IS THE LABOR ACT DOING ITS JOB?*

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This has been a period for re-examining the National Labor Relations Act by all segments of the industrial relations community. Academic analyses are marked by unhappiness with the current state of law. This theme is fairly new. Ten years ago, one would have found general agreement among labor, management and most academic scholars that the Act was doing its job, helping to provide free choice and free collective bargaining.

The consensus which existed a short time ago no longer exists. On the right, where free market analysis has become a prominent feature, there is the claim that the NLRA is inefficient and causes interference with the benevolent working of the market. Thus, for example, at a recent symposium held by the Yale Law Journal to commemorate the New Deal, Professor Richard Epstein of the University of Chicago suggested that the entire NLRA be done away with.[1] In its place, he suggested that we return to the common law. He concluded on the basis of economic and political theory that a common law system based entirely on contract is more likely to promote the interests of workers, management and society in general.

On the other side, there is a growing body of critical scholarship which suggests that the existing system has been shaped to reduce rank and file militancy and has helped to deprive unions of their vitality.[2] Some of the critics believe that the results are a system which benefits the union hierarchy, but is harmful to employees. Some view arbitration as a technique for harnessing discontent which might otherwise be manifest in a more socially useful way, and collective bargaining as a technique by which the workers are co-opted.

Stirrings of discontent can be heard now even among the moderates. Chairman Miller's comments reflected some of this discontent

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1. *See generally,* Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation,* 92 YALE L.J. 1357 (1983).

2. *See* Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law,* 4 INDUS. REL. L.J. 450 (1981).

when he argued that the processes take too long, that there is too much law, and that the rules do not always achieve their purposes.[3] In the next few minutes, I would like to address this criticism, and then give a very brief suggestion as to possible reform.

My first reaction is to protect the existing system from its critics. I am disappointed by those who are unable to recognize the genuine achievements of our industrial relations system. Collective bargaining has provided real gains for employees in terms of benefits, wages and protection against arbitrary treatment. It has given labor a significant voice in the running of important enterprises. The system of arbitration, customarily employed to resolve grievances, is the most successful experiment in dispute resolution in our time.

Recently, criticism from unions and union supporters has focused on the organizing process. Much of the criticism of the NLRA from both the academics and labor leaders is based on the assumption that labor needs increased protection against management consultants, who manipulate employees into voting against unions through a combination of fear and phony promises. I think that assumption is a distortion. There is a conspiracy of sorts by unions and the consultants to make it appear that the consultants have much more ability to manipulate votes than they actually have. This provides an excuse for the labor defeats and an inducement for clients of the management consultants.

In the course of a study I conducted of union-representation campaigns,[4] I was surprised by how often organizers explained their losses by claiming that management had violated the law and frightened the workers to vote against the union. This suggests that if the law were strengthened, if there were more limitations on management's right to speak, or if there were more concern about disciplinary actions during a campaign, unions would win a higher percentage of the elections than they do. I believe that this is incorrect. After a field study, in which we analyzed thirty-two different campaigns, we concluded that while campaigns may make a difference, the law regulating the campaigns is not very important.

I recently had the interesting experience of watching a superb union organizing effort at my own university. The Yale Clerical &

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3. *See generally* Miller, *The National Labor Relations Board: From 1970 and Into the Future*, 15 STETSON L. REV. 21 (1985).

4. J. GETMAN, S. GOLDBERG & J. HERMAN, UNION REPRESENTATION ELECTIONS: LAW AND REALITY (1976).

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Technical Workers Union (Hotel and Restaurant Employees) had enlisted a well educated, tremendously enthusiastic, deeply committed group of organizers. They considered it their prime job to enlist the leaders of the rank and file and to encourage them to speak out. This method turned out to be very successful, not only in organizing but in establishing a militant union which was able to conduct effectively a long strike which very few knowledgeable people thought they could sustain.

I do not think that unions have paid enough attention to the potential in their own ranks and I think a well run union organizing effort can blunt the effect of a typical management campaign. One of the people who conducted the Yale organizing drive said to me, "I like it when I have to deal with a management consultant because they are so predictable. I know what they are going to do and I can innoculate the employees. Every time I predict what they are going to do and they end up doing it, it makes me look good." I am amazed how rarely that point of view is manifested in union organization.

I believe that unions tend to overstress the importance of the "law of organization." This emphasis is symptomatic of a wider syndrome of overstressing the importance of the law in labor relations, a syndrome which afflicts union leaders, most Board members and leading academics.[5] I can, however, understand the unhappiness of labor with the current state of the law.

