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Robert M. Steptoe Jr.
Steptoe & Johnson

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MR. TRUMKA: IF IT AIN'T BROKE, DON'T FIX IT!

ROBERT M. STEPTOE, JR.*

I. INTRODUCTION

Distilled to its essence, Mr. Trumka's lecture at the West Virginia College of Law had but one real thesis: recent decisions of the National Labor Relations Board do not favor organized labor to the extent Mr. Trumka deems appropriate.

While purporting to explain a complete and irreversible failure of organic federal labor law in the context of a "deindustrialized" America, Mr. Trumka's address really is no more than a partisan adverse commentary upon the presently constituted Board (the Board). Regrettably, I concur that our once highly industrialized society does indeed face a myriad of increasing and seemingly insoluble economic problems; but to make "labor law" the scapegoat for these problems, as Mr. Trumka would do, is simply misleading. Rather, the "deindustrialization" problems our society faces are attributable to global economic, and technological developments which substantive labor law will not alter.

Thus, I cannot accept Mr. Trumka's thesis that labor law has failed; nor can I see any merit whatsoever in his suggestion that employees and society would better fare if the National Labor Relations Act were abolished, the Board scrapped, and "the struggle" transferred to the state courts. To me, at least, Mr. Trumka's solution would set labor relations back half a century.

II. FAILURE OF THE COURTS TO IMPLEMENT A WORKABLE LABOR POLICY

In his haste to bury substantive federal labor law and shift "the struggle" into the state courts, Mr. Trumka seems to have lost some sense of the history and purpose of modern labor law. Slightly over fifty years ago, when organized labor already had been part of the American working way of life for over a century, the situation was chaotic. The courts—Mr. Trumka's suggested panacea—had not been able to formulate or implement a workable labor policy as the increased activities of organized labor raised issues of national proportion. Case-by-case adjudication on a state-by-state basis was simply an inadequate solution for the problem. No consistent, cohesive policies were developed; court procedures were slow and cumbersome; judicial remedies were too inflexible to implement effectively what few and diverse substantive standards were developed;

* Partner, Steptoe & Johnson, Clarksburg, West Virginia; B.A., 1965, University of Virginia; J.D., 1970, West Virginia University.

and federal courts were not bound to follow state common law. The net result was that the judiciary failed to achieve any workable balance of the power of incorporated capital and the power of organized workers. Too often the courts unnecessarily suppressed the activity of organized labor out of fear for disruption of the interstate flow of goods, concern for expansion of labor disputes through secondary boycotts, and a desire to protect both the consumers and the unorganized segment of the work force.

Mr. Trunka's suggestion that responsibility for formulating labor law should be relegated back to the courts is, as he admits, at odds with the wisdom of the past, for the historical judicial inability to define and enforce national labor policy caused the executive and legislative branches of government to fill the void and spawn modern American labor law. Recognizing both the important function that organized labor played in the national economy and the absolute necessity for industrial peace arising out of a balance of power between management and labor, at the turn of the century the Congress began its attempts to protect organizing employees by eliminating judicial interference with the operation of unions and by affording some union operatives affirmative legal protection.¹

Following early twentieth century legislative attempts to achieve uniform and stable labor law, in 1935 Congress adopted what would become the bedrock of modern American labor law—the Wagner Act (National Labor Relations Act).² Senator Wagner's bill, designed to give federal support to employee organizing and collective bargaining, was introduced in an optimum political environment. Our country, still devastated by the Great Depression, was governed by a Democratic president and Congress. The New Deal climate favored federal legislation to promote the growth of organized labor—growth believed necessary if employees were to acquire sufficient economic leverage to bargain effectively with management. It was hoped that a more equitable division of the spoils of private enterprise would raise the spending power of working employees and thereby shorten the depression.

The National Labor Relations Act put teeth into earlier federal labor laws, which were little more than aspirational. Employees were not just granted the right to organize, bargain collectively, and engage in strikes and other concerted activity. More importantly, the NLRA created a mechanism for enforcement of these previously ephemeral rights. Employer violations of employee rights became actionable unfair labor practices within the exclusive jurisdiction of the National

¹ Early federal legislation included: Erdman Act, ch. 370, 30 Stat. 424 (1898); Clayton Act, ch. 323, §§ 6, 20, 38 Stat. 731, 738 (1914); Railway Labor Act, ch. 347, §§ 11, 12, 14, 44 Stat. 587 (1926); Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932); the National Industrial Recovery Act, ch. 90, § 7, 48 Stat. 198 (1933).

² National Labor Relations (Wagner) Act or (NLRA), ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1982 & Supp. III 1985)).

