the understandable and laudable desire of working people to secure a better life. Yet each of these could be, and perhaps was, resisted by employers on the ground that they were being asked to pay for something they did not "need or require." If the employers were right we would still have 72-hour weeks, 7 days a week, 365 days a year, especially if the employer's sole desires in these matters had been written into law.⁸

⁷ Philip Murray once expressed the attitude of the workers threatened with mechanical displacement as follows: "Classical economic pronouncements about the automatic absorption of displaced workers by private industry, whether true in the long run or not, are just so much dribble to the men and women who are deprived of their accustomed way of making a livelihood. . . . As a famous economist once said, in the long run we are all dead." Hearings before TNEC pursuant to Pub. Res. 113, 76th Cong. 3d Sess. 16,505 (1940).

⁸ Statement of Woodruff Randolph, President of International Typographical Union, at Hearings before Senate Committee on Labor and Public Welfare on proposed revisions of the Labor-Management Relations Act of 1947, 83d Cong. 1st Sess. 630 (1953). See note 19 *infra*.

It may be questioned, furthermore, whether all aspects of featherbedding really involve economic waste. In the railroad industry, for example, the practice has developed of paying certain employees for hours they do not work and for runs they do not make.⁹ And in the printing industry an established practice is to pay printers for certain typesetting which is never even intended to be used.¹⁰ On the surface both practices would seem to be classic examples of featherbedding, involving economic waste. Yet in both instances the practices are merely expressions—indirect expressions to be sure, but grounded in those industries' history and tradition—of the basic wage agreement for work actually performed.¹¹ To overturn them would be to upset delicate balances achieved by careful and constructive negotiations over a period of many years, without any real difference in production or efficiency.

The condemnation of employee resistance to technological change, has lost sight of the underlying motivations of such resistance. It refuses to consider any mitigating circumstances or the possibility that the economic waste of featherbedding techniques may be outweighed by other values or may even be non-existent. In the eyes of the anti-featherbedders, all obstacles placed by labor in the path of greater efficiency and more production are evil and deserve outlawry.

At the same time this concentration on the resistance of workers to technological progress ignores the fact that "labor is but one factor, and not the most important, in the total resistance to the utilization of invention and technological change."¹² Employers or investors may decline to introduce new labor-saving devices for fear that the costs of obsolescence would be too great. They may

⁹ Shulman, *Labor and the Anti-Trust Laws*, 34 Ill. L. Rev. 769, 785 (1940).

¹⁰ Randolph, *Reproduction in the Printing and Publishing Industry*, 4 Lab. L. J. 307 (1953). Randolph states, at 381: "To both employers and employees, the small cost of reproduction is cheap insurance against chaotic conditions. It is subject matter for collective bargaining; it is a factor in finally determining both the wage rates and printing prices. From this mutual agreement to a sound business practice and sound employment policy, the public derives the indirect benefit of fair prices at less than the cost of uncontrolled exploitation—there is nothing to pass on the public, because both employers and employees gain more than they lose by the practice of reproduction."

¹¹ The Supreme Court has recognized that the reproduction process "has become a recognized idiosyncrasy of the trade and a customary feature of the wage structure and work schedule of newspaper printers." *American Newspaper Publishers Assn. v. NLRB*, 345 U.S. 100, 103 (1953).

¹² Shulman, *op. cit. supra* note 9, at 785; Millis and Brown, *From the Wagner Act to Taft-Hartley* 478 (1950).

deliberately withhold or suppress patents in order to preserve the investments in existing plants and machinery.¹³ They may hire more men than are reasonably needed, or staff their payrolls with workers or relatives who receive pay for performing no work of a useful character. They may order slow-downs or cut production in order to avoid loss of profits. Or they may require workers to perform more work without corresponding additional pay.¹⁴

Sometimes such activities by management are viewed as examples of good management or as decisions or practices dictated by the necessities of the business. But they are nonetheless inconsistent with the ideals of efficiency and progress. By definition they are examples of featherbedding. As such, they are open to the identical criticisms of the featherbedding indulged in by workers. It may well be that there are considerations which outweigh such economic waste as is caused by these employer practices. But the important point is that this waste is neither recognized nor condemned by those who subscribe to the folklore of featherbedding.

