1971

The Role of Labor Relations Law in American Society

Arnold Ordman

Follow this and additional works at: http://digitalcommons.law.utulsa.edu/tlr

Part of the Law Commons

Recommended Citation

Available at: http://digitalcommons.law.utulsa.edu/tlr/vol7/iss2/3

This Article is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact daniel-bell@utulsa.edu.
Ladies and gentlemen, now that you have been sated and perhaps surfeited with the gustatory delights of Tulsa, you must do penance. I often wonder why after a solid day, a hard day of indoctrination at a session of this kind, the planners of programs deem it necessary to impose upon you and your hardworking digestive system an additional potion of mental cerebration. But luncheon and dinner talks have become an institution. Despite our American enterprise and our revolutionary tradition, we do not discard institutions lightly.

Besides, I am by Presidential edict and by Senate confirmation a government bureaucrat, and as has been said before, there is a general impression throughout the land that built into every government bureaucrat is a little complicated mechanism which, fed a luncheon or a dinner, produces a speech.

Like many other popular conceptions, particularly about government, this conception too is a myth.

I have no secret morsels of wisdom to impart. I have no intention of telling you what really goes on in the backroom of the Board, or even what really goes on in the backroom of the General Counsel’s Office. Why? Not because I'm withholding information which might be valuable to you. I

*B.A. Boston University, LL.B. Harvard Law School. Mr. Ordman is currently General Counsel of the National Labor Relations Board. This speech was made at the University of Tulsa College of Law Labor Law Seminar, Tulsa, Oklahoma, on April 22, 1971.
am simply satisfied that you would find this kind of information disappointing, and unless you happened to be a litigant in the particular case under discussion, you would find it somewhat boring.

Nor am I going to tell you about the latest case the Board or even the Supreme Court decided yesterday. That particular case may be distinguished or even perhaps overruled tomorrow. Besides, you have experts here this morning and this afternoon who are going to fill you in and give you the benefits of their expertise. I know them all, and they are all experts.

But what I want to do, and what I can do, is this one thing—to try to put today's program, to put labor relations, and labor relations law into perspective. What role is it playing in our society? What is its impact? What is its significance in the panoply of problems that are besetting us in our contemporary society and in our contemporary mores?

Is our system of labor relations law working? If it is not, what can we do about it? If it is working, whatever its shortcomings, whatever its drawbacks, can we derive any lessons from it that can help us in the other towering dilemmas that are agonizing our domestic scene, this year, and last year, and the year before that.

What can we do that we are not doing about Civil Rights? What can we do that we are not doing about our racial minorities, about the blacks, about the Spanish-Americans, about the American Indians? What can we do that we are not doing about the disaffection of so many of our young people? What can we do that we are not doing about pollution, crimes, and the drug culture, and I put to one side the tragic conflict in which we are involved on the other side of the world, in Vietnam.

I want to give you if I can this noontime a sense of his-
tory. It moves exceeding slow and it grinds exceeding fine, but it moves and it grinds.

I want to take you back about fifty years, give or take a few decades. The newspapers of that day—there was no radio or television—told of riots, demonstrations, arson, dynamiting, the calling out of the National Guard or Federal troops to quell uprisings, and destruction of human life and property. Details of these stories came from Boston, New York, Chicago, San Francisco, and perhaps even a few from Oklahoma.

Now this sounds terribly familiar. In retrospect the crises we are having today are not really new. They are a re-script, a playback, a new setting, a different interplay of contending forces. The crises to which I made reference, the crises of fifty years ago, were labor crises. The words on everybody's lips weren't Selma or Watts or Washington, D. C. They weren't Kent State or Berkeley. They were the Pullman Strike, the Haymarket Square Riots, the tragedies in the mines and the railroads, and many thought then as they do today that there might be no solutions.

But the national conscience was then aroused as I believe it's being aroused today, and the slow, creaking machinery of government reacted. You know, government, even democratic governments rarely react quickly (and sometimes I think we can be grateful for that). But the Congress did react, and a succession of legislative enactments resulted. We had the Railway Labor Act of 1920, the Norris LaGuardia Act of 1932, the National Labor Relations Act of 1935.

