Teacher Strikes and the Courts

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Preface and Acknowledgments

The courts are among the least understood of all our public institutions. Charged with the task of resolving disputes both mundane and momentous, the courts are veiled by elaborate procedure, specialized language, and behind-the-scenes consultations and maneuvers. Seeking understanding, we ponder the appellate courts' published opinions, trying to fathom their roots and their implications. Biographies probe the minds and lives of the attorneys and judges who manage the litigation process. Movies, television, and the press provide glimpses of the real or imagined world of law firms, jury rooms, courtrooms, and cases. Dawnings of awareness and comprehension develop, but then some social crisis or issue erupts, and the principal actors are faced with the task of deciding whether to take the matter to court. It is then that the limited scope of our understanding becomes manifest. Enough is known to anticipate some of the consequences of litigation. Not enough is known to predict with confidence the likelihood of these consequences, their costs and benefits, or their significance for the issue at hand. Yet decisions must be made.

School boards must make decisions when teachers strike, as they have been doing with increasing frequency in recent years. Should the teachers be taken to court? Why or why not? If so, when? How will the other side respond? What will the court do?

In this book, we describe how school boards decide whether to go to court, how teacher associations defend themselves in court, and what judges do. The book is based on data collected in the context of legal proceedings accompanying teacher strikes in the late 1970s. Through interviews with dozens of the key actors in these dramas, our case studies of court proceedings, and a survey of school districts experiencing teacher strikes during 1978–1979 we obtained a wealth of descriptive information. *Teacher Strikes and the Courts* is in significant measure a report, in their own words, by the key actors involved in strike-related litigation. This book serves to remove mystery, to enlighten, and to provide a basis for informed action. School-board members and teacher-organization leaders should find this book informative and useful.

Although bounded by the data on which we relied, the book suggests a broad view of the role of the courts in resolving social disputes. The disputes that the courts address do not originate in court; they originate in society. The courts do not seek out issues; parties must bring issues to court. But the courts will not accept social disputes in their raw form. The legal issues embedded in a social dispute must be abstracted from

it; only then can they be presented to a court. Thus, although intimately connected, the dispute in court and the dispute in society are not the same. Their differentiation and their simultaneous existence are significant. The evolution of each dispute affects the other. Judges know this; attorneys know, too. In this book we show how this knowledge affects the process of dispute resolution. Students of the legal process, and of the relationships between law and society, should find this book instructive.

Acknowledgments

The individuals who made the most important contributions to this book must remain anonymous. They are the dozens of school-board attorneys, teacher attorneys, school-board officials, teacher-organization officials, and judges who took time from their busy schedules to talk with us, to complete our questionnaires, and to direct us to further sources of information. In this book, we honor those people by relying extensively on their own words. As we learned from our sources, so, we hope, will our readers. If this book teaches, it is because we were taught by the many who cooperated with our study.

Our investigation of teacher strikes and court proceedings was made possible by a grant from the National Institute of Education and by the hospitable environment provided by Washington University. Our project officers in Washington, D.C., and our colleagues at Washington University provided encouragement and fostered our efforts. The following individuals read drafts of the manuscript and offered helpful advice: Susan Appleton and Merton Bernstein of the Washington University School of Law and Kenneth Dolbeare of the University of Massachusetts at Amherst. Of course these organizations and individuals are absolved of all responsibility for what we report here.

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Bobbe Winters managed the logistics and aggravations of manuscript preparation with skill and grace.

The work reported here is the product of a genuine collaboration between the authors. We share the responsibility for what follows.

