January 2006

Taking Back the Workers' Law: How to Fight the Assault on Labor Rights

Ellen Dannin

Taking Back the Workers' Law: How to Fight the Assault on Labor Rights

Abstract

[Excerpt] This book focuses on unions and on the National Labor Relations Board (NLRB) and National Labor Relations Act (NLRA) – the agency and the law created to promote unionization and collective bargaining. This is not a story of mourning. Rather, this book advocates borrowing from and building on the methods the civil rights movement, and in particular, the NAACP Legal Defense Fund, used to recaptured union power. They teach us that a litigation and activist strategy can overturn unjust judicial decisions, even those by the Supreme Court. More recently, the National Right to Work Legal Defense Foundation is proving that a targeted litigation strategy can still be used to "amend" the law.

Keywords

United States, labor law, legislation, employee rights, industrial relations, National Labor Relations Board, NLRB, NLRA, NAACP, union, worker, fight, assault

Taking Back the Workers' Law

HOW TO FIGHT THE ASSAULT ON LABOR RIGHTS

ELLEN DANNIN

ILR PRESS an imprint of
CORNELL UNIVERSITY PRESS
ITHACA AND LONDON

First published 2006 by Cornell University Press

Printed in the United States of America

Library of Congress Cataloging-in-Publication Data

Dannin, Ellen J.
Taking back the workers' law : how to fight the assault on labor rights / Ellen Dannin
p. cm.
Includes bibliographical references and index.
ISBN-13: 978-0-8014-4438-8 (cloth : alk. paper)
ISBN-10: 0-8014-4438-1 (cloth : alk. paper)
1. Labor laws and legislation—United States. 2. Employee rights —United States. 3. United States. National Labor Relations Act. 4. Industrial relations—United States. I. Title.
KF3369.D36 2006
344.7301—dc22 2005027433

Cornell University Press strives to use environmentally responsible suppliers and materials to the fullest extent possible in the publishing of its books. Such materials include vegetable-based, low-VOC inks and acid-free papers that are recycled, totally chlorine-free, or partly composed of nonwood fibers. For further information, visit our website at www.cornellpress.cornell.edu.

Cloth printing 10 9 8 7 6 5 4 3 2 1

CONTENTS

FOREWORD

David E. Bonior

This book addresses two concerns that have been at the heart of my work in public service for the past thirty years: the importance of citizenship and the meaningfulness of work. In many ways, citizenship and work are inextricable. When I conversed with new immigrants in the congressional district that I represented for nearly twenty-six years, I was consistently reminded of how much they wanted to be valued as contributing members of American society and saw their jobs as the primary medium for adding value to their new communities and homeland.

But when workers are prevented from exercising their democratic rights, it becomes nearly impossible to establish dignity in other critical spheres of their lives. As Ellen Dannin states, "The National Labor Relations Act says that the private workplace is not truly private because what happens at work does not remain there. It spills out into society, and society as a whole pays the price for inequality."

Verna Bader, for example, a 72-year-old grandmother and machinist from Taylor, Michigan, tried to form a union to address $5-per-hour pay and unsafe working conditions that included maneuvering around exposed live wires. In 1992, she and five other machinists in her department were fired after they stood up for themselves and voted to form a union at Taylor Machine Products.

When she fought the company for illegally firing her, the National Labor Relations Board ordered the company to pay her lost earnings. Adding

insult to injury, however, the Board allowed this issue to drag out for over a decade. The Agency failed to fully implement the values that underlie the law and to recognize the importance of a timely payment, ensuring that the spirit of the Act and its underlying values were upheld. This book demonstrates that this is a common occurrence. More than twelve years after the order was issued, Verna Bader finally received the restitution she deserved. Her victory was bittersweet. In the end, she "won," but the wait almost destroyed her faith in American justice, and understandably so. As Dannin argues, "Our work lives become incorporated into our intimate physical and mental selves. Over time, the undemocratic workplace grinds away at the belief that we have a right to participate in the decisions that affect our lives and societies."

Today's labor law, signed by President Franklin D. Roosevelt seventy years ago, embodied the profound aspiration of providing "industrial democracy" to American workers such as Bader. The centerpiece of workplace democracy was and remains the ability of workers to form unions and collectively bargain with their employers.

The Wagner Act, known more prevalently today as the National Labor Relations Act, created the National Labor Relations Board to administer and enforce the law. The NLRB is charged with upholding the law's underlying values of democracy, fairness, and justice. These underlying values have the power to transform our workplaces, empowering workers with the necessary skills to be active citizens in democracy. By shining light on these tenets of the Act, Ellen Dannin's book examines how the potential value of the NLRA transcends the workplace by serving, more broadly, as a barometer of the health of our democracy.

