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Introduction

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SYMPOSIUM ON LABOR LAW

INTRODUCTION

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On March 28, 1953, a highly successful one-day institute on labor law was held in Denver under the auspices of the Denver Bar Association. It dealt almost entirely with the substantive aspects of unfair practices by labor organizations and by employers. The three articles which follow are largely derived from lectures that were delivered on that occasion and deal, respectively, with unfair labor practices by employers, unfair labor practices by labor organizations and secondary boycotts. These will present in some detail the substantive legal limitations on the efforts of management and of labor organizations to reach objectives which can usually be gained only at the expense of some objective of the other.

Of necessity these articles will omit large segments of the general subject of labor-management relations, some of which are easily separable but others of which are so closely related that some mention of them at this point should provide useful background for the reading of the articles. In effect, the articles discuss the potential abuses of, and interferences with, the employee's right to bargain freely with his employer through agents of his own choosing. This omits any discussion of how this right was acquired, and of how it is exercised in the absence of abuse or interference.

From the birth of the first recognizable labor organization in this country in 1827, until 1890, organized labor conducted a series of experiments in technique which was regulated only by judges applying common law methods to reach their results. It is a familiar story that labor organizations were first viewed by them as unlawful conspiracies. The first break in this attitude occured in 1842, when a Massachusetts court held that Union organizations were not illegal *per se,* but that their activities must be examined on their merits. For fifty years the process of examining their activities on their merits continued in the hands of common law judges, and most labor partisans believed that the movement fared very badly.

The first legislation of significance occurred near the turn of the century. By an odd quirk of fate, statutes were passed in 1888 and in 1890 which stand, respectively, as the starting points for two diametrically opposed lines of policy. In 1888 the Federal Arbitration Act was passed in an effort to provide machinery for the peaceful settlements of disputes in the railroad industry. This machinery is the parent in legislative form of the National Labor Relations Board. In 1890 the Sherman Act, which is rarely asso-

ciated now with labor legislation, was passed, and provided the opponents of the great Pullman strike four years later with a powerful anti-union weapon. This was a bitter period, and some of its bitterest episodes occurred in Cripple Creek, Leadville, Telluride, Victor and Independence, Colorado.

The next important development occurred in 1914. The use of the Sherman Act against organized labor was bitterly opposed by labor supporters, and in 1914 provisions were inserted in the Clayton Act which were designed to eliminate Sherman Act injunctions against organized labor activities. The experience of the railroad industry, starting from the Arbitration Act, was producing new legislation and after several intermediate steps, in 1926 the Railway Labor Act was passed, containing the announcement that employees subject to the Act had the *right* to bargain collectively through representatives of their own choice. The Act also provided for boards of adjustment and mediation; its application was still limited, of course, to railroad employees.

Most labor leaders concluded that the actual gains produced by these changes were insignificant. The Clayton Act was a great disappointment to them, since the courts continued to assert jurisdiction over requests for injunctions based on the assertion that irreparable harm to persons or property was threatened. Labor turned more and more to the use of economic weapons and away from substantive legislative action on the terms and conditions of employment. By the early 1930's, the objective of labor appeared to be to clear the arena of all competing forces except labor and management; to stay the hands of Federal judges and to impose the minimum of regulation over the test of strength between unions and management. The first important legislation in this direction came in 1932. The Norris-LaGuardia Act in that year removed jurisdiction from the Federal courts to issue injunctions in labor disputes except under special circumstances. It extended protection to union activities by denying federal courts the power to enjoin strikes, assemblies, efforts to publicize the facts of the labor dispute and the very joining of union.

This was largely a negative measure, however, and in 1933 the first positive legislation of general application designed to bring labor and management together at the bargaining table on equal terms and with as little interference as possible, made its appearance. This was contained in a portion of the National Industrial Recovery Act (Section 7A) which adopted the approach of the Railway Labor Act and extended to all employees subject to the Act the right to bargain collectively through representatives of their own choice. The National Industrial Recovery Act also adopted another Railway Labor Act device, namely, the labor board. It established the National Labor Board which was intended to insure that the provisions of the Act were carried out much as the National Railway Adjustment Board presided over the enforcement of the rights of railroad employees under the

Railway Labor Act. The NIRA, and the related Public Resolution No. 44, did not last very long, but within two months of the declaration by the Supreme Court that NIRA was unconstitutional, the Congress passed, in July of 1935, the National Labor Relations (Wagner) Act.

