

June 1987

# Comments on Richard Trumka's Why Labor Law Has Failed

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## Recommended Citation

Lance Compa, *Comments on Richard Trumka's Why Labor Law Has Failed*, 89 W. Va. L. Rev. (1987).

Available at: <https://researchrepository.wvu.edu/wvlr/vol89/iss4/6>

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## COMMENTS ON RICHARD TRUMKA'S *WHY LABOR LAW HAS FAILED*

LANCE COMPA\*

I share all of Brother Trumka's sentiment and agree with most of his analysis, but I arrive at a different conclusion. Rather than calling for the abolition of the National Labor Relations Act (the Act), American working people and their unions should continue the fight to reform the nation's labor law.

It is tempting to assert that unions should take their chances with common law, judges, and juries instead of a federal statute and a specialized agency set up to enforce it. After all, things could hardly get worse. The National Labor Relations Board (NLRB) is dominated by anti-labor zealots whose bias against unions is so pronounced that we, along with most of the labor movement, have lost nearly all confidence in that body as a recourse for the abuse of workers' rights.

But I am not convinced that labor unions would fare better at common law or before judges and juries. It was precisely the failings of the common law and strike-breaking injunctions by judges that spurred our labor movement to seek protective legislation earlier in this century. I question whether judges and juries would be more enlightened today, considering the barrage of anti-labor propaganda on which Americans are raised. The situation in West Virginia might be better, where unions are more respected and judges are elected. But that is not the case in many parts of the country, perhaps most.

The political and economic climate of the 1980s is much like that of the 1920s. Without federal labor law, an unregulated test of power between employers and workers would amount to a struggle between the lion and the lamb. Only one gets up and burps.

I do not consider it an admission of failure or of weakness to acknowledge the employers' inherent advantage in a capitalist society. Workers must seek legislative protections in a market economy because the market, left unattended, works inevitably to their detriment. That is why we have minimum wage laws, occupational safety and health rules, pension regulation, and the National Labor Relations Act. Sharp criticisms can be made of each of them, but our challenge is to reform them, improve them, and enforce them on behalf of workers, not to abolish them.

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That much being said, I want to rush to agree with Brother Trumka's account of the workings of the National Labor Relations Board in the administration of President Ronald Reagan. The NLRB has failed to carry out the explicit national policy declared in section 1 of the Act: "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing," and "encouraging the practice and procedure of collective bargaining."<sup>1</sup> Employers routinely fire workers who lead organizing drives, and threaten to shut down the workplace or otherwise punish employees for organizing. Where workers stand up to such pressure and vote in favor of union representation, employers shift to bad faith bargaining to prevent agreement on a first contract, then provoke a strike or sponsor decertification moves to get rid of the union.

All of these actions by employers are unfair labor practices that the law is designed to remedy. But in the real world, employers scoff at the toothless penalties, take advantage of interminable delays, and deliberately break the law which allegedly protects the right to organize and bargain.

The temptation is to blame President Reagan and his appointees on the NLRB for this turn of events. But Brother Trumka rightly points out that the problem runs much deeper, into the heart of the law itself.

*Business Week* is hardly a champion of the labor movement, but in 1948 that publication declared, with remarkable prescience, that "The Taft-Hartley Act went too far . . . . Given a few million unemployed in America, given an administration in Washington which was not pro-union— and the Taft-Hartley Act conceivably could wreck the labor movement."<sup>2</sup>

"Repeal Taft-Hartley" was once a powerful rallying cry in the labor movement. Today it sounds about as compelling as "Who Lost China?" And yet Taft-Hartley established the legal structure that has squeezed organized labor into its current tight spot.

The Taft-Hartley amendments to federal labor law came a dozen years after passage of the Wagner Act, the monumental breakthrough for the American labor movement. Before the Wagner Act, workers had no legal protection for collective action. Employers could carry out reprisals against organizers, refuse to bargain, and refuse to sign an agreement after bargaining. The only recourse for workers was the strike to obtain recognition, to compel bargaining, to reinstate fired leaders, and to win a written agreement.

The Wagner Act rang out new freedoms to organize and bargain without fear of discrimination, and charged the NLRB with enforcing the new law. Em-

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<sup>1</sup> National Labor Relations (Wagner) Act § 1, 29 U.S.C. § 151 (1982).

