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pm seen

27 March, 1980

The Rt. Hon. Margaret Thatcher, MP,
Prime Minister,
10 Downing Street,
London, SW1.

Dear Prime Minister,

Further to our discussion last night:-

(a) As to policy I enclose a note summarising the views I expressed on the questions you asked me. (I have shown this to the Attorney but no copies have gone to anyone else)

(b) You also asked me to send you a copy of the draft clause which was prepared in December to give effect if required to what now seems to be called the "Percival" plan, and I enclose that herewith. It was prepared by Parliamentary Counsel after discussion between him, Paddy Mayhew, the Department's lawyers and myself. I also enclose a copy of a paper which I had submitted in October 1979 and which was in effect used as the instructions to Parliamentary Counsel to draft this clause and the other options we considered.

The draft clause which I am sending herewith was drafted to give effect to, and does give effect to, the proposals which I had put forward in that paper, in Cases 1, 2, 3 and 4 - in brief that the unions should continue to enjoy immunity in Cases 1, 2 and 3, but that, as proposed in Case 4, B, not being a party to the dispute, should be free to sue.

The proposals are of course more readily understood by reference to the paper itself.

Yours ever

JM.

May we talk further about the contents of these documents when you have had time to read them please?

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IMMUNITIES

1. There is one question of principle which must be decided at this point. There may well be others later - like that of making union funds liable. Of course there are links between what we do now and those further questions. What we do now may well have a great bearing (for better or for worse) on later consideration of such matters. But the one we have to decide now is the fundamental one in this field and it can and must be considered on its own.

2. The basic question is of course: Are we going to "ensure that the protection of the law is available to those not concerned in the dispute but who at present can suffer severely from secondary action (picketing, blacking and blockading)?"

3. However for present and practical purposes that can and must be translated into terms of the options available. What are the choices open to the Government at this moment? In fact that can be reduced to a choice between two alternatives - which of two conflicting interests is to prevail - as set out below.

4. First however it is important to appreciate that the choice is not, as the most recent paper might appear to suggest, whether we should (a) "ban secondary action altogether" or (b) do as the paper suggests. There are several options between the two. One is that which seems now to be known as the "Percival" option, though it is by no means personal to me. The method was designed by me but simply to implement, and would implement in a very simple form, our Manifesto promise quoted above - no more no less. In no way can it be said to "ban secondary action altogether", either directly or indirectly.

5. I return to the actual choices.

6. There are here two conflicting interests:-
(a) On the one hand the unions say that they should be free to use the employees of an employer who is not a party to the dispute to interfere with commercial contracts between him and the employer in dispute in order to bring pressure to bear on the latter - and that in order to enable them to do that the employer who is not a party to the dispute must remain deprived on his Common Law rights to the protection of the Courts for himself and his employees.

They also say that these are "traditional" rights enjoyed for a long time. That is not correct. It is understandable that they would like to keep this addition to their industrial muscle but there is no case for their claiming that it is "traditional". The advantages which they would lose would be advantages which they have enjoyed only since 1974 at the earliest.

/(b) On

(b) On the other hand if that view prevailed and the present proposals were implemented employers who happened to have a contract with the employer in dispute could find that for no better or other reason than that, they could be the object of secondary blacking causing them severe damage, in circumstances in which they would at Common Law have a right of action to protect themselves (and their employees), but, because of the new law, left in their present position i.e., unable to pursue their Common Law rights.

In practise it is inherently unlikely that they would take proceedings unless suffering or likely to suffer severe damage. If when that situation did arise they found they were still unable to exercise their Common Law rights it would be little comfort to them to say that that was necessary in order that those engaging in industrial disruption should have this extra muscle.

7. In those circumstances the choice has to be faced - and decided - as the paper accepts - as a question of "basic principle". Translating that into practical terms, would it not mean that if the Government implemented these proposals the only reasoned argument that could be advanced in support would be on the following lines?" "We have considered all the advantages and disadvantages for the "unions" on the one side and for the "victims" on the other and it is our considered view that the "unions" should retain the privilege of adding to their own muscle at the expense of the "victims" (employees as well as employers) whatever the cost to those "victims" may be." I could not say it.

8. The most serious of the practical consequences would I think be as follows:

(a) Supposing that one were able to limit the immunity by so to speak drawing a ring fence around all those in direct commercial relationship with the employer in dispute, leaving everyone outside that ring free to sue, that would still leave all those in direct commercial relationship with the employer in dispute, deprived of the right to sue, and they are the ones

(i) most likely to be attacked anyway (and even more so if as would be the case on this hypothesis, they were the only ones who could be attacked with impunity); and

(ii) most likely to suffer severely; and

/(iii) most

(iii) most likely to have a cause of action(the benefit of which would still be denied them).

(b) Up to now our position has been clear. We have always condemned such action. If we take the course recommended we could no longer complain. A union could quite properly say: "Why not? As a result of a considered decision, you have confirmed this privilege".

(c) If it were decided as a matter of principle to implement the proposals it is not easy to see how we could in the near future say we were going to restore the rights to sue which we had just, as a matter of principle, declined to restore, but unless the restrictions on the "victims'" right to sue are lifted now or soon it is of no assistance to him to talk about making union funds liable - or any of the other ways of "tightening up". This is the critical decision. Should the "victims" be allowed to pursue their Common Law rights or not? Almost everything else in this field is subsidiary to that.

9. In recent months we have seen many good trade unionists forced* with great reluctance to take action against their own employers with whom they have no dispute, at the risk of causing great damage to their employers and themselves. If the present proposals were implemented they would remain subject to those risks. Accordingly it seems equally in their interests that their employers should have back their rights to sue.

S.P.

* because they have been officially instructed so to do (by the Executive of the Union in the Steel case) and failure to obey the instruction puts them at risk of "losing their cards".

27 March 1980