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Gutting the National Labor Relations Act: A Return to 1934

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Comment / Gutting the National Labor Relations Act: A Return to 1934

PENDING BEFORE THE 88th Congress is a bill[1] to remove from the National Labor Relations Board all jurisdiction to adjudicate unfair labor practice charges arising under the National Labor Relations Act[2] and to vest such jurisdiction in the District Courts of the United States.

A review of the economic and social forces that have acted and counteracted in the area of labor-management relations is beyond the scope of this limited comment. Nonetheless, even a cursory study of the turbulent and oftimes bloody history of our industrial democracy[3] compels the realization that labor law, and particularly labor legislation, must be ranked as one of the most fundamental areas of national concern. In an area so vital to the peace and prosperity of the nation, legislation proposed to alter the present legal structure must be closely scrutinized. This is particularly true when the proposal is not to advance to a new level of sophistication, or to embark on a new legal experiment, but to recede from an existing legal pattern.

The avowed purpose of the Landrum Bill is to remove a major portion of the powers of the present legal institution responsible for primary enforcement of the national policy, in the basis of that institution's alleged failure to correctly perceive and exercise its function.[4] It is the purpose of this comment to examine the criticisms and discontent set forth by the author of the bill to

[1] H.R. 8246, 88th Cong., 1st Sess. (1963).

[2] 49 Stat. 449 (1935), as amended, 29 U.S.C. §§141-97 (1958), as amended, 29 U.S.C. §§153-87 (Supp. I, 1959).

[3] See, e.g., *Hearings Before the House Committee on Education and Labor on Bills to Amend and Repeal the National Labor Relations Act,* 80th Cong., 1st Sess. *passim.* One account contained therein tells of a labor "war" in which homes, trucks, and plants were bombed, windows smashed, and drivers beaten and stoned. *Id.* at 332.

[4] 109 Cong. Rec. 15197 (daily ed. Aug. 27, 1963).

determine whether the proposal is truly a considered move toward political maturity in the resolution of labor problems or whether it is a more sinister strike against the established legal structure designed to further the interests of one side of the struggle.

I. The Landrum Bill: H.R. 8246

A brief review of the major proposals in the Landrum Bill is in order here to display the inherent nature of the bill as regressive, rather than progressive. There are two major features of H.R. 8246 which should be separately considered.

The first and cardinal element is the removal of the jurisdiction to hear unfair labor practice cases from the NLRB.[5] This feature would limit the Board to conducting representation proceedings under the NLRA. By so removing the Board from the role of central administrator of a uniform labor policy, the bill would substantially lessen the stability of labor law in that it would result in the interpretation of the basic act not by one expert and experienced agency,[6] but by some 86 district courts sitting in various sections of the country, already charged with the administration of justice in other areas of private and public law. District courts sitting in heavily industrialized areas of the nation, already saddled with the heavy dockets brought on by large and busy populations, would have thrust upon them the initial jurisdiction of a large proportion of unfair labor cases, now exceeding 13,000 per year under the NLRB.[7]

The second major part of the proposal would be the abolition of the offices of General Counsel and Trial Examiners,[8] NLRB elements presently charged with the prosecution and initial adjudication, respectively, of unfair labor practice cases. Under the present system, an aggrieved employee may submit a complaint of an unfair labor practice to the General Counsel, who will investigate and, where necessary, prosecute the complaint. The Trial Examiners serve as the trial court and resolve the great majority of cases. Appeals may be taken to the Board itself, and thence in many cases to the federal judiciary. The bill would eliminate this screening process by removing the NLRB's jurisdiction, thus rendering the General Counsel and Trial Examiners superfluous.[9] Under the proposed alternative, any person against whom an alleged unfair labor practice has been committed may go directly

[5] H.R. 8246, 88th Cong., 1st Sess. §6 (1963).
[6] Garner v. Teamsters, Local 776, 346 U.S. 485 (1953).
[7] 27 NLRB Ann. Rep. 3 (1963).
[8] H.R. 8246, 88th Cong., 1st Sess. §§1, 2 (1963).
[9] H.R. 8246, Section-By-Section Analysis, 109 Cong. Rec. 15200 (daily ed. Aug. 27, 1963).

to the district court for redress.[10] If necessary, such persons may be given aid through the furnishing of legal services by the U.S. Attorney for the appropriate district.[11] The effort of this portion of the bill would be to force an individual employee seeking protection of his rights against either a violating employer or a violating union to either pay his own legal expenses, or to "take a number and wait his turn" in the already busy offices of the U.S. Attorneys.

