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**The Once and Future Labor Act:
Myths and Realities**

THEODORE J. ST. ANTOINE
James E. & Sarah A. Degan Professor Emeritus of Law
University of Michigan

A century ago the legal specialty of most members of this audience would have been known as Master and Servant Law. By the time my generation entered law school, the Decennial Digest had just added a new topic — Labor Relations Law. That of course dealt with collective bargaining and union-management relations generally. Now, a half century further along, we might seem to have come full circle, to judge by the lectures of the two eminent jurists who inaugurated this series. Both Abner Mikva and Richard Posner spoke on highly important and timely subjects, and yet those would be classified, not as Labor Law, but as Employment Law — to use today's term — or even as Master and Servant Law — the term still employed by the Decennial Digest. So today, at the risk of being a bit out of fashion, I am going to return to the past, and I hope the future as well, and talk about the National Labor Relations Act. I shall first debunk some of the more romantic notions about the Act's origins and purposes, and then focus on a few of the more practical lessons we should have learned about achieving its true objectives.

I. THE GENESIS OF THE NATIONAL LABOR RELATIONS ACT

About twenty years ago a group of young scholars, who became known as the Critical Legal Theorists, began a thoroughgoing reexamination of the American legal system. A central tenet of their critique was the concept of “indeterminacy” — there is nothing certain and settled about the law, and it is always subject to manipulation to serve special interests. It was probably inevitable that some of the most idealistic members of this group would turn their attention to labor law and specifically to the New Deal Era’s crowning achievement in the area, the Wagner Act of 1935.

In a remarkable article, Professor Karl Klare described the Wagner Act, the original National Labor Relations Act (NLRA), as “perhaps the most radical piece of legislation ever enacted by the United States Congress.” But he went on to say that Supreme Court interpretations frustrated the “utopian aspirations for a radical restructuring of the workplace.” Similarly, Professor James B. Atleson produced a provocative book in which he argued that unnecessary language in one of the Court’s earliest Wagner Act cases “drastically undercut the new act’s protection of the critical right to strike” by allowing the permanent replacement of economic strikers. I found these claims novel, arresting, and worthy of a closer look.

Then serendipity struck and I was invited to spend a visiting academic year here in the District at George Washington University. That was in the mid-1980s. Several of the leading figures in the enactment and early constitutional travails of the Wagner Act were still alive, and they agreed to talk with me about it. They were a varied and wide-ranging group, both in the roles they had played and in their political orientation. But they were in essential agreement on one basic proposition: the Wagner Act was designed as a comparatively moderate measure. It was intended to protect union activities but not to alter fundamentally the relative status of

employers and employees. I shall briefly summarize my conversations with some of the most significant interviewees.

Judge Simon Rifkind was the “clerk” or legislative assistant to Senator Robert F. Wagner who is credited with drafting Section 7(a) of the National Industrial Recovery Act. Section 7(a) of the NIRA was later incorporated in large part into Sections 7 and 8(1) of the Wagner Act. Rifkind said Wagner got interested in union problems when he was asked to argue against a “yellow dog contract” imposed by a New York subway line on its workers. According to Rifkind, Wagner’s aim as a legislator was to legitimate unionism, not to remake the American workplace. Although Rifkind did not regard Wagner as a scholar himself, he noted that European influences affected Wagner’s thinking. Wagner considered the United States “behind the times on social issues.” But Wagner felt he had gone as far as he could go with both the NIRA and the NLRA. To go further “would kill” the legislation. Here Rifkind pointed out that a labor relations statute like the NLRA was not even part of the initial New Deal legislative package.

The principal drafter of the Wagner Act was Leon Keyserling, Rifkind’s successor as the Senator’s clerk. The Wagner Act, Keyserling told me, was written in the Senator’s office. The Department of Labor was deliberately excluded. In Keyserling’s view, the statute was essentially a “conservative” measure. Its twofold purpose was (1) to advance social justice and (2) to channel protest and defuse potential rebellion among restless workers in the Depression. The Act did not have the “radical” purpose, Keyserling emphasized, of revamping industrial relationships between employers and employees. Keyserling did acknowledge, however, that Wagner was directly influenced by the concepts of industrial democracy that had been developed by Sidney and Beatrice Webb, English exponents of Fabian Socialism.

