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Ordman: Fifty Years of the NLRA: An Overview

FIFTY YEARS OF THE NLRA: AN OVERVIEW

ARNOLD ORDMAN*

I. INTRODUCTION

In 1935 a Wagner-Connery bill, sponsored by a Senator from New York and a Congressman from Massachusetts, was enacted into law. It became the National Labor Relations Act (the "Act" or "NLRA"). It granted employees the right to organize and to bargain collectively through representatives of their own choosing. Industrial democracy was born.

The Act also created an agency, the National Labor Relations Board ("Board"), to assure implementation of those declared rights. The Board was given two primary functions: (1) to determine by conducting secret-ballot elections whether or not employees wanted a union to represent them and (2) to prevent unfair labor practices, and to remedy them when they occurred.

In 1947, twelve years after its original enactment, the Act, then popularly known as the Wagner Act, was amended by the Taft-Hartley Act. Employers, for the first time, were given statutory protection against unfair labor practices by unions. Additional protection was afforded employers in 1959 by the Landrum-Griffin amendments.

Fifty years have passed since enactment of the Act. Riven by controversy at its birth, the NLRA still has its adherents and detractors, some more strident than others. This is not surprising. Dispassionate appraisal is difficult in a field where fair evaluations can be clouded not only by crucial economic and financial considerations, but also by socio-economic and political philosophies. And, it should be at once conceded that categorical judgments are terribly vulnerable where so many variable factors, both objective and subjective, coexist.

It is the purpose of this paper to recount briefly some of the economic and political history of the Act, to demonstrate the volatility and the constantly changing nature of its subject matter, to list some achievements and some shortcomings of the Act, and to deal with some popular criticisms and suggested reforms. The author lays claims to no special insights other than those which might flow from long and intimate exposure to the operations of the Act and to much of the personnel involved in its administration.

An overview is essential. It is too easy to get bogged down in details. Yet, a half-century of experience should enable us to distinguish the forest from the trees.

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II. A HALF-CENTURY OF PROGRESS

Laments to the contrary notwithstanding, hindsight compels the conclusion that remarkable progress has been made in the American industrial arena. We tend to forget our history. In the latter part of the nineteenth century and the early decades of the present century, the American industrial worker was ruthlessly exploited. He rebelled. But the rebellion was quelled, frequently with the aid of Government. Throughout those years the American labor scene was often a sordid spectacle of violence, rioting, demonstrations, and sit-ins. The use of armed guards, police, and the military was an all too familiar phenomenon. It was hardly a flattering commentary when fifteen years ago, in a carefully documented study, two professors revealed that there had been more violence and bloodshed in American labor history than in any other labor movement in the world.²

This history goaded the conscience of the country and finally impelled Congress to enact remedial legislation. The National Labor Relations Act of 1935 capped a series of federal statutes which endowed industrial workers with certain basic rights.³ The NLRA expressly enunciated some of these rights and created a machinery to enforce them.

More than a legislative declaration was needed, however. Like other social legislation of the early New Deal, the Act was not enthusiastically welcomed in all quarters. Its constitutionality was attacked—indeed, respected legal authorities of that decade questioned its constitutionality—injunctive relief against the Board was sought, and often obtained from, courts many of which looked askance at what they perceived as burgeoning federal legislation impinging on private property rights. Indeed, almost two years elapsed before the Supreme Court of the United States declared the constitutionality of the Act, and then only by a one-vote margin.⁴

It would be comforting to report that resistance to the Act ceased with the issuance of that decision. It did not. Even modest utopias are not readily brought into being. Resistance to the purposes and policies of the Act is still manifest in much of the Board’s caseload. Indeed, hostile critics of the Act and the Board often point to that caseload as proof that the Act has failed and that the Act should be replaced or drastically revised. It merits only parenthetical note that this effort has failed. Over a succession of political administrations neither the executive nor the legislative branches of the Government has yielded to such demands. There has been for the past twenty-five years no popular groundswell of support for elimination or substantial reform of the Act. Advocacy for such action is largely confined to narrow partisan interests or public relations outlets subsidized by those interests.