Contents

	Preface and Acknowledgments	vii
Chapter 1	**Introduction**	1
	The Dispute at the Bargaining Table	2
	The Dispute in Court	4
Chapter 2	**The Underlying Dispute**	9
	The Incidence of Teacher Strikes	9
	The Roots of Teacher Strikes	10
	The 1978–1979 Teacher Strikes	20
Chapter 3	**The Legal Dispute**	29
	The Injunctive Process	30
	Use of the Injunction in the Private Sector	32
	The Use of Injunctions in the Public Sector	33
	The Injunctive Process in the Center City School Strike	38
	Review of Research on the Use of Injunction	44
Chapter 4	**School Boards as Petitioners**	51
	Considering the Transfer to Law	52
	The Board Goes to Court	65
	Board Evaluation of Court Action	69
Chapter 5	**Teachers as Respondents**	73
	Strategy	73
	Courtroom Proceedings	75
	On the Line	91
Chapter 6	**Judges as Decision Makers**	95
	What Judges Do	95
	What Judges Say	99
	The Moment of Decision	107
	Predicting Judicial Behavior	112
Chapter 7	**Summary and Conclusions**	117

Summary of Findings 118
Trends 119
Policy Alternatives and Adjustments 120

Appendix: State Statutes Pertaining to Teacher Bargaining and Strikes, 1980 127

Index of Names 129

Index of Subjects 131

About the Authors 133

1 Introduction

In the 1950s teacher strikes were mere curiosities, occurring so infrequently that most policymakers rightly dismissed them as accidents or aberrations unworthy of close analysis. However, in the 1960s the incidence and impact of teacher strikes increased sharply. Whereas the number of teacher strikes averaged only three per year in the 1950s, by the first half of the 1970s they were occurring at a rate of more than 130 per year. In 1979–1980 there were 242 teacher strikes—an all-time high.[1] Few communities have been immune. Strikes have disrupted schools in lush suburbs near Chicago, quiet Yankee towns, old central cities of the Northeast, dynamic new cities in the South and West, and rural communities across the land. Many strikes have lasted for weeks.

A teacher strike requires some sort of response from local school officials. Often the response is to take the matter to court. The transfer is accomplished by petitioning for an injunction ordering teachers to refrain from striking. However, boards frequently find that the remedies issued by the courts are ineffective, that they involve unsought judicial intervention in the dispute that initially triggered the strike, or that they aggravate rather than alleviate the board's problem.

This book explores what happens when teacher strikes are transferred to court, why they are met with varied and unexpected judicial responses, and why all the parties—school boards as petitioners, teachers as respondents, and judges as decision makers—often voice dissatisfaction with the injunctive process and its outcomes. Our central thesis is that the parties present judges with fundamentally incompatible conceptions of the nature of the teacher–board dispute. School-board attorneys contend that the problem before the court is an illegal strike. The task of the court, therefore, is clear and straightforward: to ascertain whether a strike exists or is imminent, to find that it is illegal, and then to issue an injunction. But teacher attorneys contend that the significant problem is the labor–management dispute that triggered the strike in the first place. An injunction would not address this underlying problem and could even exacerbate it. What is needed, teacher attorneys suggest, is negotiations, not injunctions.

The court thus is presented with two problems. One is a strike; the other is a labor–management dispute. To accept the board's position is

to address the strike issue but to ignore the underlying dispute. To accept the teachers' viewpoint is to condone illegal action. Neither option is wholly satisfactory. Faced with this dilemma, judges react in diverse and unpredictable ways. Some focus on the strike, acting on injunction requests on legal grounds alone. Some delay the injunctive process, hoping that the underlying dispute somehow will be resolved. Others actively intercede, seeking to mediate or otherwise expedite settlement of the underlying dispute. Occasionally a court dismisses the entire matter, leaving the board and the teachers to resolve their problems elsewhere.

Such actions raise broad questions about the role of courts and the rule of law. Should a court deal solely with the narrow legal question immediately before it, or should it attempt to address the underlying social dispute? Should a court intercede on behalf of settlement efforts? Should it do so even over the objections of petitioners? Should a court issue injunctive relief if it is likely that teachers will not comply with the order of the court? Should a labor–management dispute be before the court at all? Although this book does not provide definitive answers to such problems, it does explore the nature of the issues upon which the formulation of public policy and practice can be based.