Now, what did the National Labor Relations Act of 1935 do? First, it declared that working men, employees, had rights. They had the right to associate. They had the right to organize. They had the right to bargain collectively through representatives of their own choosing about terms and conditions of employment. By hindsight, this was such a simple and such an obvious thing, but believe me, it was no easier to declare
in 1935 that a working man had rights than it was just a few years ago in 1964 to get a legislative declaration that the color of a person's skin should not exclude him from the rights that everyone else enjoyed.

This was the first thing that the National Labor Relations Act did. It declared the rights of employees, and as all of you know, the Act was later amended to point out that employers too had rights, which were entitled to protection and guarantees. But the hard part came first.

The declaration of rights was important because it was the foundation upon which all the later progress was built. I remember attending a conference at Howard University in 1946, and the pivotal theme of that conference was to press for a Congressional declaration that blacks had equal rights with others. A few cynical voices in that group decried that effort and said, "What is this declaration of rights? This discrimination has been going on for years, and it's going to take a generation or two generations before we can do something about it. A Congressional declaration of equal rights would be an empty shibboleth." These critics were partly right. It has been almost twenty years since the Supreme Court decided the case of Brown v. Board of Education on equal rights in the school system, and only the day before yesterday, the same court, the Supreme Court of the United States, issued four unanimous decisions in which the Court said in essence, it was time to do something about it.

The critics were partly right, but so too were those who pressed for a declaration of equal rights. We cannot work successfully for equality, they argued, until the law recognizes that we are entitled to it. How true that is, we know today.

The second thing the National Labor Relations Act did was to implement these rights. Congress created an agency,
the National Labor Relations Board, to police those rights, to protect them, to guarantee them. Now, many feel that the machinery is inadequate, that it should be strengthened, that additional and more effective techniques of enforcement are needed, that more effective remedies should be provided to protect employees and employers. I number myself among those critics. But the fact remains that way back in 1935 a machinery was provided.

The National Labor Relations Board today runs about 8,000 elections a year. We vote about a half a million employees a year by secret ballot, to determine whether or not they want a union to represent them in their dealings with their employer. The voter participation rate, incidentally, is about 88% of those eligible, and that figure has been pretty constant through the years. 88% of all eligible voters, of all the employees who are eligible to vote, do cast their secret ballots, and many for the first time, if not the only time, in their lives. I don't have to remind you that that's a record which our political elections don't begin to match, even in Presidential years. Since 1935, we have voted about 27 million employees. This alone justifies the existence of the agency.

At the outset I talked about the violence and the arson, and the riots, and the demonstrations, and the use of Armed Forces to quell those demonstrations. It may come as a surprise to you, that this very civilized, cultured, this very literate society of ours, this advanced society about which we boast, and properly so in many cases, had the bloodiest labor history that any country in the world has ever had. Now, most of this bloody labor history arose from the desires of workmen to organize and get recognition and the stone wall they met when they tried to do that. Today, violence in our labor relations has virtually disappeared. Its out-breaks are sporadic and scattered.

We have substituted the ballot box for the gun and
the brick and the club, and this, gentlemen, is economic democracy in action.

We also police the rights of employees and employers in our unfair labor practice cases. We are slow in many cases. We are not as effective as we should be in many cases. We are hamstrung sometimes by statutory limitations and sometimes, in a hopefully diminishing segment of our society, by a stubborn resistance among a handful of employers and unions who refuse to abide by the law of the land and use every stratagem to obfuscate, to defeat, to subvert, the operation of the law. Yet we should not overlook the fact that over 90% of the 35,000 cases we are currently handling every year, that over 90% of our present case load is expeditiously and effectively resolved within a matter of three or four weeks. When you stop to consider that a very large proportion of these cases carry within them the potential seeds of strikes and lockouts, you begin to appreciate the real function, the real service that the Agency is performing.

Now, all is not good. We are a long, long way from solving all our serious labor relations problems. We never will. This is not and never will be a perfect society. The road to justice in labor relations, I think as in any other field of law, is hard.

