

COMMENT AND APPRAISAL

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The reading of the articles in this symposium has been for me an interesting and instructive exercise. It has, however, left me with the impression that the events of vital importance in connection with the NLRB occurred during the first few years, and that what has happened since, even including the enactment of the Taft-Hartley Act, has been, relatively, of little significance.

The real accomplishment of the NLRA was its creation of the right of working men to organize and join unions without being penalized for doing so. It is now almost forgotten that, before the NLRA there was no legally protected right of this kind of association. It was accepted constitutional doctrine that for a government to say to an employer that he could not, with impunity, discharge an employee for joining a union, was so great an interference with the employer's privileges that it was a violation of due process of law. And as to the Federal Government, it was accepted constitutional doctrine that it was beyond its constitutional powers to regulate labor relations even in our largest manufacturing and mining enterprises.

Employers were not only privileged to penalize employees for agitating for or joining unions, but most employers exercised that privilege. In the steel, automobile, rubber, chemical and most other well financed industries, unions were practically non-existent. There was much unemployment, so that the discharge of workmen, even in large numbers, for attempted unionization, created no hardship for employers. With no bargaining strength on the side of employees, wages sought their own level and the purchasing power of the consuming public declined with wages.

Some far-seeing statesmen in a deeply disturbed Congress saw that, just as the millions of farmers were ruining their market by each competing with all the others to sell their products in an over-supplied market, so millions of working men were, by the same kind of competition, depressing wages and purchasing power and contributing to the ruin of the national economy. As contrasted with the case of the farmers, where new and extremely complicated devices had to be invented, there was at hand, in the case of the working men, the device of the labor union to increase their bargaining power. In spite of the absence of legal protections, unions had survived, in crafts which had a monopoly of skills. The pattern was, then, at hand.

The essence of the Wagner Act was in Section 7.¹ It said:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively

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¹ 49 STAT. 452, 29 U.S.C. §157 (1935).

through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

The draftsmen of the Act thought that if that right could be made a reality, a critical economic problem would be at least partially solved. How could the right be made a reality? The traditional method would have been to make its violation a crime, punishable by fine or imprisonment. The draftsmen chose another device, that of an administrative, quasi-judicial board, with the power to administer the statute and issue injunction-type orders against employers who violated it. There was a pattern for this device in the existing Federal Trade Commission Act. The choice of the enforcement method was a critical one, and the right choice was made.

The legislators who drafted and enacted the statute must have had grave doubts as to whether the Supreme Court would hold the statute to be constitutional. A voluntary committee of more than fifty lawyers, many of them of real distinction, advised the public that it was unconstitutional, on both of the grounds referred to above.

A Board was appointed. It inherited the staff which had been doing what it could with the labor provisions of the National Industrial Recovery Act, and hence had the feel of the new legislation. This staff, and the new people who were appointed to the Board and staff, proceeded to administer the law as written, and in disregard of the wide-spread doubts as to its constitutionality. But those doubts cast a heavy burden of litigation upon the Board's legal staff, because many United States district courts granted injunctions against the mere holding of administrative hearings by the Board, on the ground that such hearings were a useless and expensive annoyance to the employers, and could not, in any event, result in anything but a final decision that the act was unconstitutional.

The Board succeeded, however, in getting five fairly typical cases through the stages of board hearing and decision, and the issuance of orders against the employers to cease and desist from unfair labor practices and to reinstate with back pay employees discharged for union activities. These cases were reviewed and decided in their appropriate circuit courts of appeal, and thus were ripe for Supreme Court review. They were all accepted for review by the Supreme Court, were argued early in 1937 and decided on April 12 of that year. The Court held that the Act and its procedure did not violate the due process clause, and that it was within the power of the Federal Government to regulate the labor relations of enterprises engaged in or producing goods for interstate commerce.

It was now possible for the Board to proceed with confidence to enforce the law. It had held in abeyance large numbers of cases which had been filed with it before the Supreme Court decisions, and after those decisions a new flood of cases came to it. Its staff and appropriation were inadequate, but Congress fairly promptly gave it a considerable supplemental appropriation. Its cases were investigated and presented by its

staff with diligence and care, and were decided by the Board in accordance with the law and the evidence. Most of the cases which went to hearing and decision resulted in some finding of unfair labor practice. This was to be expected, because the staff was under instructions to investigate the cases thoroughly, and not to waste the time and the funds of the agency by bringing to trial cases which did not have merit.

The hearing officers of the Board had a difficult assignment, because many employers and their lawyers, in spite of the Supreme Court decisions, regarded the proceedings as personal affronts to the privileges and dignity of the employers, and the hearing officers as meddlesome carpet-baggers. But upon review of the Board's decisions in the circuit courts of appeals, the care and precision with which the Board's staff prepared their cases was rewarded, when the Board's decisions were approved and its orders enforced in a large majority of the cases. The courts quickly acquired an understanding of this unfamiliar subject of litigation, and there was little in the courts' treatment of board decisions of which the Board could complain.