One of my most charming interviewees was Charles A. Horsky, a Washington lawyer little known to the general public but a legend within the legal profession. He was a member of the Solicitor General's Office when the Wagner Act was passed and he handled several of the first cases before the Supreme Court on the scope of the statute. Horsky stressed that the lawyers at the Labor Board and in the Solicitor General's Office were very much concerned with preserving the constitutionality of the Wagner Act. Their arguments before the Supreme Court were "technical and pragmatic." There was no suggestion that the statute would revolutionize American employer-employee relations, beyond guaranteeing workers the right to organize and bargain collectively. Horsky's view was that the early defenders of the Wagner Act in the courts treated it as "designed in considerable part to still industrial unrest."

Ruth Weyand was a left-leaning union lawyer of genuine intellectual stature. Despite her personal desire to see collective bargaining encompass a broad array of business decisions, she conceded that the old AFL unions "bargained narrowly about bread-and-butter issues." Their practices, she declared, were not "precedent for an expansive view of the Wagner Act." She agreed that Senator Wagner and the other principal proponents of the statute were propelled by the dual motive of quieting labor unrest and promoting industrial democracy." Much like Horsky, Weyand concluded there was no suggestion at the "higher echelons" of government that the Wagner Act was a radical or revolutionary product. The constant concern of its defenders in the early court challenges was to maintain its constitutionality. That called for cautious rather than ambitious claims about its scope.

Management attorney Gerard D. Reilly came closest among my interviewees to identifying radical tendencies among the Wagner Act's champions. He was an early Solicitor and then a member of the National Labor Relations Board. Reilly dubbed as "Communist

sympathizers” two Board officials, Edwin S. Smith and Nathan Witt, and one influential union attorney, Lee Pressman, General Counsel of the CIO and the Steelworkers. But apart from these three individuals and “possibly the Board’s Economic Research Division,” Reilly did not believe that the major proponents of the Wagner Act had designs on remaking the American workplace. Reilly considered Simon Rifkind and Leon Keyserling the two persons who could speak most authoritatively on the writing of the NIRA and the NLRA. He also confirmed Keyserling’s assertion that Wagner kept legislative drafting very much within his own office. This was the vision shaping the Act.

The Congress that passed the Wagner Act in 1935 was very different from the post-World War II Congress that passed the Taft-Hartley Act twelve years later. Nonetheless, I am satisfied from these and other interviews and from my reading of the legislative history that the Supreme Court’s statement in the *First National Maintenance* case (1981) could apply to either statute: “Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union’s members are employed.”

What, then, did Senator Wagner and the 1935 Congress have in mind? I believe language in the Findings and Policies of the original NLRA, which was retained in the Taft-Hartley amendments despite some vocal opposition, got it right. The “policy of the United States’ was declared to be “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....” If that was the aim, however, something seems to have gone terribly wrong during the past half century. In the mid-1950s over 38 percent of private nonagricultural employees were unionized. Today that figure has slipped to

less than 10 percent — about one-quarter of the percentage at the 1950s' peak, and a little less than what it was on the eve of the Wagner Act.

II. THE DECLINE OF ORGANIZED LABOR

The explanation for union decline is surely multifaceted: the shift of jobs from the manufacturing to the service industries, and from the unionized to the nonunionized sections of the country; tighter legal restraints imposed by the Taft-Hartley and Landrum-Griffin amendments to the NLRA; an aging, complacent, and unaggressive union leadership; and perhaps a growing feeling among employees that unionization is no longer necessary in a time of economic prosperity and enlightened management. Insofar as workers may have knowingly and voluntarily chosen to refrain from organizing, of course, then the National Labor Relations Act is fulfilling its objective of ensuring “full freedom of association” just as if they had eagerly signed a union authorization card. But there are facts that give one pause about accepting such a scenario as the whole story.

At the same time that union membership went into a nosedive in the private sector, it was soaring in the public sector. The percentage of government employees represented by unions now stands at 42 percent — over four times the percentage in private employment. Included are many groups that would formerly have been classified as “unorganizable”: school teachers, doctors, lawyers, engineers, and other professional and technical employees. Once a State Legislature and a Governor have authorized unionization, it will be the rare agency head who will strongly object. That does make one wonder about the extent to which employer opposition, and subtle or not-so-subtle intimidation, may have operated in the private sector. Extrapolating from figures supplied by Professor Paul Weiler, for example, I once calculated that employer discrimination against employees during union organizing drives increased about four to six times between the 1950s and the 1980s.

