

# DISMISSAL WAGE

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## I



ON JUNE 7th of this year the President of the United Mine Workers, John L. Lewis, was testifying in Washington before a senatorial committee. In answer to a question he replied: "I might say right at this point that there has recently been demonstrated a coal-loading machine that loaded in one 7-hour shift more than 1,100 tons. That is the work of one hundred and ten men. It takes eleven men to operate the machine as a unit. That machine will stay, of course, and others will follow. Eleven men remain and ninety-nine go. Where do they go? That is the question that confronts the coal-miner—where do they go? There is no answer to that."<sup>1</sup>

Labor saving devices, consolidations, reorganization and other economies in the industrial world have presented an interesting question. The laborer who faces the loss of a job as a result cannot see why he should suffer for these improvements. His employer realizes such a release means the loss of morale in the ranks of his laborers and an unfavorable reaction of public opinion. The public taxpayer cannot see why he should be called upon to pay for technological displacements.

During the past ten years the dismissal wage has been receiving a prominent place in such situations. In 1936 our railroads accepted such a proposal for a five year trial when roads were consolidated; twelve hundred San Francisco ferryboat employees were covered by it when the new bridges began operation, hundreds of corporations have recognized it,<sup>2</sup> and many

<sup>1</sup> Joint Hearings, Committees of Education and Labor. S 2475 and HR 7200. 75th Cong., 1st Sess., pt. 2, pg. 291. Isador Lubin, Commissioner of Statistics U. S. Labor Dept., on this situation: Rep. Connery—"What would you do with the 100 men who did the work?" Mr. Lubin—"What you would have in effect is this: you would have the excess-profits tax to take care of it, through unemployment insurance." Pg. 361.

<sup>2</sup> For a list of 53 companies known to have used dismissal wage see 1934 Report of the Federal Coordinator of Transportation, H Doc., No. 89, 74th Cong., 1st Sess. (Jan. 30, 1935) pg. 134. Among them: Am. Radiator, A. T. & T., B & O Ry., Curtis Publ., DuPont & Co., Gen. Elec., Hills Bros., Nash Co., Travellers Ins., Swift & Co., U. S. Rubber.

unions have made it a part of their agreements.<sup>3</sup> This wage represented a gradual development from a notice of intention to discharge, notice *or* a compensation, to a notice *and* compensation. In its strict sense, the dismissal wage is a sum paid the employee at the time of his discharge over and above that due for the services he has rendered.

## II

The laborer has not always had an opportunity to say what wages he would take for his services. The control of the master over his journeymen during the early Guild period provides a study in itself. The combination of the masters to increase their profits and the formation of counter-guilds by the journeymen to secure their just share in wages and better working conditions, compared with present conditions represent only another revolution of the wheel of industrial progress.

The Black Death in England in 1349 brought a radical change in the status of the laborer; he had worked for whatever wages he could secure, but when the plague depleted the ranks of labor he became master of the situation. Emergency legislation resulted, compelling men to work and fixing wages at pre-plague levels. Laborers who took more than the established wage became liable to a penalty of double the sum taken or were subject to imprisonment. To quote Dean Landis of Harvard: "Basic to the understanding of labor law is a realization that these statutes initiated a policy whereby the labor contract and labor relationship were accorded a different status by law than that given other contracts and other relationships."<sup>4</sup>

The right of the laborer to use his bargaining power was denied him. The three centuries following kept labor in this condition; but the Revolution of 1688, the growth of manufacturing and the realization of the benefits from combinations both of employers and those secretly attempted by employees

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<sup>3</sup> Examples of discharge provisions in more than fifty collective agreements may be found in *Monthly Labor Review*, XXXIII, No. 6, (Dec., 1931) p. 94, ff., e.g., "Stereotypers and electrotypers—no member shall be discharged without one week's notice or one week's pay. . . . Street railway employees—no employee shall be discharged without 2 weeks' written notice or 2 weeks' pay. . ." In February, 1934, the National Labor Board ordered enforcement of pharmacist agreement including, "Discharge compensation—An employee shall receive two weeks' minimum notice of discharge in writing, or its monetary equivalent except where the discharge is upon due and sufficient cause." In the Matter of Peoples Pharmacy Inc., No. 199. Decisions—National Labor Board, 1934.