In brief, Section 7 became the law of the land. Most of the important industries of the country recognized it as such and began to obey it. Anti-union practices of long standing were reversed; if supervisors could not reconcile themselves to the new law they were replaced. In hundreds of instances, workmen who had, after the enactment of the law, been discharged for union activities were, as a result of board action, reinstated and paid for the time they had lost. There they were in the plant, living evidence of the law which gave workmen the right to organize and join unions. In plants where practically no workmen at all had been so foolhardy as to join a union before the law became effective, elections by secret ballot showed that a large majority of them wanted the union to represent them. Membership in the unions increased many fold, and their bargaining power increased accordingly.

Although only a few years intervened between the time when the Act really became effective, and the outbreak of the war, with its demands upon the nation's manpower, the experience of those few years indicated that the theory of the draftsmen of the Act was correct. Even when the demand for manpower was slack, wages did not go down, and thus contribute to a reduction in purchasing power. And experience since World War II has been the same. Our economy today rests on high wages and the enormous and widely distributed purchasing power resulting from those wages. It is constantly inflationary and has imposed great hardship on those who do not work for wages. But it is the fact, and it is largely the consequence of the power of labor unions, achieved by them under the protection of Section 7.

From the foregoing it is obvious that, in this writer's opinion, the able and interesting discussions in the other papers have to do with refinements of a structure which has undergone no essential change since it was

built. For instance, the questions treated in Miss Humphrey's paper of whether the Board should find an 8(5) violation without an election, or of how long an employer is obliged to continue to treat a union, once certified, as the bargaining agent of the employees, never were of vital importance. The bargaining power of a union which has a package of signed cards but does not have the support of the employees, or of a union which once had, but has lost, the support of the employees, will not produce much in the way of a bargain. In a particular case it may result in a decision that a strike was an unfair labor practice strike, with serious financial consequences to the employer. But only a union which has, currently, the loyalty of the employees, can bargain "from a position of strength."

The same may be said about Topic II of Miss Humphrey's paper, relating to "good faith bargaining." If the union has power enough behind it, it will get concessions on subjects as to which the employer would like to keep a free hand. If it does not have enough power it won't get the concessions. And so as to the employer's unwillingness to sign an agreement or to furnish information with regard to such matters as wage schedules.

The article of Messrs. Wollett and Rowen on employer speech, interrogation, espionage and surveillance as violations of Section 8(a)(1) shows that there have been interesting developments of Board doctrine on these subjects. A problem not discussed in the article because not relevant to the symposium is the intriguing one of whether a "clear and present danger" that a labor union will lose an election is of sufficient moment to override the employer's right to freedom of speech. The authors' explanation of the Board's increasing tolerance for employer speech as a result of the increased strength of labor unions and their greater capacity to defend themselves seems to me to be correct. The express statement in the Taft-Hartley Act that speech could not lawfully include threats or promises was, in effect, a confirmation of Board doctrine. But the question whether a particular speech does contain a threat or a promise, rather than an argument, is often subtle and difficult to answer.

The "captive audience" problem is one in which the factual situations are more or less alike, and the deciding tribunal therefore has the hope of laying down a doctrine which will decide all the cases. But no really satisfactory doctrine has evolved. The fairly solid property rights of the employer, on the one hand, and the rather tenuous rights of the employees to be let alone, on the other; the fact that some employees would be influenced while others would be repelled, by what the employer says; these factors make the problem a hard one to solve. The same may be said of the interrogation of employees. I think the Board has shown good judgment in its treatment of these questions.

As for surveillance and espionage, the authors' discussion of what

the Board might decide in certain situations is necessarily abstract. Espionage of which the employees are unaware, and which is not followed by more tangible unfair labor practices such as discharges, is hardly likely to be the subject of Board proceedings.

Mr. Van Arkle's paper says that, with regard to a number of questions listed by him relating to representation and elections, the Board was at first liberal in allowing employees freedom of choice as to such questions as the frequency of elections, and the bargaining unit, whether it should be craft or industrial, or should be limited to one or several plants of the employer. But, he says, the Board has, during its twenty years, restricted this freedom in the interest of protecting settled collective bargaining relationships.

I think Mr. Van Arkle has proved his thesis. Taking the so-called *Globe*² doctrine for an example, the sort of local option by which the members of a craft could segregate themselves from an industrial unit if a majority of the craft so desired it was, at least at the time of its promulgation, a fair and logical doctrine. Industrial unions were still new, were really still experimental. There was, officially, mortal enmity between the AFofL and the CIO. For the Board to have forced the AFofL craftsmen into a unit where their spokesman at the bargaining table would have been a CIO agent, would have been quite intolerable. The CIO had, or was thought to have, egalitarian ideas which might not have recognized the worth of the special skill of the craftsmen. Thus it would have been emotionally offensive and might have been economically unfair to deny freedom of choice to the craftsmen. And I thought, and still think, that even by the time of the *American Can* decision,³ it was not fair to deny the craftsmen their option, just because there had been a year or two of bargaining on an industrial unit basis. I thought that having in the bargaining unit an important group not really willing to be represented by the spokesman for the unit would not make for tranquil relations. But the Board has, as Mr. Van Arkle says, tended, with fluctuations, to refuse to sanction a change in the unit, once it is established. It would be interesting to have a follow-up on the decisions to see whether the industrial unions have succeeded in digesting what they have, with the sanction of the Government, swallowed, and whether the employer is happy in having only one interest represented on the other side of the table.

