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Practice Before the National Labor Relations Board

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1. Introduction—Purposes and Background of the Act

The present law of labor relations traces back to a shortage of labor during the period of the Black Death in England. The enormous bargaining power created in the individual worker by the labor scarcity became a menace to the national economy, and resulted in drastic legislation. In 14th century England it became a crime and a civil offense for a worker to combine with his fellows to secure higher wages or improved working conditions.

It has taken almost six centuries for labor to win recognition of its right to organize. As late as 1806, a court in Philadelphia, in the celebrated *Philadelphia Cordwainer's Case*, applied the accepted English doctrine that a combination of employees to raise their wages was a criminal conspiracy. Even after the complete suppression of unions and union activity was superseded by an attitude of judicial tolerance, there still remained a number of hang-over common law doctrines, including the doctrines of restraint of trade and interference with contract, which, together with the effective use of the labor injunction, were applied to excess in the stifling of union activity. As in many other fields of thought where new concepts evolve slowly from the old—so slowly that the old and the new have time to exist side by side in irreconcilable contradiction—a number of paradoxes became discernible in the field of labor law. For example, it became possible for workers, who were engaged in the exercise of their legal rights to organize, to find themselves locked out and blacklisted by anti-union employers who, in so doing, were also acting within the scope of the law.

Needless to say, the economic situation of the worker has changed considerably since the Black Death. In contrast with the importance of the bargaining power of the individual worker during the infancy of the industrial era, the voice of the unorganized worker today is not to be heard above the whir of the machinery. In 1898, an industrial commission appointed by the President of the United States to investigate the causes of strikes and industrial unrest in the various states, reported that "it is readily perceived that the position of a single workman, face to face with one of our great modern combinations, such as the United States Steel Corporation, is in a position of very great weakness. * * * By the organization of labor and by no other means, it is possible to

*Regional Director.

introduce an element of democracy into the government of industry." In 1912, a commission was appointed by President Wilson to investigate the industrial unrest of the period and to inquire into its causes. The commission found that in large-scale industry throughout the country there was a general denial by employers of the right of employees to organize and bargain collectively, and concluded that the denial of the right and opportunity by workers to form effective organizations was one of the main causes of industrial conflict. It reported that the most violent industrial disputes of the past quarter century "have been revolutions against industrial oppression, and not merely strikes for the improvement of working conditions." The commission went on to report that where men are well organized, and the power of employers and employees is fairly well balanced, agreements are nearly always reached by negotiations, and it recommended that every means should be used to extend and strengthen organization throughout the entire industrial field.

There have been many other official inquiries of this nature, resulting in an almost unanimous verdict that efforts by employers to suppress the efforts of employees to organize are bound ultimately to fail and to provoke, meanwhile, the bitterest industrial unrest.

One of the main reasons for the existing protection afforded workers who seek to organize, and the restraints upon employers who would interfere with such activities is this demonstrated fact that in the past industrial warfare, so costly and troublesome to the nation, has been caused chiefly by employer repression of workers' attempts at self-organization. For many years the federal government has experimented with devices designed to bring peace to industry. The National War Labor Board, set up during the World War, was such an experiment. Efforts to deal with labor relations on the railroads have had a long history, culminating in the passage of the Railway Labor Act of 1926, which is based on the assumption that the basis for stable, amicable labor relations is the periodic negotiation of collective agreements between employers and strong unions representing the employees. The National Mediation Board, created to administer the Railway Labor Act, has had notable success in averting strikes in the railroad industry. In its first annual report, issued in 1935, the board stated: "The absence of strikes in the railroad industry * * * is to be explained primarily not by the mediation machinery of the Railway Labor Act, but by the existence of * * * collective labor contracts. For, while they are in existence, these contracts provide orderly, legal processes of settling all labor disputes as a substitute for strikes and industrial warfare."

In 1933, Congress undertook, in Section 7 (a) of the National Industrial Recovery Act, to apply to employment relations generally the tried principles of the Railway Labor Act.