Although the constitutionality of this Act, which purported to reach all employees whose labor disputes might affect commerce among the states, was in doubt until April of 1937, its passage marks a key point in the acquisition by organized labor of freedom to exert its economic power in bargaining with employers. There has never been any doubt about the potential economic power of organized labor; the overriding question has always been how freely should it be permitted to be used. Nineteen thirty-five and the Wagner Act marked the high point of labor's freedom to operate with a minimum of restraint.

There has, of course, never been unanimous feeling among all groups in America that organized labor should be free to operate without restriction. During the period 1935 to 1947, a sufficient segment of the American public became convinced that unions were operating with too little restraint that in 1947 a strenuous revision of the National Labor Relations Act was undertaken, and the resulting law incorporated for the first time a series of what are known as unfair labor practices by employees; these, of course, are restrictions upon the freedom of organized labor to use certain techniques labelled unfair in the test of strength against management. As amended to date, the National Labor Relations Act (which includes the Taft-Hartley Labor-Management Relations Act) states the substantive rules which the three articles to follow will explain in detail. Whether they represent the first stopping point on a reverse swing of the pendulum which is said to have swung in favor of labor to an increasingly dangerous extent for 30 years, or whether they constitute, as many labor politicians during the 1952 political campaign announced they did, a "slave labor law", is a matter of individual political choice.

A less controversial aspect of the subject, but an equally important one, is the matter of procedure. Now that organized labor has acquired these rights, how are they exercised? The development of the National Labor Relations Board which the Wagner Act created has been a controversial subject only in connection with the policies pursued by the Board. There is little question but that some such agency should be present in the labor-management relations picture to deal with abuses and interferences by either party. Apart from its policies on such substantive matters, the manner in which it operates, its structure and administration, form the essential background and apparatus for the performances of the principal parties to labor-management relations.

The beginning of all of the many potential contacts between

organized labor and management is the organizing drive. The National Labor Relations Board comes into this picture immediately, because it is the objective of labor organizations to become recognized and certified by the NLRB as the bargaining agent for employee unit. Whenever an employer whose plant is unorganized is informed that a substantial number of his employees desire to be represented by a bargaining agent, the employer must either agree to bargain with the named agent (if he has no question that the agent is in fact supported by the majority of his employees) or he must submit the matter (or request that it be submitted) to the National Labor Relations Board.

The Board (or the Regional Director) will either hold an election or investigate the propriety of an election if a question is raised as to its jurisdiction. There are three questions that must be decided before an election can be held, and the Board can decide them all. It must be determined that the employees in question are subject to the Act, that a substantial number of employees support the request for an election, and that the unit for which an election is to be held is an appropriate unit for bargaining purposes. The Board will decide these questions subject to judicial review. The first and third of them raise innumerable possibilities for disagreement and, particularly on the unit question, the Board has broad discretion. Assuming that the necessary relation to commerce exists, and that the Board finds that the proposed unit is appropriate, the members of the proposed unit will be identified and an election held.

Agents of the Board will work closely on the scene with management and union representatives to insure that each employee registers his private choice in the matter of union representation without interference. If a majority of the employees voting select the same representative, he will be certified as such. If no majority opinion is found, run-off elections are held in which "no-union" may be a candidate, depending on the number of votes cast for that result in the election which failed to produce any majority. Elections are decided by a majority of votes cast, but no result will stand unless the Board feels that a sufficient number of members of the unit have voted.

This bare outline indicates not only how representation is determined in the simplest cases, but also indicates the dominant influence of the NLRB and its agents even in matters where no abuse or interference prohibited by law is present, charged or suspected. Against this outline, and during the operation of this procedure and its ramifications the substantive rules elaborated in the following articles operate.

This subject has always deserved attention and always will, but it is particularly timely now because the Congress of the United States is presently considering why and how it would change the National Labor Relations Act to reflect the views of a changed administration.