Labor Relations Board—an agency of labor experts. Passage of the National Labor Relations Act in 1935 was the watershed for organized labor to become an important force in American industry. In the decade following, organized employees increased in number from approximately three million to fifteen million.

Had federal labor law not evolved beyond the Wagner Act, Mr. Trumka surely would not find it necessary to postulate the failure of labor law. But federal labor law did evolve significantly in subsequent years, primarily because the 1935 Wagner Act was one-sided, protecting employees against employer tactics designed to frustrate organizational activities, but providing management no corresponding protection against union activities and, more importantly, providing employees no protection against union actions and abuses.

Thus, at the conclusion of World War II, Congress turned its attention to the need for modifications to the National Labor Relations Act. As a result of perceived friction and division within the organized labor movement, increased incidences of mass picketing and secondary boycotting, and various abuses in the conduct of internal union affairs, the public began to feel that organized labor was becoming irresponsible.³ In the words of one commentator, the U.S. labor movement was the “largest, the most powerful, and the most aggressive that the world has ever seen; and the strongest unions . . . are the most powerful private economic organizations in the country.”⁴

When the eightieth Congress convened in 1947, the Republican party dominated Congress and the White House. It was clear that the one-sided Wagner Act would be modified and, over President Truman's veto, the Labor-Management Relations Act of 1947 (the Taft-Hartley Act) became law.⁵ With Taft-Hartley, Congress shifted the emphasis of federal labor law to a balanced statutory

³ Indeed, between 1936 and 1947, over 200 bills dealing with amendment of the Wagner Act were introduced. In addition to public concerns articulated above, there were complaints that the National Labor Relations Board (NLRB) unfairly combined the functions of investigation, prosecution, and adjudication; that there existed inadequate court review of NLRB decisions; that the majority rule concept of section 9(a) was ill advised; that the NLRB was incapable of determining appropriate bargaining units; that the increased number of closed shop contracts was oppressive; that the Wagner Act was excessively one-sided; and that there was increased need for government regulation of union and concerted activity, union violence and corruption, and jurisdictional disputes, particularly in the construction industry.

⁴ S. SLICHTER, *THE CHALLENGE OF INDUSTRIAL RELATIONS* 154 (1947). Perhaps the most blatant exercise of this union economic muscle occurred in 1943—a time when organized labor had pledged no strikes until the end of the war. At that time, approximately 80% of the nation's coal miners were working under UMWA contracts. Contrary to labor's pledge, the UMWA, under John L. Lewis, conducted two long and crippling strikes which ended only when the United States Government had made substantial concessions to the coal miners and their union. A. COX & D. BOCK, *LABOR LAW CASES AND MATERIALS* 130 (6th Ed. 1965).

⁵ Labor-Management Relations (Taft-Hartley) Act of 1947, ch. 120, 61 Stat. 136.

scheme that not only protected employee rights to organize, bargain collectively, and engage in concerted activity, but also restricted certain union conduct and guaranteed certain freedoms of speech and conduct to employers and individual employees.⁶ It is noteworthy that organized labor made a grievous political error which contributed in substantial part to the passage of the Taft-Hartley Act. Overestimating its clout, organized labor opposed *any* change to the Wagner Act, and by this intransigence eliminated any chance to have an effective voice. By adopting the "all or nothing" approach, labor got essentially "nothing."

The last major statutory addition to federal labor law was adopted in 1959.⁷ As a result of Senate investigation of corruption in several strong unions, there was substantial legislative and public interest in achieving internal union democracy, which the Taft-Hartley Act had not effectively accomplished. Ironically, organized labor again made grievous political errors. Perhaps buoyed in spirit by the election of a Democratic Congress in 1958, organized labor fought hard for Taft-Hartley amendments. Conversely, business opposed Taft-Hartley amendments unless some relief were afforded as to the effects of picketing and boycotts. The inflexibility of labor leaders, who absolutely insisted upon significant Taft-Hartley changes as a condition to supporting any new labor legislation, resulted in the adoption of the Landrum-Griffin Act, which afforded no Taft-Hartley relief but, rather, embodied changes favorable to employees and business.⁸

In summary, the substantive body of federal labor law which Mr. Trumka feels has outlived its usefulness consists of three major pieces of legislation adopted between 1935 and 1959. First, the Wagner Act, a one-sided law, brought organized

⁶ Taft-Hartley engrafted broad new provisions upon the Wagner Act. Employees were given the right to refrain from joining unions or engaging in section 7 protected activities. The size of the NLRB was increased from three to five members, and the function of adjudication was separated from the functions of investigation and prosecution. Six union unfair labor practices were created to diminish secondary boycotts, prohibit coercion of employees, require good faith bargaining by unions, and prohibit featherbedding. Section 8(c) was added to give employers and unions certain free speech rights, and the duties of labor and management in collective bargaining were defined by a good faith standard. Representation procedures were modified to give employees and employers some limited rights, and minimal regulation of internal union affairs was required. Procedurally, Taft-Hartley made it more difficult to overturn NLRB decisions in the courts, and the Board was given discretionary authority to seek injunctions in federal courts pending the outcome of administrative litigation. Finally, the states were authorized to adopt right to work laws having precedence over the section 8(a)(3) union shop proviso.