The fact is that the violence and bloodshed which characterized labor relations more than fifty years ago is now virtually non-existent. Both management and labor have matured. The rascals among them are few.

III. THE BOARD’S CASELOAD

The size of the Board’s caseload is regrettable. But even that picture is not as bleak as some critics suggest. Everything must be seen in perspective. The great majority of employers, the great majority of unions, comply with the law. They do not appear before the Board. Thousands of collective bargaining relationships exist without resort to Board procedures and thousands of collective bargaining agreements have been executed and are operative without Board scrutiny. The short of the matter is that the federal labor relations law is being observed. It is working.

But this information is not publicized. Good news rarely makes headlines. Rather, headlines are made when the Board publicizes its caseload. At first glance, the figures appear frightening. In the abstract, they would seem to reflect an industrial society run amok in its resistance to federal labor regulation. And even otherwise careful observers sometimes jump to that conclusion. But the truth is that, seen in context, the Board’s caseload is minuscule when measured against the vast number of employees, unions, and employing enterprises covered by the Act.

As already suggested, the Board’s caseload is generated, for the most part, by the relative few in the ranks of management and labor who either adamantly reject the federal labor law or who, while ostensibly acknowledging the legitimacy of that law, stubbornly resist its processes when those processes are brought to bear against them. These offenders, frequently recidivists, do not, as a rule, raise novel or complex issues. Their offenses for the most part consist of blatant interference with organizational freedom and outright discharges for union activity on the part of management, and blatant violations on the part of unions. This is the basic pattern of most of the Board’s caseload: elementary and familiar violations by a small fraction of the labor and management communities.

A small portion of that caseload, however, arises from the very nature of the subject matter being regulated. This was foreseeable. The past fifty years have been a particularly dramatic era, not only in the development of national labor relations law, but, more importantly, in the evolution of the economic, technical, and even the corporate and union components of the industrial environment upon which and in which that law operates.

Few areas of contemporary legislative, administrative, and judicial action react more sensitively or more responsively to the push and pull of socio-economic forces. The changing industrial patterns, national and now international, constantly evoke new problems to which the Board procedures as well as the detailed provisions of the Act must be applied. Even problems which apparently have already been resolved sometimes take on a different format because the economic matrix from which they emerged has itself been significantly altered. Thus, the Act, in its brief half-century of existence, has had to confront and adapt to depressions, recessions,
wars and threats of war, inflation, deflation, high and low employment and unemployment ratios, the impact of competition from resurgent industrialization overseas, bursts of technological advancement (including the computer era), dramatic changes in union and management structure, affiliations and disaffiliations in the trade union movement, corporate mergers and conglomerates, and a vibrant civil rights movement with a concomitant emphasis on fair representation and seniority issues. Small wonder, then, that the Board’s caseload reflects these problems.

It follows that one prophecy can safely be made. Never will all labor relations problems be solved. The Board, so long as it exists, will never run out of work. This may be scant solace to the employees, employers, and unions who seek stability in their relationships and predictability in their obligations and benefits. But economic change and economic progress exact a cost, and that cost must be paid.

The situation is not wholly disheartening. History, even recent history, teaches us that there is a reservoir of ingenuity and goodwill in the ranks of labor and management. Confronted with a common problem, they can and do pool their efforts to come up with solutions. Thereby, they document a postulate too often forgotten: more often than not, governments do not solve problems; people do. Illustrative instances abound. Management and labor, without resort to the Board or the processes of the Act, have repeatedly and successfully resolved crises with which they have been confronted.

IV. THE NATIONAL LABOR RELATIONS BOARD IS NOT A SELF-ENERGIZING AGENCY

Also too often forgotten by the Board’s critics is the fact that the Board is not a self-energizing agency. It initiates no actions and generates no programs. To the extent it has rule-making powers, it has sedulously, and perhaps erroneously, refrained from exercising those powers. In practice, therefore, the Board asserts its jurisdictions and exercises its statutory powers only if and when its processes are invoked by the private parties who invoke those processes.