The Dispute at the Bargaining Table

Most contemporary teacher strikes are associated with collective-bargaining disputes. Collective bargaining is a relatively recent development in public education. In the 1960s, unhappy about their own unmet needs and inspired by unionized blue-collar workers' gains in wages and working conditions, teachers began a campaign to introduce collective bargaining to the field of public education. Initially most boards of education resisted teachers' demands for bargaining. School boards viewed collective bargaining as a threat to established patterns of accommodation with teachers. The traditional pattern was predicated on the assumption—embodied in law—that school boards are responsible for determining teachers' wages and working conditions. It also was built on a norm—embraced by the ideology and the professional associations of most educators—that school boards dealt with teachers individually, not collectively. Disputes over wages and working conditions ultimately were resolved unilaterally rather than bilaterally, by declaration rather than by negotiation.

Despite board reservations, bargaining and bargaining-like practices have become widespread in public education. Beginning with Wisconsin

in 1959, one state after another adopted statutes permitting or requiring the practice. By 1980 a majority of state legislatures had authorized some form of teacher–board bargaining[2] (see appendix). In many other states teacher–board bargaining is widespread even in the absence of specific legislative authorization.

One feature of private-sector collective bargaining—the right to strike—has not been widely accepted in the schools. In private employment the right to strike is thought to be an essential concomitant of bargaining. Bargaining presumes the existence of equivalent power on both sides of the table. When negotiation fails to produce a settlement, employees have a choice to make. They can continue to work under whatever terms are offered by management. Or they can strike, hoping that the pressures brought by a work stoppage will break the impasse. Management in turn can acquiesce to worker demands or can resist the strike by withholding wages and by continuing operations. Labor legislation adopted in the 1930s and 1940s legitimated the right to strike.

Whatever its merits in the private sector, the right-to-strike principle has rarely been extended to teachers. Despite widespread acceptance of teacher–board bargaining, only seven states had adopted right-to-strike laws by 1980. In each of these states the right applied only under carefully circumscribed conditions that, if not met, rendered a teacher strike illegal. Twenty-three states had statutes prohibiting teacher strikes. In states without legislation the courts, when asked, have almost always ruled that teacher strikes are illegal in the absence of legislative authorization.

The fact that most strikes are prohibited virtually invites legal remedies. A board can take the matter to court, requesting an injunction ordering the teachers to refrain from illegal activity. In some states such requests are mandatory. However, in most states boards must decide whether to seek such relief. Some boards simply accede to teacher demands in the face of a strike. Other boards countenance strikes in hopes that a settlement can be achieved without court action. Usually, however, neither concession nor delay constitutes an adequate response to the several pressures that boards face. To yield to the teachers is to jeopardize the budget and to cede the control that most board members feel they are legally and morally obliged to exercise. Delay angers the parents and students who are most immediately affected by a strike. Consequently, the court option is an attractive one.

But going to court puts the focus on only one aspect of the dispute. If judicial relief is sought, the strike no longer is simply an extension and escalation of the labor–management dispute heretofore handled at the bargaining table. Rather, the strike is made the basis for a legal dispute.

The Dispute in Court

Until the 1930s labor injunctions were widely used as tools for fighting strikes in the private sector.[3] Management attorneys found that they could easily obtain injunctive relief, often without the other side's having an opportunity to be heard in court. On the strength of management claims that a strike would irreparably harm a legally protected interest such as commerce or property, a court would issue an order temporarily banning initiation or continuation of a strike. Failure to abide by such orders subjected violators to contempt-of-court proceedings and possible fines or jail sentences. Thus union leaders and workers who had engaged in preparation for a strike suddenly found they were confronting not only their employers but the majesty and power of the courts as well.

Union leaders launched a campaign designed to secure legislation that would prevent "government by injunction." Eventually the campaign brought victory. The Norris-LaGuardia Anti-Injunction Act of 1932 and similar legislation in many states curtailed the courts' capacity to issue injunctive relief in labor–management disputes. Unable to rely on the assistance of the courts, corporate managers learned to bargain more successfully and to cope with strikes when bargaining led to impasse.

But the anti-injunction statutes did not apply to public-sector strikes. In the 1920s and 1930s, the idea of public-employee strikes was simply not tolerated. Calvin Coolidge had won the presidency largely on the basis of his widely publicized actions and words against the Boston police strike. "There is," Coolidge told Samuel Gompers, "no right to strike against the public safety by anybody, anywhere, any time." Even as stalwart a labor supporter as Franklin Roosevelt proclaimed that public employees must not strike.

