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Marion Crain-Mountney
West Virginia University College of Law

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HAS "LABOR LAW" FAILED? A REJOINDER TO RICHARD TRUMKA

MARION CRAIN-MOUNTNEY*

It is no accident that Richard Trumka assigned to his speeches the provocative title, *Why Labor Law Has Failed*. Although this title had the desired effect on me (as a labor law teacher, I have an obvious vested interest in the continuing validity of what I teach), I found the title misleading. Trumka's comments are devoted exclusively to a condemnation of the current National Labor Relations Board (the Board) and its decisions. Trumka's narrow focus prevents him from demonstrating that "labor law," as a whole, has failed. Consequently, his arguments do not support his proposal that we ought to dispose of the baby (the National Labor Relations Act (the Act)) along with the bathwater (the current Board).

Trumka's criticism seems to be as follows: While the philosophy and goals of the National Labor Relations Act and the set of engraftments (judicial and administrative) which we understand to comprise "labor law" are laudable, achievement of these goals has been frustrated through the application of labor law by the nonprogressive thinkers (otherwise known as conservatives) who presently serve on the National Labor Relations Board. Trumka states, for example, that the Act "promises but does not deliver" protections to labor, that it "foster[s] false expectations," and that society will pay a price for "perverting the dream of the progressives."¹ Trumka implicitly concedes that although the federalization of labor law was beneficial to labor's goals when a liberal administration was in power, centralized federal control over labor policy is unacceptable to labor when it is exercised by a powerful and conservative institution like the Reagan Board. Therefore, Trumka urges, labor law as we know it should be abolished, and labor should wage its battles in the state and local political arenas. In short, Trumka advocates a return to pre-Wagner Act days: deregulation and the consequent transfer of all labor disputes to the state courts.

Trumka's bitterness and frustration leak out from between the lines and around the margins of the transcriptions of his speeches. His comments resound with fear and anger: fear born of the knowledge that a significant and powerful majority of the American people no longer seem to find the unfettered operation of the free market system socially unacceptable, and anger because, in his view, unions are shackled by a legal structure which no longer operates to aid labor in overcoming the power imbalance between labor and capital.

Trumka's ultimately loses his struggle with his emotions. His comments degenerate to a thinly veiled threat of violence on behalf of organized labor if the

* Assistant Professor of Law, West Virginia University College of Law. B.S., 1980, Cornell University; J.D., 1983, U.C.L.A.

¹ Trumka, *Why Labor Law Has Failed*, 89 W. VA. L. REV. 881 (1987).

present trend in Board decisions continues. The veil becomes all but nonexistent when Trumka predicts:

In rejecting the notion that workers organized through unions should have rights and should share in power, the National Labor Relations Board has excluded a vital force from economic and social decisionmaking. That working men and women—wage earners—will reassert their rights at the workplace is inevitable. That they will use the legal process to do so becomes daily more doubtful. That process has, by now, lost all credibility.²

I empathize with Trumka's fear. I, too, am disturbed at the increasingly clear import of the decisions issuing from the Board as it has been constituted and operated under the guidance of the Reagan administration. I might even agree with one commentator's observation that the Board has, by virtue of its radical shifts in composition and course with every passing political administration, "inflicted. . . its own death wound."³ But the Reagan Board, omnipotent as Trumka might believe it to be, is not synonymous with "labor law" as a whole. Collective bargaining is a child of the Wagner Act, and, through its injection of democratic processes into the authoritarian and hierarchical structure of the world of organized capital (i.e., large corporate employers), has proved indisputably valuable in achieving the measure of industrial peace which we now enjoy. Similarly, the Taft-Hartley Act as interpreted by the courts has spawned a federal substantive labor law—a worthy goal in itself if one accepts the need for national uniformity in labor policy.⁴

The real problem is that "progressive thinkers," "liberals," and labor unions no longer have popular support. Expressed in these terms, Trumka's complaint is not unique to labor law. This is a hard time for all who value individual rights. One need only scan a sampling of recent United States Supreme Court decisions to appreciate the fact that the anti-humanist influence in this country is not restricted by subject matter or forum. Nor can the conservative bias of the Supreme Court, the Board, or any administrative or judicial tribunal which one might care to name be attributed solely to appointments made by the Reagan administration. President Reagan was the victor of not one, but two landslide elections, and

² *Id.* at 871-72.