The approach to the subject of featherbedding is evidenced by federal legislation. In the Lea Act¹⁵ it is only the employees and

¹³ See Stern, *Restraints Upon the Utilization of Inventions*, 200 *Annals. Am. Acad. Pol. & Soc. Sci.* 13 (1938).

¹⁴ "An employer counterpart of featherbedding is the 'stretchout,' the purpose of which is to get workers to perform more work without corresponding additional pay. If it is bad for the union to ask for pay for work which is not being done, it must be, from a balanced view, equally bad for the employer to require the union to agree to extra work without the employer paying for it. But we haven't heard of anybody recommending legislation which would make it an unfair labor practice for employers to require the union to agree to a 'stretchout' provision. Nor do we recommend such legislation. The issues involved in 'featherbedding' and the 'stretchout' are better left to collective bargaining. . . . This is not to say that the 'stretchout' or 'featherbedding' is not in some situations carried to unsound extremes, but it is extremely doubtful whether a legislative rule can be devised which will automatically catch within its provisions only the unsound and leave undisturbed the sound practices." Statement of Arthur J. Goldberg, General Counsel of Congress of Industrial Organizations, at Hearings before Senate Committee on Labor and Public Welfare on proposed revisions of the Labor-Management Relations Act of 1947, 83d Cong. 1st Sess. 462 (1953).

¹⁵ 60 Stat. 89 (1946), 47 U.S.C.A. § 506 (1946). This statute affects only the broadcasting industry and was directed solely at the activities of the American Federation of Musicians and its president, James C. Petrillo. It makes unlawful, by the use or threat of force or duress, to coerce or compel broadcasters to (1) hire any person "in excess of the number of employees needed by such licensee to perform actual services"; (2) pay money to any person "in excess of the number of employees needed by such licensee to perform actual services"; (3) pay more than once for services rendered; (4) pay for services "which are not to be performed"; (5) refrain from broadcasting without paid performers; or (6) refrain from broadcasting foreign programs.

the unions that are forbidden from taking action to bring about the specified featherbedding. Again, in the Taft-Hartley Act,¹⁶ it is an unfair labor practice only for a labor organization to cause or attempt to cause an employer to pay for services which are not performed or not to be performed. There has not even been a faint suggestion that similar restrictions be placed upon employers.

If it is undesirable for unions to exercise their economic power to seek the hiring of unnecessary labor, it is, of necessity, equally undesirable for employers to exercise their economic power to accomplish the very same result. From the point of view of the national interest as reflected in federal legislation on featherbedding, the evil lies in what is done and not in who has done it. Obviously, the effect on the national interest is no less harmful where the employer for what he thinks are good business reasons insists upon hiring men who perform no useful function than where a union for what it thinks are good economic reasons insists that such men be employed.

Congress concededly can deal only with certain evil-doers without encompassing all other potential evil-doers of the same character.¹⁷ But in terms of the economic theory underlying anti-featherbedding statutes, it makes little sense to penalize unions that cause economic waste while permitting employers to create the identical waste with impunity. To assume—as the federal statutes do—that management's normal self-interest will adequately protect the public in this respect¹⁸ or that management, in pursuit of profits, has demonstrated a sensitivity to the public interest and welfare that has not at least been equalled by that of employees is, obviously, to legislate a conspicuously unfounded prejudice.

The net effect of the discriminatory, one-sided formulation of the anti-featherbedding legislation is to throw the weight and prestige of government behind the employer in an important area of employer-employee relationships.¹⁹ By placing all the criminal and

¹⁶ 61 Stat. 142 (1947), 29 U.S.C.A. § 158 (b) (6) (1947).

¹⁷ *United States v. Petrillo*, 332 U.S. 1, 8-9 (1947).

¹⁸ "As we have seen, Congress could reasonably assume that the employers' normal self-interest would coincide with the public's interest in this respect, and would be sufficient in and of itself to prevent this type of practice in the absence of coercion." Brief of United States, at 94-95, filed in Supreme Court in *United States v. Petrillo*, 332 U.S. 1 (1947).