That is as it should be. Only scant references need be made to the Act or to its legislative history to document the case. Congress did not create the Board as an agency to mandate to management and labor the terms of their relationships. Congress did not create an industrial dictatorship; it fostered an industrial democracy. Congress recognized that management and labor are free institutions in a free society. It was desired and expected that labor and management would resolve their own problems and fashion their own relationships. The Board could help the parties get to the door of the bargaining conference room if the parties so desired. Once the parties are at that door, the Board must leave. Each of the parties can utilize its own economic strength to attain the bargain it seeks.

To be sure, rules were set down. The right of employees to have the freedom to organize and to bargain collectively through representatives of their own choosing was guaranteed. Neither management nor labor could trample upon these rights.
Unfair labor practices by both management and labor were proscribed. Within these limits a fair fight was contemplated and allowed. Management and labor could battle for the allegiance of the employees. Rival unions could vie for the employees’ allegiance. If labor could capture the allegiance of the employees, it could bargain on their behalf. Management could resist what it deemed to be inordinate union demands. Out of this contest a collective bargaining agreement could and almost invariably does emerge.

This was and is the congressional plan. And that plan has been fulfilled.

V. An Overview

Critics of the Act and the Board have been legion over the years. Admission to that legion is not limited. A bit of bias is not a detriment to admission. Some would even consider it an asset.

Also, expertise is apparently not required. After all, everyone knows a lot about labor relations. And the critics may even have been involved in a labor relations dispute in one capacity or another. Besides, the communications media, including newspapers, magazines, television, and radio, have given ample, albeit sometimes inaccurate and disjointed, coverage to labor relations disputes. What more is needed?

This is not to suggest that all critics of the Act fall in this category. But many, hostile and laudatory critics alike, do. Also there are those who may be described as institutional critics. These are individuals who, either in a personal or in a representative capacity, are the spokespersons for either labor or management, and bespeak the interests of their particular group. This does not, of course, demonstrate that their views or opinions are invalid. They may be quite germane and accurate. But a modest reserve before accepting those views or opinions is warranted.

Moreover, enough has been said to establish that the subject matter here is more complex than might appear to an unsophisticated observer. Not all the flaws and blemishes in the physiognomy of labor relations are attributable to the Board. As the Supreme Court emphasized in Garner v. Teamsters Union, much of the area of labor combat was designed by Congress to be free.

In the limited role which Congress did assign to the Board, its performance, as we have noted, has been quite creditable. But even on a generous appraisal, shortcomings must be acknowledged. As already mentioned, much of the Board’s caseload arises from offenders who stubbornly resist and repudiate federal intrusion into what they regard as their exclusive private domain. Perhaps more statutory provisions should be afforded to meet this problem, but that relief is not readily available. As all parties are painfully aware, the road to statutory amendment is a rocky one.

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4 Garner v. Teamsters Union, 346 U.S. 485 (1953). Disseminated by The Research Repository @ WVU, 1985
Critics suggest that there is an easy method available to abate the Board’s caseload: limit the Board’s jurisdiction to exclude many small enterprises not deserving of national attention. But, as is sometimes the case where facile remedies are suggested, statutory roadblocks may be overlooked or inadequately considered. Thus, section 14(c)(1) of the Act does provide that the Board may, in its discretion, decline to assert jurisdiction over any labor dispute involving any class or category of employees where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction. However, an important provision is added to section 14(c)(1) limiting the language which some critics find so alluring. The proviso reads that the Board “shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.”

Obviously, the statute limits the feasibility or legality of Board action, delimiting the exercise of its jurisdiction. But this is not the only drawback. The proposed change would concededly eliminate a large proportion of the cases which form the bulk of the Board caseload. But what would this achieve? A large proportion of offenders who consciously and deliberately flout the legislation would be let off the hook. They could gleefully smirk at their more conscientious and law-abiding colleagues who comply with the Act. More importantly, the right of the employee in the small enterprise seems no less worthy of consideration than the right of the employee in the large enterprise. The American employee is less anchored to his particular employing enterprise than his European or Japanese counterpart. Are we to inform him that his statutory rights are endangered if he elects to work for a smaller enterprise?

