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Chamberlin, Bradley, Reilly and Pound: *Labor Unions and Public Policy* & Gregory: *Labor and the Law*

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LABOR UNIONS AND PUBLIC POLICY. By *Edward H. Chamberlin, Philip D. Bradley, Gerard D. Reilly* and *Roscoe Pound.* Washington, D.C.: American Enterprise Association. 1958. Pp. 177. $4.50.

LABOR AND THE LAW. 2d ed. By *Charles O. Gregory.* New York: W. W. Norton. 1958. Pp. 580. $6.50.

The fact that the West Publishing Company has given the subject of labor relations the distinction of an entire volume of the *Sixth Decennial Digest,* a promotion from the stepchild position it formerly occupied under "Master and Servant," is, I suppose, something that can be called symbolic. Clearly, anyone who reads his newspaper—and particularly a lawyer who reads his advance sheets—cannot but be aware of the tremendous growth and impact of labor relations law within the past decade—the decade of the roving situs, the decade of preemption, and the decade of Dave Beck. The intense activity with which the course of labor relations law has been marked is evident to all. New rules and rulings, new doctrines, new laws and new investigations have managed to keep the

5 285 U.S. 22 (1932).

labor relations practitioner on his toes, if not completely exhausted with its pace.

This onrush of new developments makes it almost imperative to understand the background and the trends in this area. Two recent books, in their own divergent ways, go after this "big picture."

The first item of the three-page index to *Labor Unions and Public Policy,* a collection of four essays published by the American Enterprise Association, reads as follows: "Abuses by labor, 2, 20, 23, 43, 45." This indexing is misleading; the entire book is devoted to the views of four authors substantially to the effect that almost everything that goes on in the field of labor-management relations these days is an abuse by labor, a result of an abuse by labor, or something that will probably lead to an abuse by labor. Despite a few comments sprinkled throughout the work protesting the basic impartiality of everyone concerned, it is clear that the authors and the association responsible for the publication intended the work to be basically a conservative and anti-big-labor publication. Now there can be no doubt that a good, well-written volume espousing this philosophy is needed and would find not a few adherents, but, unfortunately, this is not the volume. With the exception of the one distinctly nonlegal article, the monographs leave much to be desired in the quality of their editing, writing, and authentication.

The book starts out with a very provocative and well handled piece by Professor Edward H. Chamberlin of Harvard, "The Economic Analysis of Labor Union Power." Although Professor Chamberlin's thesis (unions have too much economic power and something should be done about it) is a simple one, he presents it in a most persuasive manner. Organized labor's economic power, says Professor Chamberlin, can be credited with at least one thing if nothing else: it has, through its iron grip on the labor market, forced the economy into an inflationary spiral due to the irrefutable wage-price economic relationship. In so doing it has tended to make the economy an artificial one by destroying the "free labor market" of competitively determined wages and by substituting a fixed cost labor market. The author forcefully points out that similar activity in the raw materials or product market by businessmen would have long ago become the subject of a Holy War by the Antitrust Division and the FTC. Because, Professor Chamberlin points out, of the unchallenged acceptance by governing liberal thought of the sacred nature of organized labor, the situation shows no signs of abating or being corrected. Professor Chamberlin's suggests: Collective bargaining must be broken down into smaller units and legislation enacted along the general lines of the antitrust laws to free the labor market part of our economy from the iron grip of the monopoly of organized labor.

Professor Chamberlin's analysis is basically an economic one and there are surely scores of liberal economists, committed to the dogmas which he so capably exposes, who are ready to do battle with him on his own ground.

Since this reviewer does not purport to be either a liberal or an economist, it will suffice here to say that the monograph is interesting and provocative and deserves to be read and discussed.

After this good start, the rest of the volume is disappointing. Another economics professor, Philip Bradley, writes on "Involuntary Participation in Unionism." What Professor Bradley sets out to do is dissect the famous freerider argument against the open shop into its three component parts: (a) Unions create benefits for (b) both members and nonmembers (c) which the nonmember enjoys for nothing in the open shop. Professor Bradley concludes his discussion of point (a) by merely citing twenty or so articles which he says indicate that unions do not in fact get the workers they represent anything more on an absolute or real scale than management gives non-unionized workers. No independent empirical data or proof of this proposition is presented. Thus, contends Professor Bradley, unions do not really obtain economic benefits. Professor Bradley next touches briefly on point (b) and then returns to a restatement of what has gone before, to wit, that since there is no real benefit obtained by unions it is illogical to say that these benefits are passed on to member and nonmember alike. Point (c) is not specifically discussed. If the free-rider argument is simply phrased in terms that all employees in a given bargaining unit participate in wage increases or other benefits, *such as they may perhaps be, and short-run as they may perhaps be,* negotiated by the union as lawful collective bargaining representative, the argument stands up and has some merit, although certainly it does not necessarily justify the whole principle of involuntary unionism.