¹⁹ "The question to be asked and answered is: 'Needed or required by whom?' If the answer is: 'The employer,' then in a true sense we will no longer have collective

civil risks on the employees, such legislation gives extraordinary power to the employer. Thus the Lea Act, in proscribing any effort by the union to compel radio broadcasters "to employ any person or persons in excess of the number of employees needed by such licensee to perform actual services," gives the broadcasters the dangerous power to subject their employees to arbitrary discharge under threat of the risk of criminal prosecution if the employees try to take any effective counteraction. All the employers need do is arbitrarily to discharge a number of employees on the assertion that they are no longer needed. Any normal resistance on the part of the employees by peaceful strike, picket or "unfair" listing exposes them to the possibility of criminal prosecution. The broadcasters have the statutory privilege of being as contemptuous and dictatorial as the caprice of any moment may dictate. They need only make the self-serving declaration that the discharged employees are not "needed." Even though that declaration might not be sustained in a criminal trial, the threat of prosecution and jail is real enough to force the employees into abject submission.

Precisely this situation has developed in the radio broadcasting industry since the advent of the Lea Act. The American Federation of Musicians finds itself helpless to protest the increasing number of discharges of live musicians from radio station staffs.²⁰ The broad-

bargaining. If he says no, that automatically makes the union's demand unlawful and throws the Government on the employer's side. I insist that any union demand can be made unlawful under such proposals; the employer can always say, 'I do not need 5 men for 40 hours but do need 4 men for 50 hours' or 'I do not need 4 men at \$10 a day but do need 8 men at \$5.' It would be equally illogical to say that the union should decide how many men were needed or required, and that the employer should be required by law to hire them." Statement of Woodruff Randolph, *op. cit.* supra note 8, at 630.

²⁰ The Supreme Court has recognized the plight of professional musicians caused by technological replacement. In *NLRB v. Gamble Enterprises, Inc.*, 345 U.S. 117, 119 (1953), the Court noted: "For generations professional musicians have faced a shortage in the local employment needed to yield them a livelihood. They have been confronted with the competition of military bands, traveling bands, foreign musicians on tour, local amateur organizations and, more recently, technological developments in reproduction and broadcasting."

President Petrillo of the Federation has described the situation in these terms: "There are some 500,000 juke boxes in the United States and Canada. These juke boxes alone have taken the jobs of approximately 8,000 live musicians. There are approximately 500 radio stations which do not employ a single live musician. These radio stations are all classified as big business. They say they need the services of the American Federation of Musicians, but only in the canned kind of music. This part of our business takes away several thousand more musicians who would be employed if we did not make the canned music, to say nothing about the taverns and cafes using Muzak, recordings, etc., etc. Members of the American Federation of Musi-

casters, seeking to replace live talent with recordings, have often acted as ruthlessly as their own interests seemed to require. The Federation consequently has been compelled to reduce its function to little more than that of compiling statistics as to the lost employment opportunities in the broadcasting industry.

The unilateral wishes and determinations of the employer, moreover, inevitably become the decisive element in any statutory scheme to prohibit unions from seeking the employment of unnecessary men or the performance of unnecessary work. Whether the formal decision be lodged in a court, an administrative body or a jury, the practical situation is such as to render it unlikely that the adjudicators will rely on much more than the employer's expressed desires. Indeed, those desires are the very reason for anti-featherbedding legislation and it is only natural that they form the heart of the statutory standards.

Moreover, the objective and subjective criteria which fairly determine the appropriate number of men for any given job are so varied, abstract and elusive as to preclude their condensation into any standard usable by the statutory judges. Such relevant factors as the financial resources of the employer, the complexity of the task, the desired quality of the product, the skill of both those who manage and those who labor, the employees' energy and cooperativeness, the minimum requirements of safety, and a host of other considerations are beyond the practical scope of an administrative or judicial hearing pursuant to an anti-featherbedding statute.²¹ And, of course,

cians received \$3,000,000.00 annually for making canned music. This \$3,000,000.00 worth of canned music, when distributed around the United States and Canada, takes the place of live musicians who would receive for their work approximately \$100,000,000.00. Certainly no one can say this is a healthy condition." Letter from Petrillo to James L. Fly, Chairman of Federation Communications Commission, July 30, 1942.

Since the foregoing letter was written, it has been estimated that the number of radio stations that now employ no live musicians is 2,500. Cluesmann, *The Support of Live Music in an Electronic Age*, 50 *International Musician*, No. 4, at 9 (Oct., 1951). See also Countryman, *The Organized Musicians*: II, 16 *Univ. Chi. L. Rev.* 239 (1949); Petrillo, *Dim Future for Musicians in TV*, 51 *International Musician*, No. 2, at 10 (Aug., 1952); *New York Times*, p. 14, col. 2 (Feb. 9, 1954).