And at what cost? If the right to organize and bargain collectively is denied to any segment of the work force, the integrity of the administrative machinery is, pro tanto, impugned and the legislative purpose frustrated. This is the road to regression. We want no return to pre-1935 industrial relations patterns.

Another suggestion of critics, hardly novel, is to transfer certain functions of the Board to the courts. More specifically, this suggestion generally takes the form that the Board should retain the function of handling elections but that the function of prosecuting and deciding unfair labor practice cases should be turned over to federal district attorneys and federal district courts. Again, I make only brief reference to the fact that this also calls for a major statutory overhaul.

And this suggested reform calls attention to another paradox. Invariably, the suggestion that courts be assigned the unfair labor practice function finds itself in company with the criticism that the Board, which has been handling the unfair labor practice function, lacks knowledge of industrial life and the practical workings of collective bargaining. That some Board members may over the years have been

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vulnerable to this criticism is undoubtedly true, but no one has demonstrated that judicial appointees carry superior, or even equivalent, qualifications in this regard.

In addition, it only belabor the obvious to point out that the litigational delays (for which the Board is responsible at least in part, for which the Board can properly be criticized, and for which the Board should make more than surface efforts to remedy) would be severely aggravated if the Board's substantial caseload were superimposed on the heavy dockets which the courts already carry and about which they vehemently complain.

Court review serves an admirable function. But it serves that function eminently in its review of Board orders as presently provided in the Act.

Nor would there appear to be merit in the suggestion that the office of the General Counsel be abolished. Just as there is nothing in the nature of a judicial appointee that renders him better qualified than a Board appointee to pass on unfair labor practices, so a district attorney possesses no special attributes to assure superior performance in this area. Indeed, if at all, there is a prejudicial factor. The General Counsel has unreviewable power not to prosecute an unfair labor practice case. The district attorney would have that power also, and his motivation in the regard would be increased immeasurably by the twin objective of reducing his own caseload. I consider that unfortunate.

Indeed, years of direct experience and reflection persuade me that unreviewable discretion in the office of General Counsel to dismiss unfair labor practice charges is undemocratic, autocratic, and plain wrong in the first instance. Even internal review procedures designed to assure independent reappraisal of such dismissals are inadequate. No such power should be granted to a single individual in the labor relations area. Admittedly, the Supreme Court has so far not challenged—indeed, it has apparently recognized—the final authority of the General Counsel in this regard. I am satisfied, however, that given the proper case, the Supreme Court will rule to the contrary.

The question of who shall review the General Counsel's action of dismissal is more difficult. The Board should not be given that authority. Such a grant of authority would truly abolish the separation between the prosecutorial and judicial function for which the Administrative Procedure Act and the Taft-Hartley Act so wisely provided. Despite the greatest of reluctance, I would assign the review power to the federal district courts with the hope that the authority would be sparingly and scrupulously exercised.

There are other suggested changes with which I am not unsympathetic. One of these is that the Board's remedies have become too mechanical; that they are, in important respects, ineffective; and that the Board can devise remedies which are more effective in view of the broad statutory authority to "take such affirmative action . . . as will effectuate the policies of this Act." Too often, government
agencies and departments, as they grow older, suffer from hardening of the arteries. The zeal and the imagination which marked their early efforts fade away. The philosophy of "we've always done it this way" takes over. The fact that the old way may have become inadequate because of changing circumstances is disregarded. The well-worn path is easier to follow. I suggest that emphasis on more effective remedies would bring substantial dividends. In that connection, a review of Board procedures overall would not be amiss. In large part, those procedures have undergone little change since they were evolved by early Board pioneers.

A better public relations program would be in order. The Board should not be reluctant to assert the progress that has been made in the industrial relations arena. More importantly, the Board should make known its limitations. It is not a self-energizing agency. It was not created to impose management's view on labor, or labor's view on management. Yet, in essence, that is what certain of the strident voices in management and in labor are really seeking. That is what they are really complaining about. They do not want a neutral agency.