The Landrum bill is, in its author's own words, "directed at the National Labor Relations Board, and more particularly at the manner in which the NLRB has handled its responsibilities dealing with unfair labor practice cases."[12] There can be little doubt that the proposed measure is, as earlier stated, a regressive move, designed to withdraw the conduct of labor law from an existing legal institution and return it to the operation of the earlier system, i.e., the judiciary.

Two major criticisms of the present role of the NLRB have been established by some of the more prominent critics, and it is primarily on the basis of these two criticisms that the Landrum proposal was launched. The more fundamental of these criticisms is that the NLRB has misunderstood the policy of the National Labor Relations Act to be the encouragement of collective bargaining, whereas in reality the primary policy of the act is *not* to encourage collective bargaining.[13] The second major criticism of the NLRB's role is that the Board wrongfully engages in the formulation of labor policy under the guise of administering the statutes.[14] To evaluate these two criticisms, it is necessary to consider the sources and development of the legal institution presently under attack.

II. Legislative History of the National Labor Relations Act.

In 1935, Congress was confronted with an economic and political crisis of the first order, as the damned fruits of the depression came to be served at the legislative table. Against a background of great unemployment, economic despair, and hurriedly enacted attempts to legislate the trouble away, the move to establish a national policy in favor of organized labor was a hotly debated issue. With the defeat of the Blue Eagle and Section 7 of the NIRA,[15] business interests were uniform in opposition to progressive labor legislation.

[10] H.R. 8246, 88th Cong., 1st Sess. §10 (b) (1) (1963).
[11] H.R. 8246, 88th Cong., 1st Sess. §10 (b) (2) (1963).
[12] 109 Cong. Rec. 15197 (daily ed. Aug. 27, 1963).
[13] McGuiness, The New Frontier NLRB 14 (1963) [hereinafter cited as McGuiness].
[14] 109 Cong. Rec. 15198 (daily ed. Aug. 27, 1963).
[15] One scheme to legislate the depression away was the National Industrial Recovery Act, 48 Stat. 195 (1933). Sec. 7 (a) thereof guaranteed to covered employees the right to organize and bargain collectively. Companies who subscribed to the NIRA were allowed to display its symbol, a blue eagle. The act was declared unconstitutional in Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935).

The heated debates and controversial storm that raged on Capitol Hill ultimately saw labor triumph through the effective and courageous leadership of Senator Wagner of New York. His work, the National Labor Relations Act, (hereinafter called the Wagner Act to distinguish the basic from the amended Act), firmly established that the employee's right to bargain collectively was to be guaranteed and safeguarded by the federal government. The policy statement of the Wagner Act represented a hard won victory for the rights of labor:

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purposes of negotiating the terms and conditions of their employment or other mutual aid or protection.[16]

To effectuate that policy, the National Labor Relations Board was created and given power to investigate charges and complaints of violations of the right to organize and bargain collectively and to decide if that right had been violated by any employer.[17] On such findings, the Board could order the employer to cease and desist from the practice in question, or could fashion other remedies, enforcement of which could be sought in the federal courts.[18]

By 1947, the political structure of Congress had shifted, and for the first time since 1930, a Republican majority controlled both houses of Congress. Hearings conducted by Senator Taft in the 80th Congress[19] highlighted employer dissatisfaction with the Wagner Act's one-sided curb of employer activities which left the unions free to engage in employee coercion, obstruction of business operations for illusory reasons, and internecine warfare for control of the labor market. These circumstances culminated in the Taft-Hartley Act[20] which, while adopting the policy of the Wagner Act unchanged, described and outlawed six types of union unfair labor practices.[21] The Taft-Hartley Act also introduced several long needed procedural and administrative reforms in the composition of the National Labor Relations Board.[22]

[16] National Labor Relations Act, 49 Stat. 449 (1935), as amended, 29 U.S.C. §§141-97 (1958), as amended, 29 U.S.C. §§153-87 (Supp. I, 1959).

[17] Republic Aviation Corp. v. NLRB, 324 U.S. at 799 (1945).

[18] N.L.R.B. v. Jones & Laughlin Steel Corporation, 301 U.S. 1 (1937).

[19] *Hearings Before the Senate Committee on Labor and Public Welfare on S. 55 and S.J. Res. 22. And All Other Bills and Resolutions Referred to the Committee Having the Object of Reducing Industrial Strife in the United States,* 80th Cong., 1st Sess. (1947).

[20] Labor Management Relations Act, 61 Stat. 136 (1947).

[21] 61 Stat. 136, §101 (1947).

[22] Notably, the Board was increased from three to five members, and a separate General Counsel established to investigate and prosecute unfair labor practice cases. 61 Stat. 136 §101 (1947).