The situation is entirely different in Western Europe, which historically has been twice as organized, proportionately, as the United States, and is now even more so. There is a biting irony in this. Ours is probably the most conservative, least ideological of all labor movements, traditionally committed to the capitalistic system and to the principle that management should have the primary responsibility for managing. Yet American business in the main has never been accepting of unionization and collective bargaining. In part this resistance may result from the highly decentralized character of American industrial relations. An employer usually must confront a union on a one-to-one basis, without the security blanket of association bargaining on behalf of all or substantially all the firms in a particular industry, as is customary in Western Europe. In part the resistance to union organization may spring, among both employers and employees, from ingrained American attitudes of rugged individualism and the ideal of the classless society. As a corollary, many employers resent, as an automatic reflex, any intrusion on their total autonomy and flexibility in running the enterprise.

In the somewhat atypical context of an academic institution, I myself have been the equivalent of a CEO. I have even delivered a captive audience speech of sorts, with one of my better labor law students sitting in the audience and taking notes to document any unfair labor practices I might commit. Our clerical staff was organized at one point but later the union was decertified. I saw no adverse impact on our operations under the unionized regime. My secretarial director commented that in at least one respect unionization had its advantages. She could deal with just one person to settle a complaint, instead of having to cope with a number of individuals with often-diverging views. John Dunlop may have phrased it more elegantly, but essentially he made the same point when he said: ‘A great deal of the complexity and beauty of

collective bargaining involves the process of compromise and assessment of priorities within each side.”

Certainly, employer aversion to unionism can hardly be justified by a dispassionate analysis of the actual impact of collective bargaining in this country. The consensus of labor economists is that unionization cannot be proven to have produced any substantial shift of corporate income from capital to labor. Union workers have obtained a wage level that is 10 to 20 percent higher than their nonunion counterparts. But that differential is largely offset by increased efficiency and greater productivity in unionized firms. Indeed, the major contribution of collective bargaining is probably not economic at all. It is the joint creation of the grievance and arbitration system. The mere existence of such procedures helps to eradicate such former abuses as favoritism, arbitrary or ill-informed decision-making, and outright discrimination in the workplace.

From my own experience and from my research and discussions with union and management representatives, I would further conclude that collective bargaining has promoted both labor peace and broader worker participation in improving the quality of products and services offered the public. Unilaterally or in conjunction with unions, employers have sought employee input through plans variously denominated participative management, quality of work life (QWL) programs, and employee involvement. That is smart business. The worker on the assembly line will spot flaws that have escaped the eye of the keenest industrial engineer. I suspect some participative programs have been adopted as union-avoidance devices. Yet paradoxically, studies by Professor Thomas Kochan of MIT and others find that a strong union presence may be essential to ensure the long-term survival and continuing success of QWL undertakings.

III. THE DUTY TO BARGAIN

In recommending ways to revise or reinterpret the NLRA to better achieve its underlying purposes, I would start with what I regard as the Act's constructive centerpiece, the duty to bargain collectively. To realize the full potential of creative negotiating, we should shed as much as possible of the straitjacket imposed by the famous *Borg-Warner* case (1958). There the Supreme Court accepted a rigid and unrealistic dichotomy between mandatory and permissive subjects of bargaining. The parties are only required to bargain about mandatory subjects (the statutorily prescribed "wages, hours, and other terms and conditions of employment"), and only they may be the basis for an impasse or deadlock in negotiations. I began my legal career working with an able, tough-minded management attorney who argued *Borg-Warner*. Except for a client veto, he would have urged that all lawful subjects be mandatory. He believed that government fiat should not control so basic and individualized a question as the contract issues a particular employer or union deems important enough to back up with a lockout or a strike.