Until we recognize the interplay between citizenship and work, we will compromise American democracy and undermine its advancement. It is well documented that union membership enhances people's ability to be better citizens of a democracy. As Dannin notes, we know that union members vote, volunteer, and participate in politics and civic life in percentages far higher than those for unorganized workers. And, as Dannin asks with prescience, "If workers are told that their participation, involvement, intelligence are not wanted, will they try to increase their participation, involvement, or intelligence? Can a democracy exist when this is its raw material?"

In his *Washington Post* column on September 9, 2004, David Broder drove

home the reason why protecting workers' rights to form unions is so important. In it, he makes the link between "the decline of progressive politics, the near decline of liberal legislation, and the steady weakening of organized labor." He goes on to say that "when labor lobbied powerfully on Capitol Hill, it did not confine itself to bread-and-butter issues for its own members. It was at the forefront of battles for aid to education, civil rights, housing programs, and a host of other social causes important to the whole community. And because it was muscular, it was heard and heeded."

This is a critical time for American workers and the future of their unions. Tremendous resistance by employers, with help from the flourishing anti-union consultant industry, has inhibited workers' ability to form unions without fear of reprisal. A *New York Times* article exposed an anti-union campaign at a single factory in South Carolina where the employer allegedly paid $2.3 million to the law firm that ran the campaign. The use of illegal campaign tactics is now so widespread that every twenty-three minutes, a worker is fired or discriminated against for attempting to exercise his or her freedom of association.

As if this were not enough of a challenge to workers, trends in the economy have shifted employment away from the heavily union manufacturing sector to the largely nonunion service sector, contributing to declining union representation. As of 2004, only 12.5 percent of the American workforce belonged to a union. And in the private sector, which the Act covers, only 8 percent of employees were union members.

Given the challenges to workers' efforts to form and sustain unions, we would expect that the National Labor Relations Board would act to protect the freedom of association now more than ever. But under the presidency of George W. Bush, the Board has issued decisions that narrow the protections of the law and fail to make the Act more relevant for today's workers. The Board has limited protections for disabled workers, graduate teaching and research assistants, and temporary employees. Its decisions have weakened the rights of nonunion workers to join together for mutual aid and protection on the job. The Board has also taken steps that could undermine the ability of employers and unions to reach private agreements on the recognition process that could further industrial peace.

In the midst of this crisis in workplace democracy, Dannin advances a controversial argument: take back the Workers' Law. She calls on workers'

rights advocates to reclaim the very words and enunciated values that form the basis of the Act and to insist that courts of law base decisions on the actual tenets of the Act. The controversy lies not in the crisis itself but in the solution Dannin offers to advance the rights of workers. Years of frustration on the part of those who have witnessed the transformation of the law from one that addresses the imbalance of power between employees and employers to one that exacerbates it has led to calls to scrap the Wagner Act altogether. Some suggest creating stronger labor laws at the state level.

Having firmly established the significance of workers' rights in American democracy, Dannin turns her attention to proposing concrete actions. She calls for workers' rights advocates to pressure the judiciary to make rulings consistent with the values laid out in the Act, such as the importance of modeling democratic citizenship at the workplace and allowing freedom of association to flourish regardless of whether it occurs in a community hall or at a workplace.

Some may agree with Dannin and follow her into the legal battle she proposes, and others will not. But none can doubt her resolve to address one of the most pressing issues of our time: the social inequity that results from the violation of workers' human rights. I welcome her ideas and the spirit with which she offers them to us. We need more scholars and practitioners to follow her lead and use their energy and skills to find solutions.

ACKNOWLEDGMENTS

The ideas that became this book were in my head for many years before the first word was written. For years I tried to put together a group of labor academics and practitioners to brainstorm ways to take back the Workers' Law. The expertise needed for a project of this breadth seemed too daunting to take on by myself. Fortunately Fran Benson of Cornell University Press told me I should—and could—write it myself. I decided that she had a point. If the work was ever going to get started, I would have to do it. I owe Fran an enormous debt. She balanced encouragement and demands to help me get out a book I could not have written otherwise.

In fact, I did not take on this project alone, nor did I write this book by myself. Many people read all or part of the manuscript. They gave me valuable comments and criticisms. All of them encouraged me to continue. There is no greater gift to a writer than this kind of support. So let me thank Robert Baillie, David Bonior, Fred Feinstein, George Gonos, Immanuel Ness, and Michael Yates for their comments and criticisms.