²¹ Senator Taft repeatedly recognized the impossibility of having a court or board determine the proper number of men for a job or the necessity of particular work being performed. And he was particularly opposed to legislation which made the desires of the employer paramount under the statutory scheme. At the time of the passage of the Taft-Hartley Act, he stated that it would be "impracticable to give to a board or a court the power to say that so many men are all right, and so many men are too many." 93 *Cong. Rec.* 6441 (1947). In the 1953 hearings on amendments to the Act, he stated that to give a board that power is to put it "into the actual

any economic or social justification the union may have for its demands is totally irrelevant in this setting. Hence it becomes natural and inevitable to rely heavily on the employer's views, prejudiced and incomplete though they may be.

It may be true, as a majority of the Supreme Court has held, that the Lea Act satisfies the Fifth Amendment's requirement of definiteness in criminal statutes.²² Disagreeing with the contention "that persons of ordinary intelligence would be unable to know when their compulsive actions would force a person against his will to hire employees he did not need,"²³ the Court held that the statutory language "provides an adequate warning as to what conduct falls under its ban, and marks boundaries sufficiently distinct for judges and juries to administer the law in accordance with the will of Congress."²⁴

Yet the clarity of the language for constitutional purposes does not make the statutory task of determining how many jobs are "needed" any easier. It does not foreclose the fact that many of the relevant factors cannot be confined within any meaningful standards and that decisive weight will necessarily be given to management's analysis of its own needs and requirements. The truth of the matter is that proper resolution of these elusive considerations can only be found in the give and take of the collective bargaining process, where definite formulations are unnecessary and appropriate weight and concessions can be given to the practicalities of the situation by the

operation of a thousand industries about which they know very little and are hardly competent to decide" and that "I do not think we are going to let the employer determine the number." Hearings before Senate Committee on Labor and Public Welfare on proposed revisions of Labor-Management Relations Act of 1947, 83d Cong. 1st Sess. 258, 650 (1953).

²² United States v. Petrillo, 332 U.S. 1, 6-8 (1947).

²³ *Ibid.*, at 6.

²⁴ *Ibid.*, at 7. But the dissenting opinion of Justice Reed stated: "A statute is invalid when 'so vague that men of common intelligence must necessarily guess at its meaning.' 269 U.S. at 391. It seems to me that this vice exists in this section of the challenged act. How can a man or a jury possibly know how many men are 'needed' to perform actual services' in broadcasting? What must the quality of the program be? How skillful are the employees in the performance of their task? Does one weigh the capacity of the employee or the managerial ability of the employer? Is the desirability of short hours to spread the work to be evaluated? Or is the standard the advantage in take-home pay for overtime work? . . . This is a criminal statute. The principle that such statutes must be so written that intelligent men may know what acts of theirs will jeopardize their life, liberty or property is of importance to all. That principle requires, I think, a determination that this section of the Communications Act is invalid." *Ibid.*, at 17-18.

parties most intimately concerned. The problem simply does not lend itself to fair solution in a formal judicial arena.

Senator Taft recognized these realities in explaining the failure to incorporate the Lea Act proscriptions into Section 8 (b) (6) of the Taft-Hartley Act. It would be impracticable, he said, "to give to a board or court the power to say that so many men are all right, and so many men are too many. It would require a practical application of the law by the courts in hundreds of different industries, and a determination of facts which it seemed to me would be almost impossible."²⁵

As a result of Senator Taft's views, Section 8 (b) (6) of the Taft-Hartley Act became a relatively innocuous effort to curb one form of union featherbedding.²⁶ It labels as an unfair labor practice only those union efforts which "cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed." Section 8(b) (6), as described by Senator Taft, affects merely the efforts of a union "to accept money for people who do not work," a practice which he termed "a fairly clear case, easy to determine"²⁷ and as bordering "definitely on extortion."²⁸

The Supreme Court has recently refused to expand Section 8(b) (6) beyond this narrow, limited meaning.²⁹ As long as actual work is offered or performed, even though the employer considers the work

²⁵ 93 Cong. Rec. 6441 (1947).