Thus, while I agree with Chairman Miller that the duty to bargain is not very important as a practical matter, its current diminution reflects the courts' unfortunate conclusion that collective bargaining is inefficient and should be discouraged, a conclusion with which I strongly disagree. Similarly, the growth of the duty of fair representation has reached proportions which I find extremely troublesome. This growth has resulted from a widely accepted premise

5. For example, it is often taught that the *Steelworkers Trilogy* made a significant contribution to the status of labor arbitration. I believe that it has worked the other way. Before the law recognized the promise to arbitrate and made arbitration awards enforceable, the parties were routinely going to arbitration and obeying the awards. Both sides recognized that they had an interest in making arbitration successful. Once the courts became involved and stated ground rules under which the parties should operate, they laid the ground work for increased litigation. The parties began to challenge arbitration awards with great skill and effectiveness. In various courts of appeals in the United States today, arbitration awards are not routinely enforced. In the Sixth Circuit, for example, most arbitration awards are rejected. Courts have seized on the requirement that an award draw its essence from the collective bargaining agreement to overturn awards in which the arbitrator's opinion focuses on such things as past practice, industrial relations, or elementary notions of justice.

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that, if more doctrine in the direction of individual rights is created, the unions will be more responsive to the needs and interests of individual employees. According to this theory, the courts, by broadening the duty of fair representation, force the unions to do a better job. My experience suggests that if unions are held to unrealistic standards of representation, the result will be to overly legalize the labor movement. That would not be good for the workers they represent. Because of the technicalities involved in providing fair representation, unions have had to hold back from doing some of the things that they have traditionally done best.

The growth of the duty of fair representation fails to recognize the enormous difference between a rule that requires labor unions to behave in a certain way and the actual behavior that results. Expanding the duty of fair representation convinces unions to be cautious. Many are currently taking all discipline cases to arbitration. This is costly to unions and leads arbitrators to assume that in many cases unions are just going through the motions.

I believe however that there are at least two areas in which the NLRA *is* important and helps to achieve positive results. One involves the conduct of elections. The fact that the labor board conducts elections, which determine whether or not a union is to be an exclusive representative, is significant. I do not think the rules regulating the conduct of the elections are important, but I think the very fact that elections are conducted and that unions may emerge from these elections as the exclusive certified bargaining representatives is extremely important.

The second important legal policy is the promotion of free collective bargaining. Paradoxically, the significance of the law in this area is to be found in the fact that the rules do not shape the bargaining process. The duty to bargain over mandatory topics and the differentiation between mandatory and permissive topics are not in themselves noteworthy. What is important is the fact that, once a mandatory topic is raised by the parties, no one but the parties has any input as to what kind of agreement will be reached. Also, there is no mechanism by which the distinction between mandatory and permissive topics is enforced. Therefore, if either a union or an employee wants to insist on a permissive topic in the final agreement, it may do so if it has the bargaining power.

I am a cautious supporter of both the doctrine of exclusivity and the concept of free collective bargaining. Exclusivity has facilitated the successes of collective bargaining. Exclusivity permits the adop-

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tion of uniform working conditions for all employees. Without it, it would be impossible to utilize the type of seniority schemes provided for by most agreements. Because of the widespread use of seniority, the idea has developed that employees by their labor develop an interest in their jobs which management can not remove without reason. The concept of seniority gives meaning to limitations on employers' rights of discharge. It is seniority which makes a collective bargaining agreement enforceable. For example, an employer cannot easily discriminate after a grievance is filed because the seniority provisions protect the employee's job, his fringe benefits and his right to promotion. Without that power of seniority, the enforcement mechanism against unjust discharges simply would not work.

The scope of collective bargaining and the influence of American unions in labor relations are largely protected by the doctrine of exclusivity. In countries in which exclusivity does not exist, unions tend to be more political and less important in the day-to-day operations of an enterprise. On the other hand, there are problems that go with the notion of exclusivity. Its basic operation is to inhibit free choice, to require employees, whether they wish to or not, to be represented by a union and to prevent other employees from representation by the union of their choice.

The notion of free collective bargaining also has its costs. One of these costs is that the power of labor stems not from the merits of its case, but from the strength of the union and the type of industry involved. A union of airline pilots, for example, is able to achieve things which a union of clerical workers often cannot achieve. These achievements have little relation to the justice of the case, but rather are indicative of the union's strategic position in its industry. A second major cost is the centrality of strikes. The only thing to note about the key role of strikes is the absence of a good alternative.

Finally, my most powerful reaction is that after fifty years of the NLRA we know remarkably little about the system it has helped to establish. Labor relations abounds with myths because there are so few studies of its actual workings. Except with respect to union elections, where I took part in a major empirical study, I have based my talk today on impressions and hunches, a little bit of practical experience, and knowledge I gathered through discussions with labor and management people. I do not have the type of data which would permit me to make solid recommendations. In most areas nobody else does, either. We need careful studies of what is actually going on in labor relations to serve as a prelude to reform. The eventual reform, I

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hope, would reduce the amount of law, eliminating many of its confusions and technicalities while maintaining the basic features of the existing system.

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