After Christopher David Ruiz Cameron read the first few chapters, he supported me in this project by making the book the centerpiece for the Labor and Employment Section panel at the Association of American Law Schools conference in January 2005. He and Martin Malin also arranged to have that session taped for publication in the *Employee Rights and Employment Policy Journal.*

I owe a very special debt to David Williams. He was a stranger to me

when I asked if he would read my manuscript. To be useful to a wide audience, the book needed to include not only my perspective as a lawyer but also insights from a labor perspective. David supplied that. He was unfailingly helpful and as excited by the project as I was. He not only read every chapter, but he did so in record time, despite his own taxing schedule. David was what every writer needs. He understood what I was trying to do and made criticisms and suggestions that challenged me and helped me improve the book.

Finally, let me thank those in my personal life for their support and for suffering the neglect that is part of the price paid for work such as this. Bob, Emma, Sadie, and Sebastian, I promise there will now be more time for walks in the woods and to listen to your needs. "Two are better than one, because they have a good reward for their efforts. And if one falls, his friend will help him rise up" (Ecclesiastes 4:9–10, author's translation).

INTRODUCTION

Reviving the Labor Movement

A few months after graduating from law school, I decided to stop at Detroit's Eastern Market on the way to my new job. As I entered an intersection, I saw the largest Chevrolet Detroit ever made speeding toward me and my new compact car. Before I was hit, I had only enough time to think, "There's no getting out of this one."

When I regained consciousness, my new car was a crumpled mess. I was too. I had a concussion and bruises. But with paid sick leave, health insurance, and car insurance, my body was soon as good as new and my car was replaced. Life is better when you have enough money to live on.

Since then, I have gone on to live a middle-class life. My middle-class child has never suffered from want. Needing a new tire does not mean choosing between eating or getting to work. I do not live one paycheck away from homelessness. I can be confident that my child will have the education, parental guidance, self-confidence, and connections that will enable her to pass on her middle-class status.

But it was not always that way for me. That shopping trip to the Eastern Market was the first time I had money. I grew up in poverty that is hard for many to imagine. I was raised by a single parent after my father deserted us. We would have starved had my grandfather not given us food from his small farm, provided us with rabbits and squirrels he shot, and slipped money to my mother. We children worked on that farm and were paid in food, grew our own food, and foraged in the woods for berries, asparagus,

and mushrooms. I never had new clothes, didn't see a dentist for checkups till I was in college, and remember only one visit to the doctor, to put in stitches after an accident at school. He took me as a charity case.

Today, many in this country live in this sort of poverty and worse. In the richest country on earth, many of us live on the edge, always having to tell the kids there is not enough money, never able to make ends meet, housed in ugly and dangerous buildings and neighborhoods, and with hope for the future beaten out of us.

The gap between rich and poor yawns wide in this country and continues to grow, because far too many are not paid enough to live above desperation. Why is this?

Apologists for this state of affairs claim the market pays people exactly what they are worth. They claim that the poor have only themselves to blame, and the rich deserve every penny they get.[1] I have to wonder about people who make these claims from the comfort of a class status inherited from their parents. Are they blind to the structures that support them but weigh down those at the bottom? Don't they see that hard work often goes unrewarded? Do they even try to imagine what it means to be paid too little to live in dignity? If they know, why do they accept this?

I contend that these conditions lie more in who has power and who does not. Money flows to power, and power flows to those with money. Over time, this cycle magnifies differences in wealth and power. Most people in this country—and in the world—have neither wealth nor power.

But it does not have to be this way. In this country—and in this world—the poor get power when they are organized. For workers, the best form of organization has always been unions. This is the only way workers can get a more equal division of power and money. The same workers doing the same work make from $4,000 to $10,000 more a year when they have a union.[2] They can be fired only for cause instead of at an employer's whim. They know they have an advocate to stand beside them when there are workplace problems. That's what power and organization can do.

But we are on the verge of losing this power and organization and, as a result, these benefits. As power and organization are lost, wages and working conditions spiral down. There has long been a wholesale attack on the key institutions that create, protect, and buttress power for those who would otherwise be powerless.

This book focuses on unions and on the National Labor Relations Board

(NLRB) and National Labor Relations Act (NLRA)—the agency and the law created to promote unionization and collective bargaining. This is not a story of mourning. Rather, this book advocates borrowing from and building on the methods the civil rights movement, and in particular, the NAACP Legal Defense Fund, used to recapture union power. They teach us that a litigation and activist strategy can overturn unjust judicial decisions, even those by the Supreme Court. More recently, the National Right to Work Legal Defense Foundation is proving that a targeted litigation strategy can still be used to "amend" the law. Of course, the NRTW-LDF has powerful friends who have funded and supported it, and it has faced fewer barriers than did the NAACP.

Both these groups provide models that can be used to target judicial decisions that created striker replacement, restricted the right to strike, undermined the right to bargain, denied the NLRA rights of worker freedom of association and speech, and weakened remedies. These and other decisions have perverted the plain language and express intent of the NLRA.