<sup>2</sup> *Why the Taft-Hartley Act Failed*, Bus. Wk., Dec. 18, 1948, at 124.

employers could no longer retaliate against workers trying to organize, and the NLRB would conduct secret ballot elections to determine majority sentiment. If a majority of employees chose union representation, the employer had to bargain in good faith toward a contract.

Millions of workers flocked to the new unions in the John L. Lewis-led Congress of Industrial Organizations (C.I.O.), as well as to the older American Federation of Labor unions. Organized labor's ranks more than tripled between 1935 and 1945, from fewer than four million to almost fourteen million members.

But employers, backed by the courts, mounted an assault on the Wagner Act after World War II. Red-baiting attacks on C.I.O. unions prepared public opinion for a management offensive. And, militant C.I.O. strikes in 1946 spurred by a high rate of inflation and disclosures of wartime profiteering fed accusations that unions had become "Big Labor," rivalling the power of Big Business.

The Taft-Hartley Act put a "right to refrain" from union activity on a par with the right to organize and bargain. In its key section 8(c), the Act codified antilabor court decisions allowing employers to campaign openly and aggressively inside the workplace against their own workers who wanted to organize.<sup>3</sup>

Taft-Hartley also gave the President authority to obtain strike-breaking injunctions;<sup>4</sup> established a new class of union unfair labor practices;<sup>5</sup> permitted states where employers maintained a tight grip on government to enact "right-to-work" laws;<sup>6</sup> outlawed solidarity job actions;<sup>7</sup> allowed strikebreakers to vote in NLRB elections;<sup>8</sup> let workers bypass union representation to take up grievances individually;<sup>9</sup> and required loyalty oaths from union officials—a provision later revoked,<sup>10</sup> but not before it was used to sow divisions in the labor movement, leading to the expulsion of unions considered "too radical."

Labor's drive to repeal Taft-Hartley was stifled by the Cold War and by continuing economic expansion that lulled the movement into a false sense of security. Unions were firmly entrenched in key industries where they represented a solid one-third of the workforce. Collective bargaining revolved around how much could be gained in a new contract. The labor movement was a powerful player in American politics, winning steady legislative gains in Congress and in

<sup>3</sup> Labor Management Relations (Taft-Hartley) Act § 8(c), 29 U.S.C. § 158(c) (1982).

<sup>4</sup> *Id.* at § 208, 29 U.S.C. § 178 (1982).

<sup>5</sup> *Id.* at § 8(b), 29 U.S.C. § 158(b) (1982).

<sup>6</sup> *Id.* at § 14(b), 29 U.S.C. § 164(a) (1982).

<sup>7</sup> *Id.* at § 8(b)(4), 29 U.S.C. § 158(b)(4) (1982).

<sup>8</sup> Famous Indus. Inc., 220 N.L.R.B. 484 (1975); Pacific Tile & Porcelain Co., 137 N.L.R.B. No. 169 (1962).

<sup>9</sup> Labor Management Relations (Taft-Hartley) Act § 9(a), 29 U.S.C. § 159(a) (1982).

<sup>10</sup> *Id.* at § 9(h), 61 Stat. 146 (Repealed 1959).

strong labor states. Employers largely accepted unions, even if reluctantly, as part of the business landscape.

But in the 1970s the economy stopped expanding, and the labor-management entente came to an end. Labor representation has fallen below one-fifth of the workforce, strikes are routinely broken, and contracts are going backward more than forward. The conditions only speculated upon by *Business Week* in 1948<sup>11</sup> are those that prevail today: millions of unemployed workers desperate for jobs, and an administration in Washington whose respect for labor rights was best signalled by its smashing of the air traffic controllers' union. In this context, the current NLRB is simply carrying out the program that has always been implicit in the Taft-Hartley Act, namely, breaking the strength of organized labor in the United States.

Given a choice between jettisoning labor law and engaging in a test of sheer force with the corporations, on one hand, or seeking labor law reform to restore the protective shield of federal power, I believe the labor movement must opt for the latter. Our goal should be a return to the principles of the Wagner Act, putting the law on the side of workers and their unions.