<sup>4</sup> Landis, *Cases Labor Law* (Chicago, 1934) p. 2.

brought the labor question to the front. No consideration of this problem should omit a mention of the struggle for union recognition; but here it is sufficient to say that both legislation and court decision considered the laborer and his co-workers as criminal conspirators, as violators of their contracts, or liable for damages for enticing others to break their contracts. Until 1871 even threatening to strike, whatever the cause, was a criminal act in England.

At the same time in this country Chief Justice Chapman of Massachusetts writes in an opinion: "Every man has a right to determine what branch of business he will pursue, and to make his own contracts with whom he pleases and on the best terms he can."<sup>5</sup> This freedom of labor and business has not always existed in America.<sup>6</sup> The years of struggle for union recognition has been discussed during the recent labor movements. The Wagner Labor Act<sup>7</sup> and the subsequent upholding of it by the Supreme Court gave the laborer hope that the days of strikes, strike-breakers, espionage, and company unions were over. At last he was on a more equal bargaining basis, he had been raised from the servitude forced upon him, and again he could seek peaceably his ultimate happiness.

### III

The laborer's wage is one of the important factors in the labor contract. Where formal contracts are made covering long terms or for definite periods, the wage not only controls the amount to be paid the employees, but also provides a gauge for the settlement of damages in case of a breach of the contract. But when the laborer accepts work under an informal contract or for an indefinite period, by strict contract law, when the day or week is over the employer has no further liability than the payment of the wages agreed upon.

<sup>5</sup> Chapman, C. J. in *Carew vs. Rutherford* (1870) 106 Mass. 1.

<sup>6</sup> Early colonial legislation: "An Act Against Oppression punishes by fine and imprisonment such indisposed persons as may take the liberty to oppress and wrong their neighbor by taking excessive wages for their work, or unreasonable prices for merchandise or other necessary commodities as may pass from man to man."—*Ancient Charter 172*. As late as the Revolutionary War many towns fixed the price of labor, provisions, and articles of merchandise. (Cited in above case).

<sup>7</sup> Wagner Labor Bill (49 Stat. 449) establishes the National Labor Relations Board granting to employees the right to collective bargaining with full freedom of association, self organization, and of designating representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. This Act was held constitutional in the *National Labor Relations Cases* on April 12, 1937,—299 U. S. 532 ff.

It is of interest to note the Restatement of Contract Law as made by the American Law Institute concerning these informal contracts.<sup>8</sup> Its reporter tells us that these contracts have their origin not only in the old common law of debt—a *quid pro quo*, but also in the doctrine of assumpsit—a tort in the nature of deceit, and the gist of it is the reliance to the plaintiff's injury on the promise of the defendant.<sup>9</sup> This new concept of contracts is of particular interest to the laborer under an informal contract where pension, seniority rights, and retirement plans are held out to him by the employer. However, one cannot contend that a promise is being held out to the employee in the dismissal wage.

This practise of paying the laborer a sum over and above his stipulated wage at the time of his leaving may be considered from several angles. One may contend that it is simply an effort to assist the laborer until he is able to locate another place and is a substitute for unemployment insurance. This idea is one of the aims of the dismissal wage; but inasmuch as it usually is paid from the fund of the employer, having been charged as wages by the company,<sup>10</sup> and since it does not continue as long as the laborer is without work, nor need it cease when he has found new employment,<sup>11</sup> one is not justified in considering it as a form of insurance.

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<sup>8</sup> "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."—Section 90, Rest. Contracts, Am. Law Inst. 1932. This is also the basis of the doctrine of "promissory estoppel."