The NAACP experience provides inspiration and helpful guidance. In the 1940s, institutional and legal apartheid were the law of the land. An apartheid state was protected by state statutes and Supreme Court decisions. Brave and visionary individuals put together a multidecade strategy of both activism and targeted litigation to remake the racial landscape of this country.[3] While they have not yet achieved full success, the story is more one of success than of failure. And given the forces of law and power arrayed against them, it is a story of the power of the weak.

The problems unions face today are serious, but unions are not as powerless or as friendless as were those civil rights activists. Union power is rooted in the representation of a huge absolute number of American workers who are already organized. The basic law of the land is not anti-unionism. The law of the land on unions says:

> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees. . . .
>
> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred *by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.*[4]

This declaration of worker rights is from Section 1 of the National Labor Relations Act. This is the Workers' Law. The NLRA's insights about work, conflict, justice, and the role of law are as valid today as they were when it was enacted in 1935. Moreover, if unionists were drafting a statute today, surely they would also include language about promoting freedom of association, self-organization, free choice of representatives, equality of bargaining power, improved wages and working conditions, and collective bargaining.

Why, then, do so many union leaders speak so negatively about the NLRA and NLRB? Union representative Wade Rathke accuses the NLRB of being "complicit with employers."[5] Larry Cohen, CWA president, advocates a national day of civil disobedience to shut down every NLRB office across the country. He says, "Labor needs to show the public that the NLRB is broken."[6] The AFL-CIO's Web site is full of condemnations of the NLRA and NLRB as worthless.

This anger is nothing new. Former AFL-CIO president Lane Kirkland repeatedly said he would prefer "no law" to current labor law and that

> he prefers "the law of the jungle" over the current system because the law places too many restrictions on what unions can do to assist each other. "The law forces us, our unions, to work on products that are manufactured by law-breaking employers, employers that are in violation of the law in fact and in spirit . . . [It] forbids us to show solidarity and direct union support," he declared.[7]

Richard Trumka, while president of the United Mine Workers of America, described the NLRB as "clinically dead."[8] He told Congress:

> I say abolish the Act. Abolish the affirmative protections of labor that it promises but does not deliver as well as the secondary boycott provisions that hamstring labor at every turn. Deregulate. Labor lawyers will then go to juries and not to the gulag of section 7 rights—the Reagan NLRB. Unions will no longer foster the false expectations attendant to the use of the Board processes and will be compelled to make more fundamental appeals to workers. These appeals will inevitably have social and political dimensions beyond the workplace. That is the price we pay, as a society, for perverting the dream of the progressives and abandoning the rule of law in labor relations.
>
> I have a profound faith in the judiciary and jury system as it exists at common law. It has been the enduring bulwark against biased decision making by "experts."[9]

So if the NLRA still has strong, clear, inspiring language advocating core labor rights, including the rights to organize and bargain collectively, why is it today so detested by organized labor? The simple answer is that the way the NLRA has been interpreted and applied by judges has perverted the express language of the law.[10] Union critics are right to point to problems such as striker replacement, and remedies so weak as to be useless.[11] But they are wrong when they blame the NLRA and the NLRB for these problems.

The NLRA does not say strikers may be replaced. Section 8(a)(3) says that an employer who retaliates against employees for their union activities violates the NLRA. Section 13 says that the right to strike is not to be interfered with or impeded or diminished in any way. Despite this clear language, the Supreme Court invented the employer's ability to replace strikers out of whole cloth. This judicial amendment must and can be overturned.

Section 10(c) says that remedies must make the NLRA's purposes effective. Unfortunately, judges' interpretations have created a menu of remedies that fail to make the NLRA more effective. They do not promote NLRA policies, such as freedom of association, equality of bargaining power, employee mutual aid and protection, and collective bargaining. Therefore, these remedies violate the NLRA's clear language. Taken together, judicial "interpretations" have "amended" the law to put a heavy thumb on the employer's side of the scale.

It does not have to be this way. But as long as unionists attack the NLRA, as long as they go after the wrong target, they re letting the real perpetrators off the hook and they are complicit in their own demise. It is possible, instead, to go after the real problem and the real perpetrators and put an end to unions' slide. The campaign must enlist allies and develop multiple strategies. There is no single solution. Each strategy is important if workers are to take back their law.

Law must be one part of the campaign. Labor law has enormous potential when practiced by the creative and the courageous. It can be used to rock the boat, to push the envelope, and to push steadily forward.

This book maps out a strategy to take back the Workers' Law and the agency Congress created for unions and workers.