Mr. Gerard D. Reilly follows with a discussion of "States Rights and the Law of Labor Relations." Mr. Reilly's conclusion is that the states do not have many rights under the law of labor relations. Mr. Reilly laments this state of affairs, as well he might, but his analysis of the basic problems involved is not adequate. He starts out with a fairly stock review of the line of cases commencing with *Bethlehem Steel Co. v. N.Y.S.L.R.B.*[1] and ending with *Guss v. Utah L.R.B.*[2] He then jaunts quickly through the question of state right-to-work laws under section 14(b) of the amended NLRA. Mr. Reilly strains very hard to convince us that the union shop proviso in section 8(a)(3) "is not the Federal standard but simply a grant of power to the states to allow contracts inconsistent with the general Federal policy. . . ."[3] Just why it is so important to belabor this question does not appear, but what does appear is Mr. Reilly's clear sympathy with state right-to-work laws. The final parts of Mr. Reilly's monograph are devoted to a discussion of the NLRB doctrine that activity in violation of state laws on the picket line is an unprotected

1 330 U.S. 767 (1947).
2 353 U.S. 1 (1957).
3 At p. 107.

activity, and a discussion of the no-man's land created by the *Guss* case. Mr. Reilly would solve this latter problem by having Congress enact a general law to provide that federal legislation will not supersede state regulation unless there is a direct and positive conflict. This reviewer, for one, is inclined to question just how effective this broad and general legislation will be and would, on the other hand, much prefer to see enacted in the specific labor law field legislation such as the Smith bill,[4] which would permit state courts or agencies to assume jurisdiction when the Board chooses, for reasons best known to it, to decline jurisdiction.

The final article in this book is "Legal Immunities of Labor Unions" by Dean Roscoe Pound. A review of this article is made somewhat difficult by the reluctance with which anyone criticizes a work by so outstanding an individual. In all frankness, however, it can only be said that Dean Pound's monograph is nothing more nor less than a long recitation of complaints concerning bad decisions in labor law. It is disconcerting to find the article as the third which deals with the compulsory unionism question in the four-article volume. Presumably, it was the editor of the work who found it necessary to preserve in the article a twenty-two page introductory section concerning historical immunities of various social and economic classes.[5] When we finally get into the area of labor relations law, Dean Pound tends to overlook recent trends and recent decisions establishing liability of labor organizations for torts, for breach of contract, etc.[6] Instead, he cites 1938 and 1940 decisions of the court of appeals upholding prehistoric NLRB doctrine, e.g., reinstating strikers who engaged in violence on the picket line.[7] Decisions such as these hardly represent existing labor relations law. This is not an apology for the excesses of the NLRB in the kangaroo court days of the 1930's and 1940's, but simply a disapproval of the recitation of those excesses in this context.

If there is anything more disconcerting to a conservative than finding a conservative book he doesn't like, it is finding a book by a liberal that he does like. This is at least this reviewer's reaction after finishing Professor Charles Gregory's masterful second edition of *Labor and the Law.* This book, originally published in 1946 and revised in 1949, reviews

[4] S. 3099, 85th Cong., 2d sess. (1958).

[5] E.g., at p. 135 is such relevant information as the fact that the French nobility were given punishments "less rigorous than those to which the commonalty were subjected. . . ."

[6] See, e.g., §§301 and 303 of the Taft-Hartley Act and such recent and vital cases as I.A.M. v. Gonzales, 356 U.S. 617 (1958) and Automobile Workers v. Russell, 356 U.S. 634 (1958). Admittedly these cases were decided after Dean Pound's article was written, but the fact is indisputable that the trend over the past decade, both in court decisions and legislation, has been toward *increased* labor union liability.

[7] Pound cites NLRB v. Elkland Leather Co., (3d Cir. 1940) 114 F. (2d) 221, for the proposition that the Board may order reinstatement of strikers who commit violence on the picket line. This is certainly not a fair representation of the law today. See, e.g., New Hyden Coal Co., 108 N.L.R.B. 1145 (1954); Brookville Glove Co., 114 N.L.R.B. 213 (1955); American Tool Works, 116 N.L.R.B. 1681 (1956).

American labor relations law from its birth down to its present respectable middle age. Professor Gregory is very careful to write both for the interested layman and the attorney without making his style too complex for the former or too condescending for the latter. The appeal is certainly as universal as could be hoped for. Professor Gregory's scheme is to take a specific subject or subsection of labor relations law and follow it from its beginnings to, in some cases, its complete demise. This is the treatment he applies to the early doctrine of conspiracy, the later era of the unlawful purpose doctrine, the labor injunction problem, the Norris-LaGuardia Act, and the National Labor Relations Act. The stories of the application of the antitrust laws to labor and the rise and fall of the *Thornhill* doctrine are told with great relish and obvious enjoyment. Perhaps, in fact, a little too much space is devoted to these two topics, at least as far as the practicing attorney is concerned, for they both are, of course, simply interesting historical relics.

To the practitioner used to working his way through the innumerable citations of the labor law services, Gregory's style of hitting the high points and intensively analyzing the important cases is indeed refreshing. Clearly, as far as he is concerned, anyone can go and unearth the trivia (otherwise known as the "fine points") in labor law, but it is really the few big cases that need and demand careful attention and analysis. This attention is certainly given to them. The only subject which is inadequately treated, in this reviewer's opinion, is the all-important one of federal preemption. The subject is treated sketchily in at least three different places in the book. This is the type of subject which Gregory could handle well, and a full and separate chapter should have been devoted to it. Also, it is possible that Gregory's practice of skipping from high point to high point could obscure from the interested lay reader a clear indication of just what the NLRA provides and how its all-important anti-interference and coercion and anti-discrimination provisions work.