<sup>9</sup> Williston, "Law of Contracts Since Restatement" in *American Bar Association Journal*, XXIII, No. 6, (March, 1937) p. 173. Dr. S. Williston is the reporter on contracts, an author, and a recognized authority on contract law.

<sup>10</sup> In a survey of 212 companies employing between two and a quarter and two and a half million men, "the common method of accounting is to include the dismissal payments in the same account with salary or wages of the department or unit. . . . Over seventy per cent of companies debit the unit dismissing the employee, while the remaining companies charge the cost to general operations or special company dismissal accounts or funds."—Hawkins, "Dismissal Compensation in American Industry," *Monthly Labor Review*, XXXIX, (November, 1934) p. 1075. Dr. E. H. Hawkins of Princeton University is the recognized authority on dismissal wage compensation.

<sup>11</sup> E.g., the voluntary plan of the Philips Works (electrical) in Holland when three thousand workers were dismissed in 1930, ". . . the compensation was not paid in a lump sum, but in weekly installments. The company continued the weekly payments until completed even when the worker was engaged by another employer. If rehired by the company payments were suspended, but the right to compensation retained." Report of Federal Coordinator, *op. cit.*, p. 142. Cfr. also discussion relative to railroads, "Since such compensation is in part payment for the loss of a job, it is clear that when an employee is re-engaged no further installments should be paid." p. 91.

Had this dismissal wage come into existence with the recent depression one could consider it a temporary means of aiding the laborer. However, over fifty years ago such proposals had found their way into English litigation in which officials, officers, workmen, and servants of railways, amusement parks, paperworks, and waterworks were involved.<sup>12</sup> Legislatures seldom pass laws concerning wages without serious consideration, yet over sixty European, Latin-American, and Asiatic countries have such legislation covering specific classes of, or all, employees;<sup>13</sup> and since 1921 sixty-four national and international labor organizations have demanded dismissal compensation regulation.<sup>14</sup> A glance at the history of this payment disposes of any argument on its temporary nature without considering the industrial practice during the depression. When industry sought every means to curtail expense, this dismissal wage continued to be paid; many companies increased the wage rate while others recognized its value and adopted it under some plan.<sup>15</sup>

When a laborer accepts a job he is paid wages either under a formal or informal contract for services actually or potentially rendered. The dismissal wage does not represent a payment for actual services under a formal contract, as the laborer is not under such an agreement; neither is it a payment for potential services under an informal contract since there can be no promissory estoppel placed against an employer who has promised nothing above the stipulated wage. So this dismissal wage must represent a payment to the employee for the relinquishment of some right which he has in his job.

#### IV

J. B. Eastman in his analysis of the dismissal wage writes: ". . . There are three types of worker that have received dis-

<sup>12</sup> *Hutton vs. West Cork Ry. Co.*, 49 L. T. Rep. 420, 23 Ch. Div. 654 at 673 involving £1050 for officials in dismissal; *Strand vs. Royal Aquarium & Summer and Winter Garden Soc., Ltd.*, 89 L. T. Rep. N S (Eng.) 243, £7800 for officers and servants; *Warren vs. Lambert Waterworks*, 21 Times L. R. 685. Cases reported in "Industrial Relation Law in Making," *Industrial Relations*, II, no. 8, (Sept. 1931), p. 299-303.

<sup>13</sup> For legislation in 13 countries see *International Labour Review*, XXXV, no. 4, (April, 1937), p. 529, and no. 5, (May, 1937) p. 679.

<sup>14</sup> For list of organizations and demands see Report of Federal Coordinator. *op. cit.*, p. 148 ff; railway demands, *Schulte Bill* HR. 5364, 73rd Cong., 1st Sess. (May 1, 1933), and *Crosser Bill* HR 11609, 74th Cong., 2nd Sess. (March 4, 1936); public utilities in Massachusetts—current session.

