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Foreword: Observations of the Fiftieth Anniversary of the National Labor Relations Board: Reflections on Its Past and Projections on Its Future

Howard Jenkins Jr.

FOREWORD

OBSERVATIONS ON THE FIFTIETH ANNIVERSARY OF THE NATIONAL LABOR RELATIONS BOARD: REFLECTIONS ON ITS PAST AND PROJECTIONS ON ITS FUTURE*

*Hon. Howard Jenkins, Jr.***

This year marks the fiftieth anniversary of the enactment of legislation which created the National Labor Relations Board. It is appropriate that many educational institutions, law schools, and labor relations groups are conducting seminars marking the occasion and I am delighted that the College of Law of the University of Denver has chosen to conduct a labor seminar at this time. I am proud both of my relationship with the National Labor Relations Board and my association with this law school.

I have chosen today to speak both to the past and to the future role and function of the National Labor Relations Board. You will notice that I do not address the present. Some years ago I noticed that many, or perhaps some, officials who had served the agency left and undertook to criticize and to have comments about their former colleagues which I thought inappropriate. As a consequence I shall not comment on what the current Board is doing. Indeed since leaving the NLRB in August of 1983, I have not read any of the Board decisions, I have avoided any public comment on the work of the agency and this has been a deliberate and studied choice on my part.

Some years ago I had the pleasure of listening to an address by the Honorable J. Warren Madden, whom many of you will recall was the first Chairman of the NLRB, having been appointed by President Franklin Deleno Roosevelt shortly after the Wagner Act was passed. Years later, when he served as a Judge on the U.S. Court of Claims, Judge Madden addressed the labor law section of the American Bar Association in Montreal in 1966. On that occasion Judge Madden said some things which I think bear repeating. He observed that it is important for people to think about and talk about the origins of their institutions, for only by thinking about and talking about the origins of their institutions

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** Former Member, National Labor Relations Board, 1963-1983; LL.B., A.B., University of Denver. Mr. Jenkins is the Recipient of the honorary degree of Doctor of Laws from the University of Denver, and is the honored guest of the Symposium Speakers Conference.

can they recall why they were created and what their role and function was intended to be.

A convenient starting point is the Great Depression when the bleak picture of our national economy compelled close examination of the harsh realities of the economic facts. Unemployment soared to an unprecedented peak, production of consumer goods dropped to new lows, union membership dwindled and was virtually nonexistent in mass production industries such as steel, automobile and rubber. Wage rates spiraled downward as the unemployed competed fiercely for the inadequate number of available jobs. The downward spiral of prices quickly followed the loss of jobs and limited purchasing power.

As is frequently the case in times of stress, there were those who preferred to prescribe nostrums for our economic ills rather than tackle the more complex problem of diagnosis. They were content to treat symptoms rather than search for basic causes. Fortunately, there was a man of great depth perception in the United States Senate, Robert F. Wagner of New York, who understood the root problem and was willing to attack it. The Senator recognized that the nation's deep economic trouble was due to the lack of mass purchasing power to buy the products which our factories and farms could and would produce if the produce could be sold.

Senator Wagner, as Chairman of the Board which functioned briefly under the National Industrial Recovery Act of 1933, learned several important lessons, not the least of which had to do with the ineffectiveness of bringing about social and economic change without enforcement machinery. That experience also helped formulate the belief that downward pressure on wage rates could not effectively be resisted unless labor achieved bargaining power. If we were to preserve our free enterprise system, the only source from which that power could be derived was self-organization by employees. (A possible alternative of course, never seriously considered, was to create unions by federal charter much as banks or utilities have been chartered and assign jurisdiction and responsibility. In recent years some governments have followed this path with the economic consequences that could be predicted).

Thus, in adopting the Wagner Act, Congress accepted as national labor policy the Senator's hope that his law would make American working men free, by permitting them to join forces with their fellow workmen and thus increase their power to prevent cut-throat job competition; and that it would in time make them and their country more affluent by creating a great mass of purchasing power for the products of American industry. I venture the opinion that the intervening decades have proven him to be correct on both counts.

Though the point tends to be obscured by overriding concern with detail, there can be no doubt that one of the most potent bulwarks against governmental wage and price controls has been the development of the system of establishing wage levels privately through bargaining between private industry and free labor unions. Those whose

concern is most deeply committed to preservation of management's right to be free from governmental price fixing would do well to reflect on the role of the trade union movement in preserving a free economy. Industrial relations, like politics, make strange bedfellows.