Professor Gregory is no Cassandra as far as the present status of labor relations law is concerned. He has several specific suggestions to make but no panaceas to offer, and no indication is given that matters are seriously out of balance at the present time. He suggests, first of all, that section 8 (b) (4) (A) should be rewritten in some form other than the "dreadful mess" it is now. I suppose it is somewhat unorthodox to take a contrary position on this particular point, but the suggestion might be made that such a thorough overhaul might do more harm than good, inasmuch as a considerable and fairly equitable line of case law has been built up under the present language. Professor Gregory also suggests the doing away with the good faith bargaining requirement as to both employers and unions, a very welcome and refreshing suggestion that would eliminate the NLRB as a potential second-guesser on the subject of how bargaining negotiations should be conducted.

The final and really noteworthy suggestion of Professor Gregory con-

cerns a solution for critical industry-wide strikes, and he poses it without so much as batting an eyelash. What Professor Gregory would like to see is immediate seizure by the federal government, under specific legislative sanction, of the affected industries, actual management by the federal government in exchange for payment to the industry of a reasonable rental price, and labor and management packed off into the woods to bargain quietly by themselves until they reach agreement. Professor Gregory thinks quite highly of this scheme and minimizes the possibility of successful constitutional attack, but one is led to doubt whether such a drastic scheme would ever get by the Congress in the immediate future.

The label of "liberal" as applied to Gregory seems to be warranted not only by this latter suggestion but also by his admiration for what he terms as "real liberals" or "true liberals."[8] However, his basic philosophical convictions do not impair his impartiality in this field (an impartiality which has made him a leading arbitrator). He can be just as caustic about early employer anti-union tactics as he can be about latter-day union organizing tactics, and neither side of the Supreme Court escapes the sting of his sarcasm. Justice Black in particular gets this treatment by Gregory, who recognizes the former's "readiness to recognize the board's administrative ingenuity in modifying Congress' intent when it would help certain unions and his inability to appreciate this quality when the immediate consequences were not to his liking."[9]

One subject that is treated only briefly at various parts of the book, and treated perhaps inconsistently by Gregory, is the subject of minority and/or stranger picketing. In discussing pre-Wagner Act common law, Gregory has little use for the decisions which enjoined this type of picketing on the ground that the unions engaging in it had no legitimate interest to justify their action. Later on, however, in discussing section 8 (b) (4) (C) of amended NLRA, he seems to criticize the failure of Congress to protect labor-management stability by prohibiting picketing where there is an incumbent although uncertified union, and he also seems to approve the Supreme Court's position in the *Gazzam*[10] case, which involved this basic problem. Since Gregory's work, the law on this subject has changed fairly drastically with the promulgation by the Board of the doctrine that recognitional minority picketing is illegal under section 8 (b) (1) (A).[11] The reasoning used by the Board is the same reason-

8 At pp. 304-305.

9 At pp. 392-393.

10 Building Service Employees Union v. Gazzam, 339 U.S. 532 (1950).

11 Curtis Bros., Inc., 119 N.L.R.B. No. 33 (1957); I.A.M., Lodge 942, 119 N.L.R.B. No. 38 (1957); Operating Engineers, Local 12, 119 N.L.R.B. No. 39 (1957); Ruffalo's Trucking Service, 119 N.L.R.B. No. 144 (1958); Paint, Varnish & Lacquer Makers Union, Local 1232, 120 N.L.R.B. No. 89 (1958); Retail Store Employees Union, Local 1595, 120 N.L.R.B. No. 189 (1958); Local 912, I.B.T., 120 N.L.R.B. No. 199 (1958); New Furniture & Appliance Drivers, Local 196, 120 N.L.R.B. No. 219 (1958).

ing adopted by the Supreme Court in an entirely different context in the *Gazzam* case, to wit, that this type of activity is deliberately intended to put the employer under pressure, to force him to recognize the union, thus coercing his employees into joining. Clearly, this is not only the correct analysis but the only analysis, and, just as clearly, the analysis should not be limited to something which is administratively determined to be "recognitional" in nature.[12] It may be doubted if there is still extant anything like pure "organizational" picketing, if there ever was. Anyone with any experience with a situation such as this must recognize that the primary objective of stranger or minority picketing is coercion of the employees *through* pressure on the employer, and as such subject to the prohibitions of the amended NLRA.

Gregory's work deserves to be read by all labor law specialists and, for that matter, by all lawyers who, though generally not intimately connected with the labor field, have occasion to want to have a basic understanding of the area.

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[12] See, e.g., for an indication that this old distinction is bothering the NLRB, Local 420, I.B.T., 120 N.L.R.B. No. 19 (1958); Joint Council of Sportswear, 120 N.L.R.B. No. 90 (1958).