Strikes occurred anyway. A flurry of work stoppages by teachers and other public employees immediately after World War II prompted several state legislatures to adopt statutes providing stiff penalties for public employees who engaged in strikes. In other states judges adopted positions similar to those of the legislatures. A leading case arose in Norwalk, Connecticut. In a declaratory-judgment action, the state's supreme court asserted that government is "run by and for all the people, not for the benefit of any person or group," that public-employee strikes were incompatible with this principle of government, and that case law "uniformly upheld" the right of a government to injunctive relief from employee strikes.[4]

In the 1950s, when most public employees were distinctly nonmilitant, there were few occasions to invoke antistrike statutes or labor in-

junctions against public employees. Among teachers there were only twenty-six strikes from 1950 to 1959.[5] They were isolated incidents, not harbingers of things to come.

In 1962 a strike by New York City teachers ushered in a new era of public-employee militancy in education and other sectors of public employment. The strike eventuated in a handsome settlement for teachers. Significantly, however, the strike was terminated on the afternoon of its first day when strike leaders complied with an injunction.[6] Thus there were two lessons. One was that militance paid off. The other was that strikes could be ended by injunction. In the 1960s, bellweather strikes in New Jersey, Kentucky, Indiana, California, Michigan, and elsewhere were met by school-board requests for injunctive relief.[7]

After 1965, as teacher strikes became more commonplace, so did school-board efforts to utilize injunctive relief. Thus teacher strikes constituted not only an emerging social phenomenon but also a new category of legal phenomena. Published accounts of strikes invariably indicated that injunctions were a regular part of board strategy.[8] "Strike-management manuals," which circulated among school managers, indicated that resort to the courts was an option available to boards. In the 1970s injunctive relief was sought in about 40 percent of all teacher strikes.[9] The proportion is higher if one-day strikes and those in states with limited right-to-strike laws are excluded.

When school boards resort to injunctive relief, striking teachers face a special set of problems. An injunction threatens to shift the focus of attention from the bargaining table to the courtroom, from issues of wages and working conditions to issues of legality. To return to work in the face of an injunction is, in effect, to abandon the purpose of the strike, for an employer has no particular incentive to yield on disputed issues if the work of the organization is being carried out. Yet to defy an injunction is to risk substantial sanctions not merely with respect to public opinion but also with respect to such tangible legal matters as fines and even jail sentences.

To avoid these problems, teachers, through their attorneys, utilize whatever legal tactics they can muster in order to delay or deflect injunctions and, where possible, to turn the injunctive process to their own advantage. These courtroom goals are not ends themselves; rather, they are means toward the larger end of achieving satisfactory settlements at the bargaining table. The task, in different terms, is to blunt the injunctive process to the extent necessary for teacher negotiators to achieve a settlement.

The task of teachers' attorneys is not an easy one. As Bohannan has

observed, the courts are designed to "(1) disengage the difficulties from the institutions of origin which they now threaten, (2) handle the difficulty within the framework of the legal institution, and (3) set the new solutions back within the processes of the nonlegal institutions from which they emerged."[10] When the board initiates an injunction proceeding, it is attempting to accomplish the sort of disengagement cited by Bohannan. If the teachers seek to block disengagement of the strike from the bargaining dispute, they must do so within the substantive and procedural requirements of law. They must find ways to introduce law and evidence that will persuade a judge that the issue is broader than that of ascertaining whether a strike is legal.

In this book we will be particularly concerned with the nuances and consequences of the fact that parties in injunction proceedings present courts with a legal dispute—the strike—that is inextricably embedded in a larger labor–management dispute. Judicial management of the relationship between the disputes raises fundamental questions about judicial efficacy and equity. These questions have implications that go beyond the immediate issues.