The principles of the Wagner Act were simple. Questions of organizing, of bargaining, or taking any form of collective action lay where they belonged: in the hands of the workers themselves, free from outside interference. The law recognized a basic fact about capitalist economy: that employers inherently hold the upper hand in the workplace, based on entrepreneurial control and management authority. Accordingly, the law needed to side with workers to right the balance.

In sum, federal labor law and federal agencies that enforce the law should be partisan, pro-labor, pro-union, and pro-worker. To build their unions, workers need the confidence that comes with knowing the government is backing them up. Obviously, we are a long distance from such a state of events. But we should redouble our efforts to win labor law reform, not abolition.

The 1986 congressional elections saw the United States Senate shift to a solid Democratic majority in a clear repudiation of the Reagan program. By now, the furor surrounding the arms sales to Iran and the illegal diversion of funds to the Nicaraguan "Contras" has cracked the teflon presidency. More and more, American citizens are becoming fed up with big business abuses and Wall Street scandals.

President Reagan is effectively a lame duck, and a newly assertive Congress is beginning to move on progressive legislative proposals like national health insurance and plant closing protections. There is no reason that labor law reform

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<sup>11</sup> See *Why the Taft-Hartley Act Failed*, *supra* note 2 and accompanying text.

should not return to the top of labor's legislative agenda, especially if a reform-minded Democrat sweeps into the White House in 1988.

To achieve labor law reform, trade unionists will have to recall significant lessons of the Wagner Act period. Brother Trumka pointed us in the right direction when he called for labor action in "a world of struggle within the political and social arenas. . . ."<sup>12</sup> While I may disagree with his specific conclusion about abolishing the Act, Brother Trumka makes a forceful case, and provides an important insight, that over-reliance on labor law is a fatal error for trade unionists.

Important as it was, the Wagner Act did not itself liberate workers to begin organizing. Though the Act was passed in 1935, it did not take effect—and the newly-created NLRB did not really function—until the Supreme Court upheld the constitutionality of the measure in 1937, in the case of *NLRB v. Jones & Laughlin Steel Corporation*.<sup>13</sup> By that time, workers had already carried out a nationwide textile strike in 1933, general strikes in San Francisco and Minneapolis in 1934, sit-down strikes in Akron rubber plants and Toledo auto-light plants in 1935, the formation of the C.I.O. in 1936, and the 1936-1937 Flint sit-down action that organized General Motors.

The Wagner Act and the Supreme Court's decision to uphold it actually ratified freedoms that millions of American workers had already claimed in the shops, mines, mills, and streets. Progressive members of Congress voted for the bill out of sincere conviction, but others, even President Franklin Roosevelt and the Supreme Court majority, were moved more by a fear of uncontrolled industrial strife. The ongoing strikes and sit-ins meant that employers could not go to sleep at night certain that their workers would show up in the morning or, if they did, that they would do any work. For most in Congress and on the Court, the purpose of the Wagner Act was to restore stability to a shaken system of labor relations.

Still, the Wagner Act cannot be dismissed as an unnecessary sop to workers. Passage of the Act and approval by the Court electrified working people, emboldening them with the feeling that the weight of the federal government was on their side. The Act spurred the large-scale organizing drives of the C.I.O. and tough enforcement by the early NLRB helped workers overcome the resistance of such holdout employers as Ford and Westinghouse. In short, pro-labor laws encouraged organizing, bargaining and political action, but it took aggressive organizing, bargaining, and political action to win pro-labor laws.

In today's political and economic climate, workers cannot sit still and wait for the pendulum to swing back. To force reform of labor law, unions must wage a new round of strikes, solidarity actions, tough bargaining, aggressive organizing, and grass-roots political action.

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<sup>12</sup> Trumka, *Why Labor Law Has Failed*, 89 W. VA. L. REV. 881 (1987).

<sup>13</sup> *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

Whenever their unions have been backed to the wall, American workers have fought back with a burst of militant organizing from the Knights of Labor in the late nineteenth century to the Wobblies in the early twentieth century and the C.I.O. in the 1930s. Our labor movement advanced in spurts, not at a steady pace. It is precisely the kind of talented leadership and aggressive program for organizing and bargaining that Brother Trumka is bringing to the United Mine Workers of America (and to the labor movement as a whole) that will constitute the best lobby for labor law reform.