²⁶ The bill originally passed by the House had contained extensive provisions relating to union featherbedding. Section 12(a)(3)(B) of H.R. 3020, 80th Cong. 1st Sess., outlawed certain featherbedding practices, defined in Section 2(17) to include any practice which has the effect of requiring an employer (1) to employ more workers than are reasonably required, (2) to pay for services of more workers than are reasonably required, (3) to pay more than once for services performed, (4) to pay for services not to be performed, or (5) to pay a tax for the privilege of using, making or selling any article or machine, or to impose any restriction on its use. These provisions were drawn directly from the Lea Act but were discarded by the joint House-Senate conference committee because of Senator Taft's view that it was impracticable to have a board or court decide how many men are necessary and because of the constitutional issues which were then unresolved. These issues, which were involved in the Lea Act, resulted in the decision in *United States v. Petrillo*, 332 U.S. 1 (1947). See also Hartley, *Our New National Labor Policy* 156-157 (1948); Millis and Brown, *From the Wagner Act to Taft-Hartley* 478-480 (1950).

²⁷ 93 Cong. Rec. 6441 (1947).

²⁸ 93 Cong. Rec. 6443 (1947).

²⁹ *American Newspaper Publishers Assn. v. NLRB*, 345 U.S. 100 (1953); *NLRB v. Gamble Enterprises, Inc.*, 345 U.S. 117 (1953).

unnecessary or needless, Section 8(b)(6) does not apply. In the words of the Court,⁸⁰

where work is done by an employee, with the employer's consent, a labor organization's demand that the employee be compensated for time spent in doing the disputed work does not become an unfair labor practice. The transaction simply does not fall within the kind of featherbedding defined in the statute.

And, said the Court,⁸¹

when an employer receives a bona fide offer of competent performance of relevant services, it remains for the employer, through free and fair negotiation, to determine whether such offer shall be accepted and what compensation shall be paid for the work done.

In other words, Section 8(b)(6) "now limits its condemnation to instances where a labor organization or its agents exact pay from an employer in return for services not performed or not to be performed."⁸²

The Supreme Court's pronouncement gave immediate and powerful impetus to the persistent demands that Section 8(b)(6) be expanded to Lea Act proportions. The United States Chamber of Commerce proposed the outlawing of union demands for payments for "service" which is undesired and unnecessary, even if the union offers to perform or actually performs such "service."⁸³ The National Association of Manufacturers recommended that Section 8(b)(6) be amended to make it an unfair labor practice for a union to cause or attempt to cause an employer to pay for the hiring of employees who "in his

⁸⁰ American Newspaper Publishers Assn. v. NLRB, 345 U.S. 100, 110 (1953).

⁸¹ NLRB v. Gamble Enterprises, Inc., 345 U.S. 117, 123-124 (1953).

⁸² American Newspaper Publishers Assn. v. NLRB, 345 U.S. 100, 110 (1953). Senator Taft subsequently indicated that the Court's construction of Section 8(b)(6) was correct. In his words: "We purposely made it very narrow. We knew it was very narrow. In fact it was so narrow that in 1949 I proposed to repeal the whole thing. It seemed to me we either better repeal it or else try to work out some way to make it much stronger. When you come to try to make it much stronger, you run into practical difficulties. In effect, what you say is that the union cannot say to the employer 'We want two mine inspectors,' because if they do they are subjecting themselves to an unfair labor practice judgment. That seems to be rather a radical position for us to take. If you do not do that, then you have to say somebody will determine, the Board presumably, whether it is a reasonable demand or not. Then you put the Board into the actual operation of a thousand industries about which they know very little and are hardly competent to decide." Hearings before Senate Committee on Labor and Public Welfare on proposed revisions of the Labor-Management Relations Act of 1947, 83d Cong. 1st Sess. 258 (1953).

⁸³ Hearings before Senate Committee on Labor and Public Welfare on proposed revisions of the Labor-Management Relations Act of 1947, 83d Cong. 1st Sess. 167 (1953).

judgment" are not required or for the performance of services which "in his judgment" need not be performed.³⁴ Coupled with this latter recommendation was the remark that "the employer is about the only one who can judge as to the work to be performed and the people required to do that work."³⁵

These and other similar proposals³⁶ became codified in a bill introduced by Representative Kearns in the House of Representatives, a bill which would broaden Section 8(b) (6) to make it applicable to services which are not "necessary or required to be performed."³⁷ Such proposals, like the featherbedding myth from which they are spawned, constitute a menacing challenge to a basic concept of freedom that has always been implicit in our labor-management relations. That concept teaches that the government—whether in the form of the legislature, the court, the administrative body or the jury—shall not dictate that one party must accept the other party's wish or desire as to what shall be included in the employment relationship.