For the next twelve years, from 1947 to 1959, the unions were to undergo close scrutiny. Unhampered by restrictions on their scope and unimpeded by internal controls, they had grown to vast proportions, and some had simultaneously fallen into the control of racketeers, Communists, and other undesirables.[23] Millions of dollars went unaccounted for in union treasuries, and several of the practices thought curbed by Taft-Hartley were still unchecked.

In 1959, Congress produced the third major landmark in labor legislation: the Labor-Management Reporting and Disclosure Act of 1959, more frequently referred to as the Landrum-Griffin Act.[24] This act established internal financial and reporting controls to protect the right of employees to fair representation and honest unions. The policy of encouraging collective bargaining enunciated in the Wagner Act and adopted by Taft-Hartley was again left unchanged. The democratic functioning of unions was much improved.

III. Attack on the National Labor Policy as Interpreted by the Board

One critic, speaking from an employer forum[25] and lauded by Congressmen Landrum and Griffin,[26] has recently expressed the thought that

> It is apparent after reviewing the development of congressional policy that *it is inaccurate to state the policy of the present law in terms of the encouragement of collective bargaining.*[27] (Emphasis added).

This fundamental refutation of the stated policy of the Act is the result of a remarkable process whereby the amendments of 1947 and 1959 are considered, not as reforms aimed at the strengthening of the collective bargaining system through the elimination of abuse, but as direct legislative repeal of the policy of encouraging collective bargaining. The author, noting that the present Board misunderstood the 1935 Act and ignored the 1947 and 1959 amendments, argues that

> These demonstrate that Congress has subordinated the encouragement of collective bargaining to the protection of the exercise by workers of their full freedom of association, self-organization and designation of representatives.[28]

The logical end of this criticism is a limitation on the principle of collective

[23] See *Statement of James P. Mitchell, Secretary of Labor, Before the Subcommittee on Labor, Senate Committee on Labor and Public Welfare,* II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, 990 (1959).

[24] 73 Stat. 519 (1959).

[25] McGuiness, The New Frontier NLRB (1963). This volume was published by Labor Policy Association, Inc., a self-styled "group of far-sighted employers" *id.* at ix.

[26] Landrum and Griffin, *Foreword* to McGuiness, The New Frontier NLRB at xi (1963).

[27] McGuiness, at 14.

[28] *Id.* at 15.

bargaining whenever its encouragement would limit or conflict with an employee's full freedom of association. This leads to a negation of what are known as "union security" arrangements,[29] should one employee in a unit desire to frustrate the wishes of the majority. The answer to this criticism lies in a simple but basic understanding of the principle of majority rule in any democratic society or community. If full freedom of association, or of speech, or of almost any other sort is taken in an absolute and unqualified sense, it would appear doubtful whether majority rule is at all possible.

The courts, fortunately, have had no such problem with understanding the Act's basic policy. Mr. Justice Stewart, speaking for the Supreme Court in a case upholding the pre-eminence of federal law over state law in suits for breach of collective bargaining agreements arising under the Labor Management Relations Act,[30] firmly stated the true national labor policy. The passage below also highlights earlier discussion herein as to the pressing need for uniformity in labor law.

> The importance of the area which would be affected by separate systems of substantive law makes the need for a single body of federal law particularly compelling. *The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keynote of the federal scheme to promote industrial peace.* State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at *the very core of federal labor policy* . . . a contrary view would be completely at odds with *the basic policy of national labor legislation to promote the arbitral process* as a substitute for economic warfare. (Emphasis added).[31]

IV. The Board's Subsidiary Policymaking Function.

The author of the Landrum Bill, in an extensive and scathing attack on the Board made in the House of Representatives, summed up the second major criticism underlying the move to destroy the NLRB with this remark:

> . . . practically all of the Board's excesses through the years, all of its absurd decisions, have reflected one central misconception of its own role. Early in its existence, Mr. Speaker, this agency somehow conceived the notion that Congress had given it a policymaking function. In this view, the NLRB is 100 percent wrong.[32]

[29] To secure a uniform labor market, the unions strive generally to achieve agreements whereby all workers either become members of the majority union in the plant or unit organized, or pay some sort of dues equivalent to the majority union. Arrangements under which new employees must join a union within a certain number of days are called "union shop" agreements; similar arrangements providing that an employee need not join a union but must pay to the majority union amounts equivalent to member's dues are called "agency shop" agreements. These and other forms of union security arrangements are well described in Labor Law Group Trust, Labor Relations and the Law 551 (2d ed. 1960).

[30] 29 U.S.C. §185 (1958).