A Strategy for Taking Back the Workers' Law

The litigation strategy to take back the Workers' Law is not based on a trivial, esoteric quibble about how judges have interpreted the NLRA. These decisions are lawless actions by judges who have not interpreted the law but have rewritten it. They have created a law that is diametrically opposed to the language of the NLRA and to Congress's clear intent and purpose.[12] How and why this happened is the subject of the early chapters of this book. The later chapters lay out a detailed strategy to reverse these decisions and restore the original values and ideas of the NLRA.

To develop a successful strategy it is necessary, first, to analyze what makes judges rewrite the NLRA. This information is then used to develop ways to repeal the judicial amendments and to enforce the Workers' Law. Both trial and activist strategies must be rooted in the NLRA's policies. The law Congress enacted was supposed to radically remake the workplace and society. It was not some timid law with hidebound procedures and trivial rights. Sadly, most of us do not read the NLRA and are not aware of what it was enacted to do. We have come to believe that the law as amended by judges is in the NLRA. To repeal those judicial amendments, we need to know what the NLRA says. In this book, the core chapters lay out ways to use the NLRA's policies as the foundation on which to build a litigation strategy.

The book also looks for legal allies that can help restore the Workers'

Law. Some of these allies are our founding documents, the Declaration of Independence and the United States Constitution. The NLRA also has allies in international law. It cannot be said too strongly that the judicial amendments do not meet human rights standards.[13] All these documents create a law consistent with the NLRA as enacted by Congress.

The Attack on Unions

Just how badly have the courts distorted the law and set the United States at odds with international law and the NLRA? As an example, here is how collective bargaining is supposed to work under the NLRA. The employer and union are to meet as equals in terms of bargaining power, to codetermine the conditions of work. They are to negotiate, using their full powers of persuasion, including the right to strike. The right to strike is fully protected by Section 13, and it is illegal to interfere with that right, impede its exercise, or diminish it. Employers who fail to bargain in good faith violate the NLRA. They cannot fire or retaliate against workers who support unions, who join with other workers to improve each other's working conditions, or who strike in order to improve their own or other employees' working conditions.

When an employer does any of these things, Section 10(c) imposes whatever remedies are necessary to promote the NLRA's policies. These policies include "encouraging the practice and procedure of collective bargaining" and "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." If an employer illegally discharges a worker, the backpay awarded must be substantial enough to ensure that workers feel free to associate with one another and to support their union and to encourage the employer to abide by the law.

But here's how "collective bargaining" works under the judicial amendments. If a union and employer reach an impasse in bargaining, the employer may implement any part of the terms it calls its final offer. Nothing requires, or even encourages, the employer to try to reach middle ground and an agreement. If the union strikes, the employer may hire new workers to permanently take the jobs of the strikers. Even though the strikers

may never get their jobs back, this is not to be treated as firing strikers because of their union activities. If the employer bargains in bad faith, it is simply ordered to bargain in good faith and to post a notice telling employees it will bargain in good faith. If the union doesn't strike, the employer can lock out the workers and hire "temporary" replacements. The average lockout now lasts more than three years, so those temporary replacements will fill those jobs for years.[14]

In short, the courts rewrote the NLRA to permit employers to exit collective bargaining and dictate the terms of work. An employer can retaliate against workers by taking away their jobs through a lockout or through permanent replacement if they strike. Moreover, the courts say that Section 10(c) may give only the most limited of remedies.[15]

In doing so, judges have taken away the rights the law gave to workers and have given employers virtually irresistible incentives and opportunities to avoid unions and collective bargaining. What employer would bargain when the law says it can insist on what it wants even if it is unreasonable and that it can reach impasse, implement its final offer, lock out workers, replace strikers—and use all this as a tool to deunionize and to send a cautionary message to other workers about what happens to employees who vote for a union?

This is not the only attack on the NLRA and NLRB. Republican Congresses have weakened unions directly with actions such as denying employees of the Department of Homeland Security the right to join a union, and a Republican president destroyed the Professional Air Traffic Controllers Organization (PATCO). They have also weakened unions by boldly attacking the NLRA and NLRB. Congress has tried to restrain the NLRB from prosecuting employers for refusing to hire salts (workers who apply for jobs in order to organize an employer) and from expanding the use of Section 10(j) injunctions.[16] Congress has so severely restricted NLRB budgets that investigator and attorney staffing in regional offices fell from 930 in 1994 to 874 by 1999. This has led to a severe backlog of cases.[17]

These actions are part of a program that is returning unionization to its numerical levels and status before the NLRA was enacted. Those were not good times for unions. The NLRA replaced a system that saw unionization as an illegal conspiracy with one that said unionization was a legal right and a social necessity.[18] With this multipronged extremist attack on union rights, unions have not fared well. Unionization has plummeted,[19] and

with it the working standards and prospects for so many of us and our families and neighbors.[20] As power has tilted ever more toward employers, workers have lost the ability to be heard and to negotiate their workplace conditions.