⁷ Labor-Management Reporting and Disclosure (Landrum-Griffin Act) of 1959, ch. 120, tit. I, 61 Stat. 140.

⁸ The substance of Landrum-Griffin is basically as follows. Section 8(b)(7) was added to limit recognitional or organizational picketing. Section 8(b)(4) tightened up secondary boycott loopholes in Taft-Hartley. Section 8(e) created the hot cargo union unfair labor practice. Section 8(f) legitimized pre-hire agreements in the construction industry. Voting rights were created for economic strikers for a period of one year, and section 3(b) was amended to permit the NLRB to delegate to its regional directors responsibility for determination of appropriate bargaining units and questions concerning representation.

labor to a level of unequalled economic power. Second, the Taft-Hartley Act, which balanced the economic power somewhat, gave increased rights to employees and employers. Third, the Landrum-Griffin Act basically continued the balance of power achieved by Taft-Hartley.⁹

III. FEDERAL LABOR LAW IS ALIVE AND WELL

Simply stated, labor law has not failed and is in no immediate danger of failing. The National Labor Relations Act affords employees, employers, and labor organizations a delicate balance of rights and power. The system was not hastily conceived, but rather has developed in stages over the past 50 years.

Mr. Trumka's argument that "labor law has become a dangerous farce" and "has failed in its announced task of securing the rights of working persons"¹⁰ is belied by the fact that a Democratic Congress rejected union-backed labor law reform proposals in 1977, even with President Carter's support for the legislation. Were the situation as dismal as Mr. Trumka contends, surely the ninety-fifth Congress would have enacted reforms necessary to preserve the balance of rights and power achieved over the years.¹¹

Even though Mr. Trumka tells us labor law has lost all vitality, I suspect that in reality he has no major quarrel with the body of substantive labor law. Instead, his issue is with the Board, which he accuses of having transformed itself, under President Reagan, into an active and conscious proponent of the destruction of workers' rights and prosperity, all as the hand maiden of "the special interests."¹²

⁹ An excellent history of the development of modern labor law is provided by the American Bar Association Section of Labor and Employment Law. 1 *THE DEVELOPING LABOR LAW*, 3-67 (C. Morris 2d ed. 1983).

¹⁰ Trumka, *Why Labor Law Has Failed*, 89 W. VA. L. REV. 871, 877 (1987).

¹¹ Putting aside for a moment my personal disagreement with Mr. Trumka's substantive thesis that labor law has failed and should accordingly be buried, I wish to comment briefly upon Mr. Trumka's choice of rhetoric, which to me seemed a bit extreme. No doubt he passionately and sincerely feels for the working man, but many of his accusations and conclusions were unnecessarily overstated. Before a sophisticated audience predominated by law professors, law students, and practicing members of the bar, I wonder if Mr. Trumka's frequent use of hyperbole detracted from the substance of his intended message.

¹² Trumka, *supra* note 10, at 872. Curiously, Mr. Trumka thought it important to deny emphatically that labor is a "special interest." I would have thought that he, as president of the statutory exclusive bargaining agent of thousands of coal miners, would view himself and his union as legally obliged to have nothing less than the highest and most special interest in the welfare of his constituents. In any event, it is doubtful that anyone takes seriously his assertion that "labor is *not* a special interest," just as no one would credit a similar statement from the president of the National Association of Manufacturers.

In fact, most labor lawyers acknowledge that the National Labor Relations Board, despite periodic philosophical swings at the top,¹³ is one of the most effective and efficient federal administrative agencies. Notwithstanding the fact that Board members are political appointees, who obviously reflect in some part the labor philosophy of the appointing President, the men and women who run the Board's regional offices throughout the United States are highly competent public servants who enforce the National Labor Relations Act with almost single-minded dedication. Board members come and go, but Regional Directors, Regional Attorneys, Administrative Law Judges, and other major players tend to be life-long fixtures within the agency. Board members undoubtedly have substantial influence on many of the close and difficult issues,¹⁴ but with respect to protection of employee rights to organize, engage in concerted activity, and bargain collectively, Mr. Trumka is simply wrong in his assertion that labor law and the Board have failed in the announced task of securing the fundamental rights of working persons.