[31] Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flour Co., 369 U.S. at 104 (1962).

[32] 109 Cong. Rec. 15198 (daily ed. Aug. 27, 1963).

Rep. Landrum then described his concept of the proper function of the NLRB in relation to unfair labor practice cases, noting that "the NLRB is charged . . . with deciding, whether on a particular set of facts, an unfair labor practice has been committed."[33] This was shortly followed with the assertation that "Unfair labor practice cases are private law suits—nothing more."[34] Reading from a report submitted some nine years earlier, Rep. Landrum voiced his opinion that that document's treatment of the private law suit characteristics of unfair labor practice cases was still valid, quoting:

> This is precisely the function which our courts perform. It is the very function for which courts were established. It is one which they alone should exercise. It should never have been placed elsewhere.[35]

Unfortunately, the law of labor relations is not so simple. This much, at least, became obvious to the Board "early in its existence," when it was confronted with a corporate employer which announced a policy of refusing to hire union members or union adherents.[36] Nowhere did the Act provide the means whereby an employer could be forced to drop such a discriminatory policy. Although there was specific language protecting employees already on the payroll against discrimination on the basis of union connection,[37] nothing in the Act dealt with the pre-employment aspects of discrimination. It was obvious that such a policy, if lawful, could seriously hinder the encouragement of collective bargaining.

The Board, however, did not consider itself confined to the process of judicial identification of a specific act as a specific unfair labor practice in the manner advocated by Rep. Landrum. An order was issued to the employer ordering it to offer employment to the workers so discriminated against. Such is the nature of the Board's interpretation of its subsidiary policymaking powers.

Mr. Justice Frankfurter, upholding the Board's order and its power, ruled for the Supreme Court:

> To deny the Board power . . . would confine the 'policies of this Act' to the correction of private injuries. The Board was not devised for such a limited function. It is the agency of Congress for translating into concreteness the purpose of safeguarding and encouraging the right of self-organization. The Board . . . does not

[33] *Id.* at 15197.
[34] *Id.* at 15198.
[35] *Ibid.* The quotation was read from the committee print, Report of the Committee on Education and Labor, pursuant to H. Res. 115, 83rd Cong., 2d Sess., on matters relating to the Labor Management Relations Act of 1947.
[36] Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177 (1941).
[37] 49 Stat. 449 §10 (c) (1935).

> exist for the 'adjudication of private rights; it acts in a public capacity to give effect to the declared public policy of the Act. . . .'[38]

Speaking more directly to the power of the Board to go well beyond the specific language of the statute, the Court held:

> A statute expressive of such large public policy as that on which the National Labor Relations Board is based must be broadly phrased and necessarily carries with it the task of administrative application. . . . But in the nature of things Congress could not catalogue all the devices and strategems for circumventing the policies of the Act. . . . Congress met these difficulties by leaving the adaptation of means to ends to the empiric process of administration.[39]

Other Board "policymaking" has been upheld under the Act. The granting of twenty years superseniority rights to returning strikers and non-strikers was found to reduce so drastically the effectiveness of strikes as to be an unfair labor practice. To this Board "policy" the Supreme Court agreed whole heartedly.[40] There is no valid doubt of the Board's necessary and legitimate function of engaging in the formulation of subsidiary policy, within the confines of the basic Act and, of course, subject to limited judicial review.[41]

Conclusion

Legislative history, logic, expediency, and legal precedent unite in powerful concert against the proposals imbedded in the Landrum Bill, against their sources and against their effects and purpose. The history of the successes under the National Labor Relations Act of the practice and procedure of free collective bargaining as the embodiment of industrial democracy weigh heavily against the bill. The logic in the development and conservation of an expert and experienced legal institution to deal exclusively with an intricate and vital area of law precludes acceptance of the bill. The expediency of everyday affairs in labor law, with its tens of thousands of cases, works against the bill, and the revered force of legal precedent upholding strongly and clearly the policy of the NLRA and its application by the NLRB constitutes support for the existing institution that argues inexorably against the bill.

It is submitted that the Landrum proposal is reactionary and politically immature in nature, and does not truly represent an advancement in the law of labor relations. Rather, it bears the doleful characteristics of a move to repeal a successful policy, to destroy a most useful institution, to upset a delicate balance between labor, management, and the public interest, and to deprive the laboring classes of adequate protection of their status as free men, able effectively to bargain for the terms and conditions under which they shall labor.

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[38] *Supra* note 36 at 192.
[39] *Id.* at 194.
[40] N.L.R.B. v. Erie Resistor Corp., 83 S. Ct. 1139 (1963).
[41] *Supra*, note 35 at 188.