This shift in workplace power affects all of us. In the United States, virtually all social benefits come through the workplace and not from the state. As a result, anything that shifts the balance of power toward employers and away from employees has direct consequences for the welfare of individual workers and their families. Our children are robbed of a fair start in life. Lower wages mean less money to spend and fuel the economy. Children who are raised poor suffer from that deprivation all their lives. Some have no reason to buy into the society and may then fight back against it—through crime, for example.

The consequences, however, are even more serious than a decline in social welfare: our very democracy is at risk. Unions and union members play a powerful role in promoting democratic values and action. They are active in all phases of the electoral process, from registering new voters to getting out the vote to lobbying for new laws that benefit us all. Unions were instrumental in the enactment of Title VII, the Occupational Safety and Health Act (OSHA), the Family and Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA), increased minimum wages, improved unemployment insurance, the Employee Retirement Income Security Act (ERISA), and many other laws.[21] These laws make all workplaces safer and provide greater equality of access to jobs and fair treatment.

Some argue that union decline means that unions are no longer useful. Some claim that unions are adversarial in an era when what is most needed in the workplace is cooperation.

Nothing supports these claims. Day after day, unions are actively involved in protecting workplace privacy, living wages, gender and racial equality, and workplace safety. Unions are the only ones that enter every fight for all these rights and more. Only unions give workers the information they need to protect themselves.

If there were no more unions, how long would these laws exist? Would new laws be enacted to meet new problems? Would they be updated as the need arises? How can a system of individuals come together to exercise the power and vision that make this happen? Who would do the lobbying and research? Who would get out the vote for sympathetic legislators? With-

out union support, eventually these laws and their protections would be lost.

The judicial rewriting of our fundamental collective bargaining law means that, in the international arena, the United States is a country that fails to abide by international laws declaring that freedom to join a union is a fundamental human right. Human Rights Watch's comprehensive report *Unfair Advantage*[22] details how U.S. labor law now betrays its promise.

It may be easy to shake off concern for the poor or for the opinion of the international community, but all of us are poorer in innumerable ways when workers are denied their rights under the NLRA to collectively assert power. It is, therefore, in the interest of our entire society to make effective the promise of the NLRA to protect workers' "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

What Can Unions Do?

Ultimately, union success or failure depends on attacking those who have led the campaign against unionization. Proposals to replace the NLRA or to avoid the NLRB fail to take on the fundamental problem unions face. The NLRB and NLRA are weak because they, just as much as unions, have been under assault. Attacking the NLRA and NLRB means that unions have failed to take action to protect the precious resource that the NLRA is. Furthermore, attacking the NLRA and NLRB is not cost-free.

Attacks distract unions from going after the real sources of their problems. It is curious that more union leaders have not considered why their allies in assaulting the NLRB are archconservatives. Why have unions not thought about whose interests they promote when they are on the same side as those who promote corporate interests?

These attacks actually make the NLRA and NLRB less effective. The public servants who work for the NLRB are themselves members of unions. They work for the NLRB because they believe in the Board's mission. Consider the impact on the morale and effectiveness of these workers—and union brothers and sisters—when they are under attack from both the

right and the left. These attacks also hurt workers because they are so broad that workers may not go to the NLRB, even when it is their only recourse.

Unions need to be more active in filing Board charges and using the law. (Chapter 8 discusses strategies for using the Board to enhance union strength and the right to organize.) Because statistics on filed charges are used to measure the level of law violations, when unions let unfair labor practices go without filing charges, they send a message that we have achieved labor peace. Filing charges demonstrates to workers that employer actions are illegal. An increase in filing also supports the case that the NLRB needs more staff and more funding. Rather than calling for sit-ins at NLRB offices, union leaders should be sitting in at congressional offices. They should be even more vocal on judicial appointments, and they should demand money and respect to strengthen the NLRA. To take back the Workers' Law, unions must support the NLRB as an institution and attack those who have undermined it. They must develop a multipronged strategy to take back the NLRA so workers have the power to stand up against corporations. Staughton Lynd said, "From my point of view, the historical miscarriage of the NLRA makes it more and not less important to 'celebrate and seek to restore to its intended vigor the right to engage in concerted activity for mutual aid or protection.'"[23]

Unions need to wage a broad campaign that speaks to this country's workers in language about working-class and democratic values. Unions must challenge their political foes and support their allies. As part of this effort, unions must be in the forefront of developing a litigation strategy to reverse the judicial amendments and restore the NLRA to its original purpose. They must fight to make the NLRB a powerful institution that can uphold worker rights.