In a very real sense, the problems of the industrial community are a reflection in miniature of the problems of our nation. The socio-economic problems that beset us in the human relations field which are the concern of all Americans are not unlike the socio-economic problems that constitute grist for the industrial relations mill. Underlying both sets of problems are the major political and legal tasks of testing and readjusting doctrine so as to harmonize two fundamental democratic principles, namely: preservation of the rights of the individual, and preservation of free democratic institutions. Upon reflection it should not be surprising to find that neither set of problems can be solved in isolation. Whatever judgments form the base from which doctrine emerges in the one area will also by logic and necessity dictate doctrine in the other. Those whose primary concern is with the strengthening and expanding of our economy as well as those whose efforts are directed toward elimination of social and economic inequities in the broader sense need clearly to recognize the fact that neither group can achieve its goals if it disregards the other.

Most observers tend to concentrate on the sharp conflicts and the deeply divisive positions in the labor-management arena. Not simply to be different, but because of their relative importance I would emphasize the similarities and draw attention to the parallel objectives shared by management and by organized labor.

At the risk of oversimplification, let us first look at the true fundamentals stripping away the less important facade and protective coloration with which they are surrounded. Management, as a category descriptive of owners and managers of business organizations, is committed to the development and growth of economically sound, financially profitable business enterprises. Spokesmen for management remind us again and again that such institutions can flourish only if free from governmental intrusion and independent of governmental controls over the internal decision making processes.

In much the same way, and for many of the same reasons, organized labor espouses the view that if our economy is to grow there must exist a strong, independent, free trade union movement composed of autonomous, separate organizations likewise free from governmental intrusion and governmental control of its internal decision making processes. Both management and labor then approach the industrial relations problems in our economy basically in agreement at least as regards the role properly to be exercised by government and, more importantly, as regards the necessity that private organizations, be they business or labor, must be privately controlled and their choices dictated by their own self-interest.

Both labor and management taken generically speak as one in es-

pousing the principle that central to sound labor-manangement relations is employee freedom of choice. There is no ideological dispute between mature spokesmen of unions or employers over whether employees have the right to act in concert or singly as they choose. Perhaps the less sophisticated are even more obviously dedicated to the principle of free employee choice—if one can judge by the campaign materials in representation cases.

We also find evidence that unions and employers on the whole are together in acceptance of the view that if a bargaining relationship has been established (voluntarily or involuntarily), the obligation to deal with each other is real.

Thus it is clear that in creating the NLRB Congress described its role and function as two-fold. The first was to permit and assure employees private freedom of choice free from outside interference and coercion when deciding whether to engage in collective bargaining, along with the right to choose their representative freely without coercion. In the words of Chief Justice Hughes, speaking for the Court in *Jones and Laughlin*[1] in 1937, "the statute goes no further than to safeguard the right of employees to self organization and to select representatives of their own choosing for collective bargaining . . . without restraint or coercion by their employer."[2] This, said the Chief Justice is a fundamental right. "Employees have as clear a right to organize and select their representatives for lawful purposes as the (employer) has to organize its business and select its own officers and agents."[3]

The second function was to encourage the process of collective bargaining as an alternative to governmental involvement in the industrial process. Let the terms and conditions of employment be determined by the parties themselves without governmental intrusion; and in order to accomplish that make certain that collective action was called for to enforce both the duty to bargain and to bargain in good faith.

Whatever may have been the primary thrust of the Wagner Act when the Taft-Hartley Amendments were adopted twelve years later, Congress did not repeal the Wagner Act, but engrafted Taft-Hartley upon it. Similarly, twelve years after Taft-Hartley, when the Landrum-Griffin Amendments were adopted, there was no coalescing of the previous legislation. There was simply an engrafting of the Landrum-Griffin Amendments on the Taft-Hartley Amendments on the Wagner Act. These three pieces of legislation are of equal dignity and though one follows the other—all are law and there are those who know the gospel only according to Wagner as well as those who are apostles of Taft-Hartley. The Labor Board must, of necessity, be ecumenical.

During my twenty years of service as a Member of the Labor Board I held firmly to the view that it was not the proper function for Board

1. National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).
2. *Id.* at 33.
3. *Id.*

Members to be about the business of telling Congress how to write legislation. I made no recommendations for amendments or changes in the law and indeed refused invitations from both the House and Senate to comment on legislative proposals then pending before the Congress. I felt it to be inappropriate for a person with decisional responsibilities under a federal statute to undertake to describe how the statutes ought to be written; just as I would have thought it inappropriate had Members of the Congress undertaken to advise me on how to decide cases. Incidentally, at no time during my service on the Board did any Member of the Congress or any President undertake to influence any Board case or the manner in which that case would be decided.

Now that I am free from those constraints I am willing to share my views on ways in which I think the work of the Board could be improved by some changes in the statutes.

With that comment I move with some trepedation into the political arena: an area where I have been more of an observer than a participant.