The early attempt of the Board in the *Aluminum Company*⁴ and the *Axton-Fisher Tobacco Company*⁵ cases, to require the unions to compose their inter-union disputes before coming to the Board, was frustrated by the AFofL—CIO split. Mr. Van Arkle's view that now there is a considerable amount of dependable extra-legal machinery for the settle-

² *Globe Machine and Stamping Co.*, 3 N.L.R.B. 294 (1937).

³ *American Can Co.*, 13 N.L.R.B. No. 126 (1939).

⁴ *Aluminum Company of America*. 1 N.L.R.B. 530 (1936).

⁵ *Axton Fisher Tobacco Company*. 1 N.L.R.B. 604 (1936).

ment of such disputes, and that the board should keep hands off and let that machinery operate, seems sound.

The tendency of the board to regard contracts for longer periods as bars to the election of new representatives seems to the writer to be a natural development. Workmen have settled into their union relationships more fully than they had in the early years, and are not so likely to change unions on short notice. But, as has been said above, if the union has in fact lost the support of those who voted it in, it can't do effective bargaining even though the Board still requires the employer to bargain with it.

Professor Forkosch's paper shows that there has developed, under the Act, an elaborate experiment in Federal-State relationships. The unwillingness of Congress to put a quantitative limit on the enterprises to which the original Act should apply; the unwillingness of the Supreme Court to draw such a line, when Congress had not done so, though it was suggested to the Court by counsel for the Board that such a line might be drawn; the budgetary and administrative problems facing the Board if it assumed all the jurisdiction which the Act granted to it; these are at the root of the problem. This writer is not aware of any similar legal situation. It is as if a county sheriff should announce that, because of a lack of manpower and equipment, the law relating to certain named lesser offenses would not be enforced. If, without announcement, he had in practice ignored such lesser offenses, the existence of the law might deter violation, since, in any particular case the law might be applied. In the case of the NLRB, the announcement and the practice leave an important no-man's land. A state cannot, even if it is willing, fill the gap, unless it enacts a replica of the Federal statute and administers its law substantially as the Federal law is administered. If one or several states should do that there would still be a complete lack of uniformity in the application of Federal law in the different parts of the country.

Professor Forkosch has made this problem the subject of what seems to me to be a remarkably acute analysis, and has indicated what should be the answers to the many different questions that can arise. The really troublesome situation that develops out of the Board's announcement of quantitative limits on the type of cases it will take have not been litigated, and perhaps cannot be litigated because the statute does not direct, but only "empowers" the Board to take any case at all. Yet the present practice seems to this writer to be impossible. It seems to mean that an employer whose business is small but is otherwise just like that of a larger employer against whom the Board would proceed, can with impunity, discharge his employees for joining a union. His action would be in direct violation of an applicable Federal law, yet his immunity from the sanctions of the law has been assured to him by official announcement.

In the early years of the Board, such small cases were taken, though

there was no lack of large cases to occupy the time of Board and staff. Now there is much wider recognition of the law, much more voluntary compliance, and much greater power in unions to retaliate against violation. It would seem that small employers who are covered by the Act would, if they were not granted immunity, usually obey the law, and the Board would not be greatly burdened by the handling of such cases as would need to be handled. So far as holding elections is concerned, the Board's skill and efficient machinery is such that that should not be a great burden. The present situation is legally anomalous and must result in unequal and unfair treatment of employees. If the real purpose of the Board in renouncing a part of its jurisdiction is to relieve small employers from obedience to the law, the renunciation has no justification at all. Obedience to this law is not a burden. It involves no reports, no paper work, no keeping of records. Except for the duty to bargain, one obeys the law by doing nothing at all. Even if it were a burden, it is the law, and should not be set aside by those appointed to administer it.

I do not find in these excellent articles, nor does my own observation of the work of the Board during its first twenty years indicate, any considerable evidence that this law, in action, has been swayed by the political or economic outlook of its administrators. The Board's decisions run well beyond one hundred volumes, and, although they deal with a subject on which feelings run high, and which is tied to a constantly changing economic situation, there is, I think as great a consistency of doctrine in these volumes as any admirer of *stare decisis* could wish. I think the Board is an example of the advantages of the administrative, quasi-judicial tribunal, combining an unusual understanding of the subject matter with which it deals, with a judicial attitude toward its decision-making functions.

As with any important law, after its main principles are established there are many fine points on its margins which still have to be litigated. These cases are important to the litigants, and important to the law, since their correct decision is necessary to keep the main structure from being eroded at its margins. But, in comparison with the work of laying the legislative and constitutional foundations of the law, and getting its central principle, the right of employees to organize unions, established, this marginal litigation is like a cold war, or at most a guerrilla war, as compared to a full-scale shooting war.

I congratulate the Board upon its approaching twentieth birthday. In my opinion, the Board and its staff have administered the law with unusual skill and diligence, and, under this administration the law has achieved its declared purpose to a greater degree than any other important statute of which I am aware.