In another time, with a different Board, I feel confident Mr. Trumka would attack neither the law nor the Board. The pendulum will undoubtedly swing again, and in a matter of years it will be business and industry castigating the Board and Mr. Trumka providing its defense.

Mr. Trumka's thesis of labor law failure breaks down even further if one thoughtfully defines the parameters of "labor law." Although Mr. Trumka confines his analysis to the National Labor Relations Act, generic labor law includes a much broader collection of common law and statutory employee protections, some of which Mr. Trumka and his union constituents rely upon with increasing frequency.¹⁵ These protections are afforded without regard to union membership or affiliation and may, ironically, explain the national work force trend away from union representation and membership.¹⁶

¹³ Bias within the NLRB is historical. It no more indicates labor law failure than judicial bias indicates failure of the judicial system. It is axiomatic that personal bias will impact most legislative, executive, and judicial decisions, and particularly in agency decisions will personal bias and expertise tend to merge.

¹⁴ The concerted activity issue emphasized by Mr. Trumka is difficult, and NLRB law on the issue has been in a state of flux for some time.

¹⁵ Favorites include: Federal Coal Mine Health and Safety Act, 30 U.S.C. §§ 801-962 (1982); Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1982); Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000-2017 (1982); Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 301-309 (1982); and Multi-employer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1001-1461 (1982). However, a review of the table of popular names acts in *Federal Labor Laws*, lists over 120 separate federal laws governing industrial activities, economic relations, employment opportunities, and federal contracts. See *FEDERAL LABOR LAWS* (8th ed. 1987). Add to these the various state legislative and common law employee protections, and any reasonable person will easily conclude that "labor law," in a generic sense, affords an amazingly broad array of employee protections.

¹⁶ Contrary to Mr. Trumka's views, most modern employers conscientiously attempt to respect

IV. FEDERAL DEREGULATION WOULD COMPOUND THE AMERICAN PROBLEM OF "DEINDUSTRIALIZATION"

It is regrettable but true, as Mr. Trumka observes, that vast areas of America are being deindustrialized and that capital investment by American employers is increasingly shifting to other countries. But does Mr. Trumka's suggestion that we "abolish the Act," "deregulate," and "let labor law cases go to the jury,"¹⁷ offer even a scintilla of hope that these problematical global economic developments will be reversed? Obviously not, and to imply that states' common law of labor can restore America's industrial strength seems to be a red herring argument of the highest order. Absent stable and uniform labor law throughout America, there will be even less incentive for capital investment in this country.

History has taught us well that the judicial system is inherently incapable of formulating and implementing effective labor law. Varying common law rules developed in fifty different states by thousands of judges possessed of different biases is not the answer. Most judges are experts in the study and application of law generally but are rarely possessed with the economic sophistication and workplace expertise required to formulate and administer labor law. Under Mr. Trumka's proposal, the free flow of interstate commerce would be severely hampered by the emergence of conflicting state common law rules. Moreover, the courts are not equipped to provide for and subsequently enforce effective labor remedies, which frequently involve ongoing supervision of the parties.

V. CONCLUSION

Even if labor law had failed, it would be no solution to relegate the problem to judges and juries. The obvious alternative available to Mr. Trumka and other labor leaders is to go back to the source of our current body of labor law and petition again for reform. If there is merit to what Mr. Trumka tells us, then surely Congress will recognize that merit and act justly. Perhaps the administrative scheme of things could be improved, and perhaps the range of philosophical swing between succeeding Boards could be reduced. If so, I venture to say that business would be as supportive as organized labor of reforms designed to make procedural and substantive labor law more consistent and predictable.

In sum, I fear Mr. Trumka's brave new world "without preemption and the expert agency."¹⁸ Current global economic conditions dictate conciliation, not confrontation. Notwithstanding Mr. Trumka's aversion to the present Board and

employee rights. For Mr. Trumka to assert that labor law has totally failed the American worker is grossly inaccurate. Perhaps what he really means to say is that labor law has failed to provide American unions the desired level of economic power.

¹⁷ Trumka, *supra* note 10, at 881.

¹⁸ *Id.*

its resolution of certain issues adverse to organized labor, the fact remains that the overall body of labor law in our country is stable and balanced. The significant employee rights secured by the Wagner Act are not in jeopardy. Employee jobs, however, are in jeopardy, and it would be better for national labor leaders to focus on the long term serious issue of work preservation rather than exacerbate their short term quarrel with the Dotson Board. Myopic obsession with displeasing Board decisions will get us nowhere. Instead, organized labor and business must abandon the "we versus them" mentality and work toward achievement of mutually rewarding goals.