The National Labor Relations Act was passed on July 5, 1935, creating the present National Labor Relations Board. The House Committee on labor described the measure as "merely an amplification and further clarification of the principles enacted into law by the Railway Labor Act and by Section 7 (a) of the National Industrial Recovery Act, with the addition of enforcement machinery of a familiar pattern." It should be made clear at the outset that the Act was not designed to remove all causes of labor disputes nor was the board intended to regulate and supervise wages, hours or working conditions. The essential purpose of Congress was to promote industrial peace by giving definite legal status to the procedure of collective bargaining. Since one of the most fertile sources of industrial discontent had been the refusal by employers to recognize and negotiate with employee representatives, it seemed plausible that the removal of this evil would result in a more harmonious relationship.

The Act provides, in essence, for only three things. One is the liberty of working people to join or form unions if they wish to, free from interference by their employers. The second is the duty of employers to bargain collectively with the representatives selected by a majority of their employees. The third is the duty of the board to ascertain by an election or otherwise what unions, if any, a majority of the employees in a proper unit desire to represent them. These, it will be recognized, are the basic requirements for collective bargaining. Without freedom from employer interference and without the opportunity to organize into self-directed and self-financed bargaining agencies, the right to organize is a sham. Nor has anything been accomplished if employers assume an attitude of mere tolerance toward employee organization without an accompanying willingness to bargain. Collective bargaining implies, in addition to recognition, an acceptance of an obligation to negotiate in good faith, with the purpose of entering into a binding agreement when negotiations are successful.

In setting up the National Labor Relations Board, Congress made use of the same device which it had used to regulate railroads, communications, trade practices and other types of industry which presented special problems. The board was given powers to investigate and adjudicate cases where employers, by failing to accord employees their rights under the Act, have committed unfair labor practices in which the national government has an interest by reason of the effect of those practices upon interstate commerce.

2. Practice Before the Board

Cases brought before the National Labor Relations Board fall into two categories—those which have to do with unfair labor practices under the Act, and those having to do with questions concerning the

representation of employees. The Act itself enumerates the prohibited practices, and empowers the board, subject to court review, to prevent any person from engaging in any unfair labor practice affecting commerce. The unfair labor practices described and forbidden by the Act may be summarized as follows:

1. Employers are prohibited from interfering with, restraining, or coercing employees in the exercise of their rights to form, join or assist labor organizations or to engage in labor activities.

2. It is an unfair practice for an employer to dominate or interfere with, or contribute support to, any labor organization.

3. It is an unfair practice for an employer to discriminate against an employee in order to encourage or discourage his membership in a labor organization.

4. It is an unfair practice for an employer to discriminate against an employee because he has filed charges or given testimony under the Act.

5. It is an unfair labor practice for an employer to refuse to bargain collectively with the representatives of a majority of his employees in a proper unit.

If it is found that an unfair labor practice has been committed, the board is empowered to order the offending employer to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of the Act. In no sense is the remedy afforded by the Act punitive in nature. The statute is remedial. In protecting the fundamental liberty of the working man, Congress selected the administrative process, rather than that of the criminal trial, as the means of enforcement. The employer who has acted in violation of the statute does not pay a heavy fine and go to jail; instead he notifies his employees that he will cease and desist from interfering with their guaranteed rights, reinstates those employees whom he has illegally fired because of their union activities, and agrees to bargain collectively with the duly designated representatives of a majority of his employees if he has refused to do so in contravention of the Act.

The board's procedure is set forth in the Act, and is amplified by the rules and regulations. The procedure is simple and direct, and is intended to provide an orderly and expeditious method of administering justice. The work of the board is of necessity decentralized through regional offices. Each region is under a Regional Director, who has a legal staff and field examiners. The latter aid in the investigation and adjournment of cases, working directly under the Regional Director.

The board itself does not initiate a case. Its attention is first drawn to an alleged violation of the statute by a sworn charge filed in a Regional Office by an employee or a group of employees, or by a labor organiza-