³ See Farmer, *Transfer of NLRB Jurisdiction Over Unfair Labor Practices to Labor Courts*, 88 W. VA. REV. 1, 2 (1985) (criticizing the instabilities in labor policy wrought by the political character of the Board, and advocating the transfer of unfair labor practice cases to the federal district courts; the author proposes that the Board's jurisdiction be limited to supervision of representation elections and review of election cases).

⁴ See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957) (interpreting section 301 of the Labor Management Relations (Taft-Hartley) Act as a jurisdictional grant to federal courts which authorizes them to fashion a federal substantive law governing collective bargaining agreements).

continues to be one of the most popular Presidents in American history.⁵

The fact is that it is not simply the Reagan Board, which has retreated from the ideal of pluralism and the notion that workers organized through unions should share in power, but the American populace itself. In light of the public support for conservative (read anti-labor) policies, Trumka's proposal that unions return to the state courts and "get political"⁶ is doomed to failure. Further, any initial success by the more powerful unions in particular states or regions of the country would ultimately be achieved at a high social cost: further stratification of workers by class, and the creation of a new class composed of the very poorest and least powerful. As Oliver Wendell Holmes observed long ago, it is

pure phantasy [sic] to suppose that there is a body of capital of which labor, as a whole, secures a larger share. . .for the members of an organization, but, if they do, they get it at the expense of the less organized and less powerful portion of the laboring mass. They do not create something out of nothing.⁷

The change in our political climate which has occurred since 1935, when the Wagner Act was passed, is explicable at least in part by reference to the evolution (Trumka might call it the decline) of our society from an industrial economy to a service-oriented economy. Whether one considers this a change for the better, however, is no longer relevant. The reality is that such a change has occurred, and that the number of unionized workers has diminished as a result. I agree with Trumka that labor must respond to the changes in our economy, and even that those changes demand a relatively radical response, more radical than a change in personnel on the National Labor Relations Board. But I reject his invitation to return to pre-Wagner Act days. Such a course would do little to advance the social values which Trumka embraces and which the drafters of the Wagner Act had in mind: a sharing of wealth between capital and labor and the attainment of industrial peace.⁸

Class war might better be averted if labor sought to change the Act rather than to scrap it. By this I do not mean simply that the Board should be dismantled and that labor disputes be transferred to the federal district courts or to a newly created federal labor court, although that might be a necessary consequence of

⁵ While the office of the President has been blighted and the strength of Reagan's character questioned as a result of the negative publicity surrounding the Iran/Contra Arms Deal, the administration's domestic policies have emerged from the fracas unscathed.

⁶ See Trumka, *supra* note 1, at 881.

⁷ *Plant v. Woods*, 176 Mass. 492, 496, 57 N.E. 1011, 1016 (1900) (Holmes, J., dissenting).

⁸ See Labor Management Relations (Taft-Hartley) Act, § 101, 29 U.S.C. § 151 (1982)

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest. . .by restoring equality of bargaining power between employers and employees.
Id.

the sort of change which I propose. Instead, I suggest that the focus of the organized labor movement be redirected toward the theme which is common to all persons engaged in the work relation, across all classes: alleviation of the fundamental tension that exists between our humanity, our individual differences and the ways in which we express them, and our need to sell our labor—a significant piece of our lives measured in terms of time—in order to survive. In other words, perhaps the time has come to redefine the word “labor” to focus upon the similarities between classes of workers rather than the differences between them.

