Denver Law Review

Volume 62
Issue 2 *Symposium: Labor and Employment Law: A New Focus for the Eighties*
Article 3

February 2021

Introduction

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The University of Denver deserves great credit for its effort to focus attention on our nation's federal labor laws, for they have suffered from neglect during the past decade and have lost much of their force and vitality. In particular, the most fundamental of our labor laws, the National Labor Relations Act, has proved to be ineffective when applied in the new labor relations environment of the 1970s and 1980s. Congress will have to enact major reforms of the NLRA if the Act's goals of industrial democracy and industrial peace are to be achieved, and the debate which must precede such reform needs to begin immediately. I am pleased that my alma mater is helping to initiate that debate.

For many years I have been a member of the Subcommittee on Labor-Management Relations, the principal labor subcommittee in the House of Representatives. In October 1984, the Subcommittee published a report which briefly outlines some of the major failings of the Act. The most serious among them are its inability to deter or effectively remedy employer resistance to collective bargaining; its failure to protect employees from discriminatory discharge or to make them whole for the injury they suffer; the NLRB's scandalous delays in adjudicating cases; administratively and judicially created limitations on the scope of bargaining and the type of employee protected by the Act; and the emasculation of labor's economic weapons, the strike and the boycott.

The results of these failings are serious. Collective bargaining in the private sector, which Congress intended to be a nationwide system for adjusting industrial disputes and giving working people an effective voice in economic life, is on the wane. Fewer than twenty percent of American workers are protected by collective bargaining agreements, and the number falls each year.

Employer resistance to collective bargaining is widespread and vicious. As Professor Paul Weiler testified at the Subcommittee's hearings, the number of employer unfair labor practices has increased astronomically; since 1960 the number of charges against employers has increased five-fold while the proportion found meritorious has increased by more than thirty percent. Between 1970 and 1980, the number of certification elections dropped, but the number of meritorious charges against employers more than doubled.

I believe that the illegal activity of employers and their agents is the

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principal cause of the decline in unionization. When one out of every twenty workers who votes for a union is fired by his employer, the chilling effect on unionization cannot be overestimated. This chilling effect is aggravated by the lack of any meaningful governmental response to the employer's illegal action until years later, long after the employer's power has been confirmed and the organizing campaign has failed.

Illegal employer resistance to collective bargaining, and the NLRB's ineffectiveness in preventing or remedying it, are not new phenomena. In 1977, Congressional hearings on the need for labor law reform presented a detailed picture of the problem, illustrated most notably by the examples of Monroe Auto Equipment, Darlington Manufacturing Company, Florida Steel, and J.P. Stevens. These infamous labor law violators were pioneers in a now common strategy of abusing the legal processes of the Board and the courts to delay adjudication of their violations for so many years that justice would ultimately be denied to their victims. Darlington, for example, avoided liability for its ruthless termination of 550 employees for more than two decades and succeeded in deterring the organization of its four dozen sister plants. They pioneered the strategy counseled by a growing, cynical element of the legal profession to flout the law openly, relying on the calculation that any damages awarded under the NLRA would be less than the costs to the company of an organized workforce.

Economists, legal scholars, and recently, the GAO, have proven beyond a reasonable doubt that the Act's remedies do not deter illegal discharges and other anti-union acts by employers. It was already well established at the time of the 1977 Congressional debate on labor law reform that the Act's remedies are little more than a license fee for union busting.

In recent years, however, the Act's weaknesses have been exploited on a far wider scale than ever before. An entire industry of lawyers and consultants has grown up, not to counsel employers on how to make collective bargaining work for them, but on how to avoid collective bargaining work for them, but on how to avoid collective bargaining altogether and to defeat the aspiration of their employees for a meaningful voice in determining the terms and conditions of their employment. Respected law firms and universities in every part of the country present seminars that teach employers how to prevent unionization and how to decertify existing unions, seminars that undermine our national labor policy's encouragement of collective bargaining as the means to settle industrial disputes. As a lawyer and an ardent defender of higher education, I have been ashamed to see my profession and many great universities helping to promote the spirit of lawlessness that characterizes much of industrial relations today.

I am even more concerned, however, by the increasingly anti-union and anti-collective bargaining bias of the National Labor Relations Board. Despite its failings, the NLRB in the past could be expected to fight Darlington, J. P. Stevens and Florida Steel. It could be expected to

defend collective bargaining and the right of workers to resort to it. Such expectations can no longer be taken for granted.

The current Chairman of the NLRB has expressed his hostility to collective bargaining in word and deed. In Congressional hearings, Chairman Dotson refused to retract his statements that, "Unionized labor relations, shortsighted demands, greed, and debilitating work rules have been the major contributions to the decline and failure of once healthy industries," and that "collective bargaining frequently means labor monopoly, the destruction of individual freedom, and the destruction of the marketplace as the mechanism for determining the value of labor." Mr. Dotson's anti-union animus and that of his like-minded colleagues on the Board is apparent in their many opinions narrowing the scope of bargaining, limiting the Act's protection of concerted activity, approving the interrogation of open and active union supporters, condemning threats made by strikers while condoning threats made by employers, and restricting the right of unions to discipline members who cross picket lines.

There is every reason to doubt whether a Dotson Board would have prosecuted J. P. Stevens with any vigor and to question whether the Stevens employees' partial organizing success would have been possible if they had had to rely on the Dotson Board to protect their rights.

Regardless of the Board's composition, however, it is clear that changes in the National Labor Relations Act are needed if collective bargaining in the private sector is to survive, let alone to grow. But in any case, the needs and demands of workers will not disappear. If employer hostility to reform is not moderated; if Congress cannot summon the will and the courage to reaffirm its commitment to collective bargaining, other solutions will arise. As Professor Clyde Summers testified at the Labor Management Relations Subcommittee's recent hearings:

> In the absence of collective bargaining, employees need to be protected by law from unjust dismissal, they need to be entitled by law to refuse excessive overtime, they need statutory rights to sick leave, paid vacations, and severance pay. Beyond this, the law must create some form of employee participation structure, such as works councils, to provide a measure of industrial democracy. The law cannot be indifferent to the needs of workers; the responsibility of the law is to aid the weaker party, if not through establishing collective bargaining, then through direct legislation.

We must never forget that the Wagner Act was passed in response to years of violence and industrial unrest that shook the nation's economy in the early part of this century. If the law does not treat the great majority of working people fairly, they will resort to means outside of the law to obtain economic justice.

I hope therefore, that the labor relations bar will dedicate itself to a reaffirmation of the value of collective bargaining. It is time for our profession to become part of the solution instead of part of the problem.