tion. When such a charge is filed, it is investigated by agents of the board attached to the particular Regional Office with which the charge is filed. This investigation is not perfunctory; it involves careful study of the matter in conference with the persons filing the charge and with the employer. The objective is to obtain all the pertinent facts from the parties. Upon the basis of this investigation about 16 per cent of all charges are dismissed as without merit or as not within the board's jurisdiction. About 26 per cent in addition are withdrawn by the charging party. These withdrawals usually result from advice by the Regional Office that the charges are without merit or not within the board's jurisdiction. The very large total of about 42 per cent of all cases are thus disposed of favorably to the employer in their preliminary stages by dismissal or withdrawal before issuance of a complaint. About 52 per cent additional are settled in this preliminary stage; that is, the matter is adjusted between the board and the employer in a manner satisfactory to both. These three methods of disposition; that is, dismissals, withdrawals, or adjustments, account for 94 per cent of all cases thus far closed, and the board has closed some 20,000 cases. This leaves only about 6 per cent of the cases brought to the board in which the board, as a result of the preliminary investigation, considers formal proceedings warranted. These are the cases prepared and tried. The preparation is done in the Regional Office, except that an occasional case is spcially assigned to an attorney attached to the Washington staff.

Up to this point, the proceedings have been informal. In the small percentage of cases which require formal action, a "complaint" is issued by the Regional Director, for the board. The complaint details the respects in which it is alleged the employer has violated the law, and the facts on which jurisdiction is claimed under the commerce power. The person complained of, the employer, is expressly granted the right to file an answer setting forth all defenses to the complaint, and to appear in person or otherwise and to give testimony at the time and place fixed for the hearing in the complaint. The hearing is conducted by a Trial Examiner designated by the board. The testimony taken at the hearing on the complaint and answer is required by the Act to be reduced to writing, so that a permanent record is made of the testimony. Upon conclusion of the hearing, the trial examiner makes his intermediate report, containing findings of fact and recommendations as to the appropriate order that should be made by the board. This report is served upon the parties, who are permitted to file exceptions. The parties may also have oral argument before the board, and may file briefs. The board at Washington then reconsiders the entire record and makes its own findings and order. It may set aside the hearing and order a new one, it may require additional testimony to be taken, or, if it believes the hearing has been adequate, it may proceed to decide the case on the merits.

There has been some confusion as to the kind of evidence received by the board at its hearings. It is true that the board, as in the case of other administrative agencies, is not required under the Act to follow the orthodox rules of evidence prevailing in courts of law or equity. However, the evidence received must be material and competent. In the *Consolidated Edison* case [305 U. S. 197 (1938)] the U. S. Supreme Court laid down the following standard: "The statute provides that 'the rules of evidence prevailing in courts of law and equity shall not be controlling.' The obvious purpose of this and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order. *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 44; *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 227 U. S. 88, 93; *United States v. Abilene & Southern Ry. Co.*, 265 U. S. 274, 288; *Tagg Bros. & Moorhead v. United States*, 280 U. S. 420, 442. But this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence."

The board has no power to enforce its decisions and orders, except by petition to the appropriate Circuit Court of Appeals. The right is also reserved to the employer to petition the Circuit Court to set aside the order of the Board. Upon the filing of its petition, the board is required to certify and file in the court a transcript of the entire record in the proceeding, including the pleadings, testimony, and the findings and order. The court then gives notice to all parties of the filing of the petition for enforcement and the filing of the record. At this point the case becomes a case within the jurisdiction of the Circuit Court of Appeals. After the case is briefed and argued, the Circuit Court has power to make a decree enforcing, modifying or setting aside in whole or in part the order of the board. The Circuit Court is not limited to a mere review of the findings made on the evidence which the board permitted to be taken. It has the power to order that additional evidence be taken by the board for transmittal to the court in addition to its power to set aside the board's order for any procedural error or material exclusion of evidence.

The procedure of the board has been considered by the courts in many cases and has invariably been accorded judicial favor. In the *Jones & Laughlin* case [301 U. S. 1 (1937)], Chief Justice Hughes spoke of the board's procedure as follows: "The procedural provisions of the Act are assailed. But these provisions, as we construe them, do not offend against the constitutional requirements governing the creation and action of administrative bodies. See *Interstate Commerce Comm'n v. Louisville*

& Nashville R. Co., 227 U. S. 88, 91. The Act establishes standards to which the board must conform. There must be complaint, notice, and hearings. The board must receive evidence and make findings. The findings as to the facts are to be conclusive, but only if supported by evidence. The order of the board is subject to review by the designated court, and only when sustained by the court may the order be enforced. Upon that review all questions of the jurisdiction of the board and the regularity of its proceedings, all questions of constitutional right or statutory authority, are open to examination by the court. We construe the procedural provisions as affording adequate opportunity to secure judicial protection against arbitrary action in accordance with the well-settled rules applicable to administrative agencies set up by Congress to aid in the enforcement of valid legislation."