Experience teaches that achieving changes in the labor statutes is extremely difficult. No change comes easily. For example, the last substantive change in the law occurred in 1974 and a major effort to overhaul the statute in large part in 1978 completely failed. In my view there are several basic reasons for this difficulty. The first is that the National Labor Relations Board has no constituency. It is unlike some regulatory agencies whose impact is felt through its direct power to regulate a given industry or as with other agencies, the power to award franchises, to grant licenses, and take action that will benefit people subject to the regulation of that agency. In the course of events, most people who come before the NLRB lose and those who don't, feel they should not have been there in the first place. Of course, I should quickly add that the Labor Board should not have a constituency and it is appropriate that it not have one, primarily because of the nature of the Board's responsibilities. Nevertheless, the plain political fact is that the Board lacks clout in the legislative process and has no one to speak for it either in the appropriations process or in the legislative process itself. One could hardly expect disappointed litigants to go on to the Hill and urge the Congress to help this agency and provide it with more resources and funds or to take action that would be beneficial to the agency. Both labor and management have their own partisan positions for which they lobby and their own separate legislative goals.

A second basic reason for the difficulty lies in the fact that both labor and management have their own partisan positions for which they lobby, and their own separate legislative goals. Thus concensus among those most directly affected does not come easily. Moreover, there is wide diversity within both groups. Contrary to what some political cartoonists would have us believe, organized labor is not a monolith. Neither is management monolithic in its views. Leadership positions in both groups are held by persons of differing political philosophies, party

affiliations, organizational goals and personal ambitions, to say nothing of the size and character of the constituent organizations.

A further complicating factor is the legislative system itself. It has been suggested that the genius of our system lies in the fact that the legislative process is a process of accommodation to competing points of view and that seldom does any one point of view prevail to the exclusion of all others. It has been described in terms of a horse race with the suggestion that in the socio-economic area, there is never a clear victory, but rather always a photo finish with the debate going on for years as to who won. Nothing said here is intended either in word or spirit to be critical of the legislative process. I think Congress is doing exactly what it should do in reacting to the kinds of problems facing it. Rather the thrust of my observation is that the likelihood of significant substantive change in our labor laws is slight.

Despite that rather negative and dismal forecast concerning substantive changes, there are some procedural changes that I think could be made if they obtain the support and backing of the organized bar. I recognize at the outset that the line between what is procedural and what is substantive is not always clear. To me, however, the differences are real. I will briefly outline the proposals and my reasons for suggesting the changes.

The first has to do with a little known provision which makes it impossible for the Board to employ economists. For many years there has been a rider on the NLRB appropriation bill which forbids the Board to expend any of its funds to employ economists. Without going into detail, this dates back to a time when some felt that there were employed by the Board economists who also were either communists or fellow travelers. The consequence of this rider is that the Board's knowledge of economic matters comes through happenstance, briefs filed by parties, or whatever incidental reading Board members happen to do. Since much of what the Board does is in the area of determining appropriate units and handling the problems of collective bargaining generally, knowledge of the industrial economy is key. For example, when the health care amendments were passed and for the first time the Board started looking at hospitals, nursing homes and other health care institutions on a broad basis, we needed to know what the industry was like and we needed information about employment in the industry. If we had had economists capable of doing research and gathering data for us, the information would have made our task a great deal easier and perhaps the results in some cases might well have been more useful and more acceptable to the parties. In any event, it is almost ludicrous for the National Labor Relations Board to be flying blind in dealing with the industrial economy of our nation.

A second area in which change would be beneficial, in my view, deals with the existence of Board vacancies. As you know when a Board Member's term expires, at midnight of that day his authority ends and until a new Member is appointed and confirmed or brought into office

through a recess appointment, that seat remains vacant and the staff which reported to the Member whose term expired is taken over by the Chairman or a senior Member and that person must operate and direct two staffs. I have experienced that situation and know that it is an unnecessary burden on the senior Member in my case, or the Chairman in another case, to have the burden of giving direction to two staffs while trying to carry on his normal duty.

Since there obviously is no way in which a President of the United States can be compelled to act quickly in filling vacancies, and I certainly don't suggest any criticism of any President for delay in the appointment process, that is his prerogative and I make no suggestion with regard to it. I do, however, feel that if the Board is to function effectively there should be five Members, and one way to encourage the prompt filling of vacancies is to provide in the law that a Member whose term has expired shall remain in office until a successor is appointed. Most other agencies have such a provision. The Labor Board is almost alone in this regard.

The law currently requires that all lawyers employed by the Board work for a specific Board Member. They are not employed to work generally for the Board and this too needs modification so as to permit general employment by attorneys of the Board and not require that each Board Member hire a staff independently.

This change would enable the Board Members to restructure their staffs so as to retain the right to employ senior members of the staff for themselves independently and to have a pool of attorneys who could do the research and reading records and preparing memoranda, analyzing the cases for the use of the entire Board. As matters stand there is a great deal of duplicative effort expended by Board Member staffs and each Board Member currently has about twenty or so attorneys on his staff. I would think that this could be restructured so as to permit each Board Member to have four or five senior attorneys who report to him individually and the remainder of the lawyers would be working for the Board as a whole. This could be done quite easily.