Hypocrisy is encouraged and candor reduced by the *Borg-Warner* formula. A savvy party that urgently desires a permissive subject in a contract can usually bring negotiations to an artificial deadlock over a legally sanctioned mandatory topic. Experienced, sophisticated participants in a mature, durable bargaining relationship do not engage in such ploys to evade the law's strained distinctions. If a union like the United Auto Workers wishes to discuss pension improvements for retired workers, technically a nonmandatory subject, the Big Three auto manufacturers discuss them. Other veteran management lawyers tell me similar stories. In those circumstances the law is superfluous. Where legal regulation is needed is for inexperienced or hostile parties and immature, fragile relationships. The time required for bargaining should not be a serious impediment to management's occasional need for swift action. A sampling I once made of NLRB cases indicated that negotiations reached an impasse or deadlock in a median

period of six and one-half weeks. After impasse, of course, an employer may institute its proposed terms unilaterally, without the consent of the union.

Borg-Warner's mandatory-permissive rubric probably reflects a national consensus that there is some untouchable core of entrepreneurial and union autonomy that is beyond the reach of compulsory collective bargaining. An outright overruling of *Borg-Warner*, either judicially or legislatively, is therefore unlikely even in a much more liberal political climate than exists today. But at least I think it would make for a far healthier and more responsible labor relations if the duty to bargain encompassed, as the Labor Board once declared, any employer action that could effect a "significant impairment of job tenure, employment security, or reasonably anticipated work opportunities for those in the bargaining unit." That conclusion is adequately supported by the language, legislative history, and policy of the NLRA. The Supreme Court gave qualified endorsement to the proposition in *Fibreboard Paper Products* (1964). Despite the Court's subsequent retreat in *First National Maintenance* (1981), sound personnel policies alone would argue that the broader scope of required bargaining should ultimately prevail.

Collective bargaining is much more than a means of allocating employee jobs and compensation. Even a hard-headed labor economist like Neil Chamberlain was moved to say: "[T]he workers' struggle for increasing participation in business decisions . . . is highly charged with an ethical content." For me, this moral dimension of negotiations between unions and management cannot be avoided, because those negotiations determine the nature of work in the shop. And it is primarily work that defines a man or a woman — that largely determines a person's very identity. A thoughtful study for the federal government has found that "most, if not all, working people tend to describe themselves in terms of the work groups or organization to which they belong. The question 'Who are you?' often elicits an organizationally related

response. Occupational role is usually a part of the response for all classes: ‘I’m a steelworker,’ or I’m a lawyer.”

IV. UNION REPRESENTATION

Frustration over the increasing employer resistance to unionization and the failure of organizing efforts in recent years has led to proposals for some major changes in the law. These have included the certification of unions on the basis of card checks, “instant elections,” and compulsory arbitration of first contracts as a remedy for employer refusals to bargain. While I understand and sympathize with the motivation behind these recommendations, I am generally not happy with them.

The installation of a labor organization as the exclusive bargaining representative of the employees under Section 9(a) of the NLRA is more than the unilateral choice of an agent by a principal. It could be described as a statutorily mandated shotgun marriage, establishing an ongoing relationship that will substantially alter the way an employer must carry on its day-to-day business. The union’s decisions will also be binding on dissenting employees, even though they may constitute close to a majority in the bargaining unit. Under those circumstances it seems only fair that the employer should have the opportunity to get his side of the story across to the employees before they vote. Denying the employer that right might even raise constitutional free speech issues. For those reasons I would oppose instant elections or automatic certification simply on the basis of a card check. Compulsory arbitration of first contracts, if limited to cases of employers’ flagrant refusals to bargain, is more supportable. But it still cuts against as basic a policy as we have in our labor law, namely, freedom of contract. As expressed by the Supreme Court in *American National Insurance* (1952), it is not the function of government to “sit in judgment upon the substantive terms of collective bargaining

agreements.” The effect has been to preclude the NLRB from imposing a contract term even as the remedy for a refusal to bargain by an employer.