Teacher strikes constitute not only an emerging social phenomenon but also a new focus for social research. This book draws on the authors' recent study of the injunctive process in teacher strikes.[11] We conducted field studies of teacher strikes in California, Illinois, Louisiana, Michigan, Missouri, New York, Pennsylvania, Vermont, and Washington. There we spoke with petitioners, respondents, and their legal counsel. We studied trial-court records and appellate cases. We interviewed officials representing teacher associations, school-board associations, and state labor-relation and education agencies. We analyzed court rulings and statutory law pertaining to injunctive relief from teacher strikes. In addition, we conducted a survey of all 158 districts experiencing teacher strikes in 1978–1979.[12] We also consulted the few available studies of legal proceedings accompanying teacher strikes.

Chapter 2 examines the nature and origins of the disputes that develop between school boards and teachers. Chapter 3 reviews the nature of the injunctive process. It also provides a case account of an injunction hearing, illustrating the processing of a teacher strike in the courtroom. In the three following chapters, we examine the actions of the parties involved in the injunctive process: boards as petitioners, teachers as respondents, and judges as decision makers. Chapter 4 looks at the options school boards weigh in determining their response to the strike and at the legal processes and strategies that boards employ in the courtroom. Chapter 5 notes the techniques that teachers as respondents use to delay, evade, or capitalize on injunction proceedings. Chapter 6 describes the pressures that may induce judges to employ restraint, delay, and mediation as they

attempt to deal with the strike, the underlying dispute, or both. The last chapter presents a critique of public policies that rely on courts as forums for ending teacher strikes.

Notes

1. *Government Employee Relations Report* (Washington, D.C.: Bureau of National Affairs, July, 21 1980)871:18.

2. *Cuebook II: State Education Collective Bargaining Laws* Report No. F80-5 (Denver: Education Commission of the States, 1980).

3. Arthur A. Sloane and Fred Witney, *Labor Relations,* 3rd ed. (Englewood Cliffs, N.J.: Prentice-Hall, 1977), ch. 3.

4. *Norwalk Teachers' Association v. Board of Education,* 83 A.2d. 482, Sup. Ct. of Errors of Ct. (1951).

5. Robert J. Thornton and Andrew Weintraub, "Public Employee Bargaining Laws and the Propensity to Strike: The Case of Public School Teachers," *Journal of Collective Negotiations in the Public Sector* 3 (Winter 1974):34.

6. *The New York Times,* April 12, 1967, p. 1.

7. Martha Clevenger, "Teacher Strikes: 1960–1968," mimeographed (Saint Louis: Center for the Study of Law in Education, Washington University, 1980).

8. For examples, see David L. Colton, "The Influence of an Anti-Strike Injunction," *Educational Administration Quarterly* 13 (Winter 1977):47–70; Donald J. Noone, *Teachers v. School Board* (New Brunswick, N.J.: Institute of Management and Labor Relations, Rutgers University, 1970); Robert G. Stabile, *Anatomy of Two Teacher Strikes* (Cleveland: EduPress Publishing, 1974); and Christopher R. Vagts and Robert B. Stone, *Anatomy of a Teacher Strike* (West Nyack, N.Y.: Parker, 1969).

9. A national survey of strikes at the beginning of the 1975–1976 school year showed that 43 percent of the districts sought injunctive relief. See David L. Colton, "Why, When and How School Boards Use Injunctions to Stifle Teacher Strikes," *American School Board Journal* 164 (March 1977):32–35. A national survey of 1978–1979 strikes showed that 40 percent of the districts sought court relief. See Edith E. Graber, "Survey of 1978–1979 Teacher Strikes," mimeographed (Saint Louis: Center for the Study of Law in Education, Washington University, 1980).

10. Paul Bohannan, "Law and Legal Institutions," *International Encyclopedia of the Social Sciences* 9 (1968):73–78.

11. The research was supported by the National Institute of Education, through grant no. NIE-G-78-0149. Findings are reported in David

L. Colton and Edith E. Graber, ''Enjoining Teacher Strikes: The Irreparable Harm Standard,'' mimeographed (Saint Louis: Center for the Study of Law in Education, Washington University, 1980).

12. Strike sites were identified from information provided by the Bureau of National Affairs, the Bureau of Labor Statistics, and selected state departments of education. For a full report of the survey, see Graber, ''Survey of 1978–1979 Teacher Strikes.''