I might add that the holdover provision should also be changed with regard to the General Counsel. You may not realize that on the day a General Counsel's term expires, if no new General Counsel has been appointed the work of the field offices grinds to a halt. No complaints can issue, no briefs can be filed, no enforcement actions are taken because they are taken by the authority of the General Counsel, and it is necessary, therefore, for the President to appoint an Acting General Counsel which is usually done very quickly. A Regional Director or some senior member on the General Counsel staff is named as Acting General Counsel. But that is a caretaker function and the occupant understands that the Acting General Counsel is just a caretaker. It would be useful, I think to change the law at the same time as the Board law is changed and apply it also to the General Counsel.

The final two proposals for change are somewhat more controversial, I would think, than the others. These have to do with the appeals to

the Board from decisions by Administrative Law Judges and appeals or enforcment of Board decisions in the courts.

The problems to be addressed in the first proposal are time delays in case processing and Board case load. The fact that these problems exist needs no documentation. Neither is there any doubt that these problems continue to frustrate those who seek to use the Board's processes. Under current law governing unfair labor practice cases, any party has an automatic right of appeal to the Board and the Board has no discretion with respect to these appeals. It must accept all of them no matter how frivolous. I would urge legislative action designed to provide greater finality to Administrative Law Judge decisions and discretionary review by the Board. I am well aware that proposals of this type have been considered in the past and rejected for a variety of reasons. I bring them up again, because I think that the need is clear and the possibility that minds have changed, may warrant a reconsideration of these proposals. I shall not, at this time, attempt to outline in detail how the proposal should be drafted. I shall only state what I believe to be the desired goal of balancing full Board consideration of cases and expeditious processing of the case load.

Based on experience it is my firm belief that Board time can be better spent on important issues and problem areas in which clarification is needed along with careful craftsmanship of decisions that will ultimately go before the courts.

This, rather then devote as much time as we have to frivolous problems and problems which the ligitants are certain at the time they file the appeal that there will be no reversal of the Administrative Law Judge's decision.

Moving on to the last of these proposals dealing with court enforcement of Board decisions, it is my view that there is need for clarification of the role of the General Counsel and the role of the Board in the enforcement area.

When Congress separated the prosecutorial and the decisional responsibilities, it gave an independent General Counsel the prosecutorial function and reposed in the Board the decisional function. It properly made it impossible for the Board to usurp or interfere in any manner with the role and function of the General Counsel. At that time, insufficient thought was given to the question of where the enforcement function should be carried out. As a consequence, internal accommodation had to be sought and thus the function was exercised by the General Counsel. So long as the relationship between the Board and the General Counsel is amiable and cooperative, the problems can be resolved without controversy. However, the General Counsel is in an awkward position. He is a prosecutor before the Board, urging positions which the Board may reject in its decision. The General Counsel then puts on his enforcement hat and goes to court seeking to enforce the very decision he may have opposed in litigation.

It is a tribute to the many persons who have served as General

Counsel and Board Member, that seldom has controversy arisen. But the fact that it has arisen from time to time is reason enough for Congress to clarify the role of each: the General Counsel and the Board, so that it is not left to good men and women to do good, but let the law specify how the function should be carried out. Having served as a Board Member during peaceful times and when controversy arose, I am firmly of the view that this is a problem which is best solved by the Congress rather than by accommodation between the Board and the General Counsel.

The decisions rendered by the Board are the Board's decisions, and what happens to them in court is a matter of concern to the Board. The General Counsel, all that I have known, have undertaken to keep separate their role as prosecutor and their role as enforcer of Board decisions so that it is not to impugn the integrity of the occupant of the office, neither is it to assert that the Board knows better how its decisions should be handled. It is simply a question of the propriety and right of the Board to supervise the enforcement of its decisions, if that is what Congress wants. On the other hand if Congress is more comfortable with the function being exercised under the supervision and control of the General Counsel, and desires to have the Board excluded from that role, then it behooves Congress to clarify its intention. Here again I outline no specific detailed proposal. I state merely the obvious; that lack of clarity has lead to controversy from time to time, and since the lack of clarity originates with the legislation, the corrective step is to clarify the legislation in some manner so that the work of the agency will not be disruptive or dependent upon good will.

I conclude these comments by repeating a point made earlier that the preservation of the rights of the individual and the preservation of free democratic institutions are linked in their goals and that those whose primary concern is with the strengthening and expanding of our economy as well as those whose efforts are directed toward elimination of social and economic inequities in a broader sense, need clearly recognize the fact that neither group can achieve its goals if it disregards the other. The discussions at this seminar will be helpful in further analyzing those points and I appreciate the opportunity to be with you on this occasion.