Considerable controversy has been generated over the nature and effects of employer conduct during a union organizing campaign. A quarter century ago, a celebrated empirical study by Professors Steve Goldberg and Jack Getman found that employers’ supposedly coercive tactics did not “significantly” affect employees’ voting behavior. They therefore recommended that the NLRB “cease regulating speech and, for election purposes, nearly all conduct.” Separate sets of interviews by Derek Bok and myself with union organizers indicated that they did not believe most employer speeches were all that intimidating. They insisted, however, that the presence of management speakers and the absence of union counterparts at workplace forums conveyed a strong message about the relative power of the competing parties. In later years, the Goldberg-Getman thesis has been vigorously contested by most other observers. At one time I was quite taken by the Goldberg-Getman views, especially because they paralleled my own investigations. But my inquiries were made in the early ‘60s, and that was a different world. I have also been shaken by the statistics on the increasing number of statutory violations by private employers and by the sharply diverging patterns of union organizing in the public and private sectors.

I still see little sense in the Board’s dithering over such employer comments as, “I will fight the Union in every legal way possible. . . . I’ll deal hard with it, I’ll deal cold with it. I’ll deal at arm’s length with it.” So I believe the Board should get out of the time-consuming, hair-splitting process of scrutinizing the combatants’ presentations for evidence of misleading or vaguely ominous statements. But all parties are entitled to an election free of outright discrimination or egregious threats, and the Board must continue to set aside elections rife with

serious misconduct or blatantly coercive speech by either employers or unions. I would also adopt one Goldberg-Getman recommendation that was at least partially accepted by the Reagan-Bush Labor Board, although ultimately rejected by the Supreme Court in *Lechmere* (1992). Under certain circumstances a union should have access to an employer's premises to counter management campaigning prior to an election, particularly in larger enterprises where employees disperse widely at the end of the workday. The plant or shop is the natural forum for conveying views about unionization. A party denied access is under a severe handicap in trying to reach the voters. That is truer in today's fragmented, heterogeneous society than it ever was.

Although I am no fan of "instant elections," the blunt reality is that prolonged campaigns are an open invitation to unscrupulous employers (or unions) to engage in coercive activity. Maybe a statutory time limit should be imposed on the processing of the routine representation case. Here a fair balance would have to be struck between the employer's need, especially the smaller or inexperienced employer's need, to prepare and get its message across to the workforce, and the goal of preventing the tactics of "stall, delay, and intimidate." The ill-fated Labor Reform Bill of 1978, as passed by the House, would have allowed a maximum of 25 days between the filing of the election petition and the holding of the election. That seems too short. An employer needs at least a couple of weeks to prepare for a Board hearing. The 1978 House-passed measure might have left only a week between the Regional Director's direction of an election and the election itself. Without attempting to be too precise from my academic, non-practicing perch, I would suggest a maximum time in the ordinary case about twice that prescribed by the 1978 bill between the petition and the election — let's say around six or seven weeks.

The NLRA has never provided for general damages for injuries inflicted on employees. The remedies for unfair labor practices traditionally are cease-and-desist orders and reinstatement with or without back pay. Yet if an employer unlawfully refuses to bargain with a majority union, the employees are deprived of the benefits negotiations might have produced, usually including a wage increase. The conventional remedy of an order to bargain operates only prospectively and does nothing to restore the months or years of financial loss the employees may have suffered. At least when the employer's violation is flagrant and egregious, the NLRB should be able to provide monetary relief. Remedies are the lifeblood of rights, and the status quo sucks much of the blood out of the fundamental right to organize and bargain collectively. At one point the D.C. Circuit seemed on the verge of recognizing the validity of a compensatory remedy for flagrant violations, but then it grew fainthearted and drew back.

Neither principle nor practical calculation problems should stand in the way of an appropriate monetary award in these cases. A make-whole remedy would not be a contract imposed on the parties by the Board; it would have no continuing existence into the future. It would be a form of backpay order, based on the putative contract that could have resulted from good-faith bargaining, discounted by the chances that the parties would not have reached agreement. The measure of the loss would be derived from a composite of union contracts in similar labor-management relationships. Of course there is an element of speculation here, but no more so than in many contract, tort, or antitrust damage awards. In other contexts we do not hesitate to resolve such doubts against the wrongdoer. This make-whole relief would also be genuinely remedial and not punitive. It would simply put in the employees' pockets what the employer denied them by its bad faith in refusing to bargain. I harbor no illusions that my proposal is likely to be embraced any time soon by the current federal judiciary or by Congress.

But it is one of the most prized of academic prerogatives that one can cavalierly dismiss the unseeing present, and address oneself to the far more receptive and sagacious future.