A litigation strategy can achieve these goals without the need to campaign for new legislation. These ideas are novel, and it is reasonable to be skeptical. They are based on the contention that, since judges' decisions have radically altered the plain language of the NLRA, it is judges themselves who must be called to account.

First, consider the legal protection of salting. Salts are workers who apply for jobs in order to organize nonunion employers. Once hired, they boldly assert their rights under the NLRA. Having someone in the workplace who is fearless in advocating unionization can be a powerful tool. If employers fire a salt for promoting unionization, unions lose an advocate

but can file charges with the NLRB to prosecute the employer for violating the law.

Over the years, the NLRB has found it a violation of the law to fire a salt for union activity or to refuse to hire a salt. But the courts of appeals were hostile to salting. They reversed case after case. Despite this, the NLRB steadfastly supported the right to use salting as an organizing tactic. In 1995, the NLRB persuaded the Supreme Court that its interpretation was right.[24] As a result, an employer could not refuse to hire and could not discharge an employee for being a salt.

That is not the end of the story, however. Employers were outraged that they could not refuse to hire pro-union workers who were also fearless organizers. So the Republicans held congressional hearings at which they condemned the NLRB's decisions, attacked the NLRB for prosecuting employers who discriminated against salts, and tried to enact laws reversing the Supreme Court. They have so far been unsuccessful in amending the law or using the power of the budget to prevent the NLRB from enforcing the law and protecting organizing.[25]

But how long can the agency hold out, given the power of those against it and the lack of union voices in support of the NLRB? Unlike unions, the Republicans take the NLRB very seriously and have gone to the mat to prevent the appointment of NLRB members who would be sympathetic to labor and to the NLRA's policies and to ensure the appointment of pro-business, anti-NLRA members. How long will these NLRB cases stand in the face of this campaign to destroy the Workers' Law?

Or consider the Supreme Court's decision in the case of *Lechmere, Inc. v. NLRB*.[26] This case is widely seen as an anti-union decision that makes organizing more difficult. Lechmere's store was located in an open shopping plaza. When union organizers tried to place union literature on employees' cars in the far end of the parking lot, Lechmere threatened them with arrest for trespass. Those who refer to the NLRB as labor's enemy should recall that the Board decided that union organizers had the right to go onto Lechmere's property to organize workers. It was the Supreme Court that decided the employer's property rights trumped its employees' NLRA rights. The Court—not the NLRB—made it harder for unions to organize.

There is a second aspect of the *Lechmere* decision that is more subtle but potentially more damaging to employee rights to organize and engage in collective bargaining. In order to decide the case as it did, the Supreme

Court had to define the word "employee." It said "employees" meant only the employees of a specific employer. This is the common meaning of the word, but the NLRA says exactly the opposite. The NLRA says that the term employee "shall include *any employee*, and *shall not be limited to the employees of a particular employer.*"[27] This definition is intended to promote and protect worker solidarity across workplaces.[28]

Thus, under the NLRA, Lechmere's employees, the union organizers, and workers at other employers were all employees and had the right to make common cause with one another so that they could increase their bargaining power and improve their working conditions. But the Supreme Court majority made that very difficult when it wrote the *Lechmere* decision.

It is hard to believe that justices of the Supreme Court cannot read the plain words of a statute, but the only other explanation is that they decided to judicially "amend" the NLRA. In trying to understand what drove the Court to do this, it is not enough to attribute its decision solely to class bias. Doing so does nothing to change this sort of decision making. To make effective change it is necessary to explore what affects judges so that they engage in judicial amendment. In *Lechmere*, this was a force that was powerful enough that the justices decided the case that overturned the plain language of the law. Understanding the processes that lead to judicial amendments makes it possible to develop effective strategies to counter them.

Making the NLRB Part of the Solution

Not only is the NLRB not the enemy, but unions can make it part of the solution. True, the NLRB cannot do everything for unions, but the union movement would benefit enormously by thinking creatively about how to make the best use of the NLRB and the NLRA, rather than throwing them away because they are not perfect.