Since the featherbedding folklore traditionally believes in condemning the uneconomic practice of workers only, the passage of anti-featherbedding legislation usually means that the employer groups for the moment are dominant politically. They can demand—as they have—that their employees be compelled by law to perform and receive payment for only such work as the employers consider desirable or indispensable. On the other hand, in the politically unlikely event of the enactment of legislation making supreme the desires of workers as to the proper number of employees or the necessity of certain work, the situation would be equally intolerable. Employees would then be in position to dictate to their employers, under threat of invoking governmental sanctions, that compensation be paid to a certain number of employees and that certain work be performed. Either

³⁴ *Ibid.*, at 257, 274.

³⁵ *Ibid.*, at 258.

³⁶ The American Newspaper Publishers Association, for example, proposed that Section 8(b) (6) be amended so as to make it an unfair labor practice for a union (a) to cause or attempt to cause an employer to pay any money, in the nature of an exaction, for services which are not performed or which are not to be performed, or for permission to use any process or machine, or (b) to cause or attempt to cause an employer to agree not to use any process or machine unless the product of such process or machine is reproduced by employees who are not employed on such process or machine in the regular course of their employment, or (c) to cause or attempt to cause an employer to enter into an agreement not to use any process or machine. *Ibid.*, at 1267.

³⁷ H.R. 3146, 83d Cong. 1st Sess. (1953).

situation is, plainly, the direct antithesis of a democratic society. It is either a throwback to feudalism or an acceptance of the basic trappings of modern totalitarianism.

This outrageous assault upon the principles of freedom is not made more palatable or justifiable by clothing it with elaborate provisions for administrative procedure and judicial review. Giving a board or a court the right to determine how many men are needed or what work is necessary cannot destroy the fact that the needs or wishes of either the employers or the employees must necessarily be decisive under any statutory scheme. And under existing and proposed legislation, the employers' desires are the dominant factors. Any board or court is understandably influenced by that fact. Indeed, the more an effort is made to give appropriate consideration to other factors the more confused and futile the task becomes. Administrative and judicial bodies simply are not equipped to formulate a decision which by its very nature can be reached fairly only through the processes of free and private collective bargaining. Hence, beneath the labyrinth of procedures and rules must lie the ugly fact that by government fiat the wishes of one of the parties to an economic dispute are being imposed on the other.

Even if it were possible for an administrative agency or a judicial body to articulate a fair and just determination, distilled from appropriate consideration of all relevant factors and cognizant of all the important elements of compromise and concession, the essential evil would remain. The government then becomes the arbiter of the productivity of our economic system. A free economy cannot long survive such an atmosphere. It is but a short step removed from the total power of government to determine what shall be produced and who shall produce it.

Hardly a day goes by but that some union does not make a request which calls for or necessarily requires the employment of additional employees and which brings resistance from the employer on grounds of efficiency, economy, benefit or utility. It has always been the measure of our freedom and a tribute to our system of law that such proposals are freely advanced and freely resisted without fear of sovereign intrusion or restraint. In the vast preponderance of instances, these issues are resolved by discussion, concession or compromise. And where stalemates develop, the parties are free to resort to peaceful economic measures in defense of their positions.

Such is the setting in which the featherbedding issues can best be resolved. Indeed, it is the only setting in which to resolve them in a manner consistent with our ideals of freedom. It permits unions to assert their time-honored right to better the workers' standards of living by fighting for what the unions believe will achieve that goal. At the same time, the employers retain their equal right to resist any demands which they may think unwarranted or unduly burdensome or which they are merely unwilling to grant. The employers in turn can make their own demands and suggestions, with the unions free to oppose them or make concessions.

Without question, there have been unreasonable demands by both employers and employees. But in a free society unreasonableness can best be met by free and full discussion and negotiation, aided by the bright light of publicity. To attempt to quench unreasonableness by statutory force is to invite suppression of both the reasonable and the unreasonable and to destroy some basic values that keep our society free.