V. NONUNION EMPLOYEE PARTICIPATION

Having espoused traditional union organization up to this point, I think it only fair to say a few words about another and quite different development in this country. A growing number of companies, both large and small, especially in the new high-tech industries and in the old personal-service industries, are nonunion. I have my suspicions about whether all their employees have knowingly and voluntarily rejected the opportunity to organize. But I have no doubt that many of these workers, wisely or otherwise, have freely chosen to remain without union representation. Still, their employers, if they have gone to the right business schools, will wish to solicit the workers' opinions and suggestions in a systematic way. And you can count on it that some employer or employee will eventually come up with the idea of a formal "employee committee" to facilitate the process. The company will be pleased to provide an office and a typewriter, coffee and doughnuts at joint meetings with management, and even a note taker at the meetings to see that the employees' views and proposals are properly recorded and transmitted to the company's higher-ups.

However congenial to the parties, most of these arrangements are, under the strict logic of NLRB precedent, violations of Section 8(a)(2) of the Labor Act. They constitute illegal employer "domination" or "assistance" of what is technically regarded as a "labor organization." Fortunately, in my opinion, some federal courts of appeals have realized that Section 8(a)(2) was aimed at quite different targets. Those were the puppet-like sham "company unions" of the 1930s and the employers who gave preferential treatment to their favorite (the less assertive and more malleable) as between competing unions. If 21st century employees have chosen freely and knowingly and the committee or other body acts truly on their behalf and for their benefit, I

see no reason for objection except the dead hand of a long-distant past. While I might believe the workers' interests would be better served by a full-fledged union and collective bargaining, that is not my decision to make. Paternalistic safeguards may have been necessary to protect an uninformed and vulnerable workforce against itself in the Depression Era, but that would hardly seem the reality today. Section 8(a)(2) should be liberally construed or else amended to permit nonunion employee participation in management decisionmaking as long as it is wholly voluntary.

VI. CONCLUSION

One of the truly great people of our time is Monsignor George G. Higgins, the famous "labor priest." For 25 years he was the director of the Social Action Department of the United States Catholic Conference, and for almost a half century he chaired that unique experiment in union democracy, the UAW's Public Review Board. His achievements have not gone unrecognized. This past year he added to his many awards the Presidential Medal of Freedom, the highest honor this country can bestow upon a civilian. Yet despite his eminence, it is entirely characteristic of the man that he has devoted himself in recent years to the betterment of agricultural workers, those American "untouchables" who do not enjoy the protections afforded by the NLRA.

Monsignor Higgins is both a social activist and a social thinker, steeped in the teachings of the Papal encyclicals on the condition of labor. Drawing upon those social encyclicals, he has even been prepared to suggest that working people may often have a "certain moral obligation to join a union." An intellectual tradition even older than Monsignor's, harking back to Aristotle and the Greek philosophers, holds that human beings are social and political creatures, "whose nature is to live with others." We are nearly all joiners. It is not enough to have an ABA Section of Labor and Employment Law, which accepts all corners. We must have a more selective

group, the College of Labor and Employment Lawyers. We want to be with and work with our peers. Is it any wonder, then, that Monsignor Higgins would enjoin most working people to come together in organizations capable of advancing their common goals?

That, then, is for me the glory of the Wagner Act. It was not designed to make employees the equal partners of employers, nor yet to pit the two groups against each other in eternal combat. Rather, it recognized the reality that at times their differing concerns would lead to conflict, but civilized conflict within appropriate rules of engagement, and that at other times their mutual interests would lead to periods of extended cooperation. Only a suicidal worker or deranged labor leader seeks ill for the company that holds the key to their economic well-being. In my experience, management almost invariably knows more about running the enterprise than do the employees. But seldom if ever does it know so much that it cannot learn from them. Similarly, employees almost invariably know more about what is good for themselves than does the most benevolent and well-intentioned of employers. The situation begs for the interchange of ideas and mutual accommodation in a systematic fashion. I cannot believe that a private sector workforce that is only one-tenth organized is ultimately good for labor, for management, or for the whole of our society. And so I look for a day when the promise of the Wagner Act — that workers may freely organize and bargain collectively through representatives of their own choosing is at long last fulfilled.

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