Of course, the truth is that unions have not avoided the Board. Labor's infantry knows it needs the NLRB. They know that the NLRB is the only place to go for some remedies. No law other than the NLRA makes it illegal to fire workers discharged for union activities. True, the current remedy is not adequate, but it does provide reinstatement and backpay. While it would be better to have a larger remedy, these are certainly better than

no remedy at all. There is a price to be paid for union rhetoric against the NLRB. For example, I have seen workers who heard this message fall prey to charlatans who told them that they should not go to the Board. They offered to represent the workers in court and promised huge awards. Of course, those cases were quickly dismissed because the only remedy is through the Board.[29]

Union leaders also need to consider how their anti-NLRB rhetoric affects the public servants who work for the NLRB, who care about its mission, and who put in long hours trying to enforce the law. These are potential allies labor should not alienate. Union leaders need a steady stream of young people who are eager to go to work for the NLRB because they want to promote justice and enforce the Workers' Law. Union leaders need to ask how attacking the NLRB affects who applies for a job with the Board. They should work to make these jobs attractive to graduates from labor studies, industrial relations, or other labor-friendly programs. Unions need to make working for the NLRB a legitimate career goal for these students.

NLRB employees know the remedies are too weak, but they also know what it means to help people who are in desperate circumstances. From my years with the NLRB, I carry the memory of people in trouble who were profoundly grateful that their government had provided them an attorney at no charge who would fight for their rights. Even years after I left I occasionally received thanks from people who said I had made a difference in their lives.

The NLRB is staffed with many dedicated workers—who themselves are unionized—who work hard to further the NLRA's goals of promoting equality of bargaining power, collective bargaining, and freedom of association. The NLRB has supporters who have good reasons to feel the way they do.

What I propose is building on what exists to make it more effective. I contend that the NLRB can be used even more strategically by unions to increase union power and improve the lives of workers. Even now, some unions use NLRB filings, decisions, and settlements for propaganda value. They send out messages to the workers and call press conferences to announce that the government has decided that an employer is a lawbreaker. Even in this antigovernment age this is a powerful statement. But when unions vilify the NLRB and NLRA, they risk hurting labor's image. Union leaders need to ask why any worker would risk becoming a member of a movement that says its worst enemy is a small government agency.

Of course, and as our labor leaders know, U.S. common law was and is uniformly hostile to unions and the rights of workers. Thus Congress had to pass law after law before it could outlaw the common law labor injunction and overrule court decisions that said labor unions were criminal conspiracies. Even now, the common law says that an employer can fire a worker for no reason or a bad reason. If the NLRA were repealed, all workers would be covered by that law.

Workers in unorganized workplaces—that is to say, most workers in the United States—are especially vulnerable. They may not be aware that the NLRA applies to them. Employers who retaliate against them for taking the first fledgling steps toward collective action violate the law. Recent NLRA cases have protected employees who spoke out against a wide range of employer policies, who challenged rules telling them they could not discuss their working conditions, and who blew the whistle on their employer's illegal conduct.[30] Without the NLRA, they would have no protections at this critical stage.

This is not to say that the NLRA and NLRB don't have flaws. Their critics have made valid charges about the NLRA, the NLRB, and problems unions face in relation to them. Taft-Hartley outlawed important union economic weapons and organizing tools. Election processes can too easily be subverted by anti-union employers,[31] the appeal process means waiting years for a remedy, and remedies are so late and so weak that it may pay to violate the law. Add to this that NLRB regional offices are perennially understaffed, and some Board personnel are bureaucratic and unsympathetic.

In short, the problem is not criticisms; it is that the criticisms have been so extreme that they encourage discarding rights and what can be a useful tool for unions. As long as unions still have these tools and these rights, they need to take a course that is realistic and strategic. This book does not argue that the NLRA is a panacea or that it can solve all labor's problems. No one thing—not even if unions devoted 100 percent of their budgets and time to organizing—can alone make the difference in union success or failure. This book attempts to open a discussion on strategies to make better use of the NLRA and the NLRB now, even without statutory reform.

1

WHY JUDGES REWRITE LABOR LAW

Some will naturally be skeptical of a legal strategy to promote unionization. They will argue that law is irrelevant to union success or is a crutch that inevitably will weaken unions. Or they may argue that the only way to union success is through a social movement. These discussions tend to break down into debates over which is the one correct strategy.

I do not advocate a legal strategy as the only approach. Success depends on a campaign that uses many kinds of tactics and that draws on a wide range of skills and talents. It needs activists, organizers, those who serve the needs of members, strategists, and good lawyers.

The legal issues I discuss here provide useful information to anyone interested in union success. I urge taking a realistic view of the NLRA as one among many resources unions can use. The NLRA embodies rights that our forebears worked and struggled for over many decades. In recognition of their struggle, we have an obligation to protect, preserve, and strengthen them.

We need to apply the lessons our forebears did when they faced the Great Depression and fought valiantly against evil and oppression in World War II. Those who lived through those hard times learned that you make the best of what you have. And generals do not refuse to engage the enemy because the battlefield's conditions are not perfect or there might be losses. To wait for and plan only for the perfect battlefield is to concede the war to the enemy. Nor is there only one appropriate strategy for fighting a war. A