<sup>15</sup> *Monthly Labor Review*, XXXIX, no. 5, (November, 1934) p. 1076; Hawkins, "Dismissal Wage in Foreign Countries," *Serial Number R232*, U. S. Dept. Labor (Bureau of Statistics), April, 1935, p. 5.

missal compensation. One group was most grateful for the dismissal wage; another accepted the wage as a right; and a third protested against the wage in the belief that some injustice was done them in that they were selected for discharge."<sup>16</sup>

In determining what the dismissal wage for the workers shall be, one must consider the factors involved: what laborers are covered, the length of their service, the cause of the dismissal, the wages they have earned.

Temporary or substitute workers are not included in the dismissal plan, while salaried workers usually are better covered than day laborers. In foreign countries special legislation has been enacted for specific classes of employees as seamen, apprentices, civil servants, agricultural workers, and others.<sup>17</sup>

Most plans and legislation provide for a probationary period before the employee becomes eligible for the dismissal wage. During this period the employee determines whether he is fitted for this particular work, and at the same time the employer has an opportunity to decide whether he wishes this man to handle the work. This trial period may last a few weeks, a month, or longer, depending upon the employer and the industry. After this time has expired, the number of years the employee has worked is one of the basic factors in determining the amount of his dismissal wage.

With much probationary precautions it would be unfair to ask an employer to compensate a dismissal when the laborer voluntarily quits or is discharged for a just cause.<sup>18</sup> Foreign legislation lists specific causes which relieve the employer of dismissal payments, for example, false statements, dishonesty, violent action, immorality, carelessness, drunkenness, violation of law, sabotage, and frequent insubordination. There are also statutory regulations governing cases of public policy, acts of God, bankruptcy, or the death of the employer.

Some dismissal plans include not only the actual years of service of the employee but also his age as well as the cause of the dismissal. These factors are combined with the average

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<sup>16</sup> Report of Federal Coordinator, *op. cit.*, p. 139.

<sup>17</sup> Seamen's codes for forty-five countries provide usual compensation of one or two months' wages for dismissal without cause and return passage to home country, larger amounts for officers. Agricultural workers are insured an equity in the crop.

<sup>18</sup> There are exceptions to this, some paying those voluntarily leaving; others asking for volunteers to quit; while others pay discretionary dismissal wage for serious cause.

earnings of the employee in a number of different formulas. To quote the Federal Coordinator of Transportation: "They may follow a simple rule as one week's pay for each year's service; or they may be computed in a mathematical formula."<sup>19</sup> These sums may vary from a few dollars to thousands. When the U.S. Rubber Company closed four plants in 1929 the dismissal wage paid varied from a low of \$104.61 to a high of \$2,088 with an average payment per man of between \$400 and \$500.<sup>20</sup> These wages were of the greatest assistance to the discharged man,<sup>21</sup> yet such wages could not have been recovered under our present civil law.

## V

While the dismissal wage is not universally adopted, its application through local industries, trade agreements, and legislation shows the widespread recognition of this right of the laborer in his job. The adoption of a dismissal plan is not proposed as a means of settling all difficulties in the adjustment of wage matters; however, it does represent a step toward justice in situations where it may be invoked and therefore is worthy of deep consideration.

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<sup>19</sup> Federal Coordinator's Report, *op. cit.*, p. 136.

<sup>20</sup> Clague, Evan, & Couper, "When Shut-down Came, A Dismissal Wage in Practice," *Survey Graphic*, February 1, 1931, pp. 477-80. In five Japanese Shipping and Steel Industry Cases in 1927 and 1931, involving over eight thousand men, more than a million and a half dollars were paid in dismissal wages with an average of over \$186 per man—Coordinator's Report, p. 142.

<sup>21</sup> For a discussion of the psychological and sociological reactions of these plans see Schwenning's "List of References," *Monthly Labor Review*, (February, 1932) and "Selected Bibliography," Report of Federal Coordinator, p. 151.