It is impossible for the ever-increasing membership of the capital-gathering class, the professional and semi-professional service workers, to support fully the goals of the National Labor Relations Act unless they understand and appreciate them. In order to appreciate those goals, nonunionized workers must perceive a commonality of interest between themselves and unionized workers. The most effective means of acquiring such an appreciation would be through personal experience—whether via participation in a union or through participation in an employee organization or other group which approximates the function of the traditional labor union and attempts to influence employers’ decisions through the presentation of employees’ concerns.

I recognize that my proposal would require a significant amendment to the National Labor Relations Act. As it is presently constituted, the Act excludes from its coverage both supervisory and high-level managerial employees.⁹ Moreover, the Act explicitly outlaws the employer dominated “employee association,” or company union.¹⁰ Some may say that it is politically unrealistic to suggest a revision of the Act to make it possible for all employees to see the similarities between what we now think of as the laboring class, and the capital-gathering class. But the signposts are already pointing in the direction of worker unification. The spate of wrongful discharge litigation in recent years furnishes a good example. The goal of wrongful discharge litigation is to establish a just cause standard for termination, a protection which most unionized workers covered by collective bargaining agreements now take for granted. Managerial and supervisory employees are beginning to appreciate the value of job security.

Similarly, professionals and supervisors are turning in increasing numbers to the workers’ compensation system for relief from job stress-related problems. This provides further evidence that, at bottom, the tensions which a managerial-level employee feels are remarkably similar to those experienced by non-managerial,

⁹ See National Labor Relations Act § 2(3), 29 U.S.C. § 152(3) (1982) (excluding supervisory employees from coverage under the Act); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974) (employees at levels of managerial structure are so clearly outside the Act that no specific exclusionary provision was thought necessary).

¹⁰ National Labor Relations Act § 8(a)(2), 29 U.S.C. § 158(a)(2).

unionized employees. The need for job security and the desire to address collectively issues of employee discontent caused by stresses inherent in the workplace present problems of "labor law," regardless of the nature of the job.

It may be that my perception of the problem does not diverge so greatly from Trumka's. Trumka recognizes that labor is not a "special interest."¹¹ He appreciates the significance of the chicken-rendering case which he discusses as having nothing to do with labor unions, but instead with "human beings, and how the labor law treats human needs."¹² Nevertheless, the solutions which we propose are very different. Trumka seems to relish the idea of open hostility and class war, romanticizing the pre-Wagner Act days.¹³ He demonstrates a cynicism which is fundamentally inconsistent with the peaceful coexistence of the labor force and capital owners.

The tenor of my appeal is different. We would be foolish to ignore the teachings of our history. If we have learned anything from the union movement and our experience with the Wagner Act and its progeny, it must be the simple lesson that we accomplish more when we unite than when we divide. The development of unions or employee organizations for workers at all levels would go far toward illuminating that unity of interest which we humans have in our role as workers. History has proven the fundamental value of collective bargaining and the "friendly adjustment of industrial disputes"¹⁴ in achieving labor peace without sacrificing our democratic ideals. If organized labor saw its role more broadly—as one of service to the needs of all workers—labor would regain popular support because the labor movement would contain something for everyone.

When we pose the question as Trumka has, asking why labor law has failed, we necessarily impose limits upon the answer at which we will arrive. I believe that we should ask instead how labor law must evolve if it is to succeed in our nonindustrial society.

¹¹ Trumka, *supra* note 1, at 872.

¹² *Id.* at 875.

¹³ For example, Trumka speaks of the days (presumably prior to the Wagner Act) "where the employer cannot fire a worker at will." Trumka, *supra* note 1, at 873. On the contrary, however: "[f]ifty years ago a foreman could discharge an employee for any reason or no reason." A. COX, D. BOK & B. GORMAN, *LABOR LAW* 11 (10th ed. 1986). Today, with the advent of collective bargaining agreements containing just cause provisions, and, in the nonunion sector, the burgeoning body of wrongful discharge and Title VII litigation, that is frequently no longer true.

¹⁴ See National Labor Relations Act § 1, 29 U.S.C. § 151.