This underlies the recurrent cry, sometimes from management, sometimes from labor, that the Board is too political. Translated into plainer terms, the complaint is that the Board is deciding too many cases in favor of management, or in favor of labor, as the case may be.

It must be acknowledged that this criticism goes in cycles, that in liberal administrations it is management that complains; in conservative administrations labor complains.

But candor compels the admission that the complaint here is not wholly without substance. Ideally, this should be a government of laws, and not of men. But the unyielding reality is that administrators and adjudicators are men. Both appointing authorities and appointees have philosophies and orientations. Yet, men and women of integrity, in the discharge of their administrative and judicial function, resist the intrusion of their personal convictions when a question of legal interpretation is involved.

I believe this effort has been largely successful at the Board as at other administrative and quasi-judicial agencies. I would not deny that there has been, at different times and in differing degrees, a political impact on the Board's decisional processes. But I also believe that impact has been minimal. Moreover, the healthy restraint of appellate court review tends to preclude too violent swings if the direction of either management or labor.

Finally, I am aware of no complete solution to the problem. There is little reason to assume that district court judges are immune to political influences. Life tenure is suggested as a palliative here. But Supreme Court Justices also have life tenure and even that august tribunal is not immune to criticism that it is making political judgments. One significant advantage would be forfeited, however, by transfer of Board jurisdiction to the district courts. Whatever its shortcomings, labor relations law is laid down in the first instance by a single agency with nation-
wide jurisdiction. A uniform code of law is established. Will the labor relations picture be improved by entrusting the interpretation and application of the Act in the first instance to several hundred independent district court judges? I think not.

Not all criticisms of the Act and of Board processes have been listed here. Not all suggestions for Board reform have been here enumerated. But the criticisms here listed and the reform measures here enumerated should furnish ground for closer scrutiny of criticisms and reform measures not itemized here.

There is no intent to suggest here that the Board is immune to criticism and that neither the Act nor the Board’s processes are susceptible to improvement. That is certainly not the case.

But remarkable progress has been made in American industrial relations. Some of that progress is attributable to the Board. By the same token, there are still major problems which remain unsolved and the Board is not wholly free of blame in that regard.

As pointed out at the outset, the Board was given two principal functions to perform: (1) to conduct elections for the selection of a bargaining representative if the employees so desire and (2) to prevent and remedy unfair labor practices. Essentially and ideally, the second function should be ancillary and subordinate to the first. That ideal has not been realized. The function of conducting elections has operated admirably. But a dwindling of the unfair labor practice caseload has not occurred. It still consumes most of the Board’s time and resources.

This was not foreseen by the framers of the Act. They did not anticipate the stubborn resistance displayed by a small minority of the labor-management community to the processes of the Act. Nor did they anticipate the dramatic changes in the labor relations arena which would come to the cynosure of the Board.

For the Board, finding the answers to these problems was not and is not an easy task. The Board’s freedom of action in this regard is tightly circumscribed by the statutory framework in which it operates. The Board’s task would also be considerably lightened if, in bringing these problems to the Board and addressing them, labor spoke with a single voice and management with a single voice. Even then, the Board would have to be concerned with the often unarticulated public interest and the often unarticulated interest of the employee qua employee.

Yet, with increasing frequency, neither management nor labor speaks with a single voice. The interests of the large corporation often do not coincide with the interests of the small businessman and there are even differences within these separate groups. The divergent views among labor organizations, aggregates of labor organizations, and even within particular labor organizations is also familiar to informed observers. Predictably, business and labor are subject to and react to the forces of the marketplace.

But problems before the Board are not insoluble. In due course they will be solved. They will be solved faster if interested parties contribute their cooperation,
their energies, and their goodwill. Criticism should not cease. It is often warranted. Recommendations for changes should continue but with the caveat that such recommendations should be constructive.

Most importantly, the Board itself, collectively and as an aggregate of individuals, together with the General Counsel, must never forget that their mission is, not to implement their own views, but the policies and procedures of the Act they were appointed to administer. That Act has over the years served the nation well. May it continue to do so.