We have still to consider those cases which have to do with questions concerning the representation of employees. These proceedings are inquiries into the question of whether or not a majority of the employees in an appropriate collective bargaining unit have designated or selected bargaining representatives. Such proceedings arise on the filing of a petition, as distinct from a charge. Here again the board is authorized to conduct an investigation and in connection therewith to hold a hearing. However, the issues in a representation proceeding are quite different from those in the complaint proceeding. For one thing, the employer is not charged with any violation of the Act. The conflicting claims of the parties relate only to the question of appropriate unit and the collective bargaining majority. The function of the board's attorney in these cases is to aid both sides in placing upon the record sufficient information bearing on these questions to enable the board to reach an intelligent decision on the record. If the proof as to the designation by a majority is left in doubt on the record made at the hearing, the board may direct that the question concerning representation be resolved by an election by secret ballot held under its supervision and control. The board has held more than 2,300 elections, in which close to a million valid votes have been cast.

In representation cases, the board makes no final order against anyone. It determines the appropriate unit, and states whether or not the petitioning union has or has not a majority in that unit. If there is no majority in the unit, the petition is dismissed. If there is a majority, a certification to that effect is made. Such a certification is merely a certification of fact, which neither increases nor decreases the rights or obligations of the parties. As a practical matter, it removes from the scope of conflict one of the issues which may give rise to an industrial dispute.

Unfortunately, there is insufficient time for any attempt at a thorough analysis or evaluation of the board's work. I will therefore refer

briefly, in closing to Senator Wagner's recent report to the Committee on Education and Labor of the United States Senate. The Senator pointed out that in 1938, the first full year of operation of the National Labor Relations Board under the Supreme Court's mandate, there were only about half as many strikes, one-third as many workers involved, and less than one-third as much working time lost, as in the year 1937. For the first time in a period of eight successive years there was a decisive turning back from the rising number of conflicts. There were fewer workers involved in strikes during 1938 than in any year since 1932, and workers lost less time through strikes in 1938 than in any year since 1931. All during 1936 and through March, 1937, there were many more strikes called than cases filed with the board. When the Supreme Court upheld the law in April, 1937, the trend was immediately reversed, and the number of new board cases each month has averaged 3½ times the number of strikes, while the number of workers involved in board cases since May, 1937, has been many times that involved in strikes. Equally significant is the history of the sit-down strikes which increased in number to the peak figure of 170 in the month of March, 1937, and then declined to the point of relative obscurity. It is on the strength of facts such as these that Senator Wagner told the Senate committee that "The National Labor Relations Act has thus played a notable, constructive role in our national life. To millions of workers it has brought a better understanding of their employer's problems, and the material and spiritual value of participating in a free organization of their fellows for mutual aid and protection. To most employers who have given the principles of the Act a fair trial, it has brought labor peace, and beyond that, a more human relationship with workers based on the mutual respect and understanding that grows out of free bargaining between free men. These employers—and they now represent the overwhelming majority —are among the chief beneficiaries of the Labor Act."

NEW BOOKS AT LAW LIBRARY

Miss Secrest, Librarian, advises that the following books have been received at the library in the City and County Building, namely:

Quieting Title in Colorado, by Williams, 1939.

Wills, Hornbook Series, by Atkinson, 1937.

Partnership, Crane on—1938.

Real Property, Thompson on—1939.

Fair Trade Acts, Weigele on—1938.

Criminal Evidence, Underhill on—1935.

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NEW OFFICERS ELECTED BY THIRTEENTH JUDICIAL ASSOCIATION

Meeting at Fort Morgan, the Fourteenth Judicial District Bar Association selected Sherman E. Walrod of Holyoke as its president, and Charles Kreager of Sterling as its secretary-treasurer. Governor Ralph Carr and Justice Norris C. Bakke of the Supreme Court addressed the association.

Following the meeting, a banquet was held at the Fort Morgan Country Club. Mr. William R. Kelly of Greeley, president of the State Bar, and M. E. H. Smith of Greeley, president of the Weld County Bar Association, were present at the meeting.