The problem we solved yesterday is replaced by the problem, the new one, that arises today. Only a part of our caseload has to do with good employers and good unions, as ranged against bad employers and bad unions. Those are easy cases. The tough ones are the ones where both sides are right. We worry about the employer who has good and legitimate reasons for subcontracting part of his operations, but we also worry about the employees whose livelihood is at stake and who are going to lose their jobs. We worry about successorship, about retirement, about multi-
employer bargaining, and the trend so visible today, of what
is sometimes called coalition bargaining, or coordinated bar-
gaining.

These are problems that are generated, believe me, not
by kooks, or by bad people. They are generated by the
laws of economic development, by what I like to call the
forces of the marketplace.

Our economy is growing. It's becoming more complex.
Our large corporations are getting larger, and the conglom-
erate corporation is becoming increasingly visible in our
industrial system. I suggest that when this happens, the
balance of bargaining power shifts. I suggest further that
a shift of bargaining power on one side of the bargaining
table will inevitably call for a corresponding adjustment of
bargaining power on the other side of the bargaining table.
Multi-employer bargaining, we forget sometimes, has been
going on for years and years even though it is not pro-
vided for in the statute. It came about because in certain
industries where there was a strong union, small employers
banded together to pool their strength so they could deal
with that strong union. Now, we have taken this for granted
for many years, and not gotten excited about it. It has
become accepted, and I think despite some qualifications the
Supreme Court has put in this field, multi-employer bar-
gaining is going to continue.

But today there is a trend in the opposite direction.
The growth of large corporations, the joining of separate
enterprises in a single conglomerate corporation is pushing
labor unions to join their forces so they can have comparable
bargaining strength. I am not going to burden you with all
the problems today and the problems that will be raised,
I would suggest, for the next five or ten years, but I think
history teaches us one solid lesson in this regard. It is more
likely that the laws on our statute books and that the de-
cisions in the casebooks will accommodate to economic bed-rock facts than it is that bedrock economic facts will yield to a law that does not take those economic facts into consideration.

Now, to return to my theme, I believe that the labor relations law of this nation is working. Imperfectly, of course. Haltingly, yes. But it is working. There will be changes, if for no other reason than because the economic data is changing. The unbiased observer, the unbiased lawyer, I think will conclude that a decisional change in any field of socio-economic law, more often represents a change in the facts than it does in the legal principles.

We are a controversial agency. Every single year a number of bills are introduced to abolish the Act and/or the Board. This year is no different, but the result usually is, paradoxically, that our jurisdiction expands. The fact of the matter is that in a few months we are going to take over 750,000 employees of the new Postal Service. I think it likely that before too long farmworkers will be brought under the National Labor Relations Act.

Why? Because in my view, the Act is working and working because unlike so many other troubled areas in our national life—racial discrimination, civil rights, pollution—the government in the case of labor relations, did not content itself with pious proclamations, lip service, or mere declarations of statutory rights. It created a machinery, an agency with powers, too limited perhaps, but powers to implement those rights.

This has not been done, I regret to say, in the civil rights area. We have an EEOC, of course, but in its present form, it is a relatively toothless structure. It has idealism, but no pragmatic strength. It has objectives, but it does not have weapons. In its present state, I don't believe it is an overstatement to say that it has not succeeded. If the labor his-
History of the United States has taught us anything, it has taught us this: a declaration of rights without implementation of those rights is a fraud. It helps you little to hold a candy cane in front of a crying child if when he reaches for it, you take it away.

There are no panaceas. You are right to be suspicious of those who advertise simple solutions to complex social problems. Like Justice Holmes, I have no faith in simple panaceas, and almost none in sudden ruin.

Our society today is in turmoil. I don't think I overstate, but I believe that the national conscience today is again being aroused. I believe that the Supreme Court is listening. I hope it will continue. It is filling a void left by legislative and executive inaction. I believe Congress is now listening. The administration tells us that it is listening. But none will listen unless you and I make our voices heard. The rights of every American—black, white, yellow, brown, the young and the old, the sick and the tired, the homeless and the undernourished, the unemployed and the unemployable—all have rights. What we are lacking today is effective machinery to implement those rights.

This I believe is what labor history has taught us.

We have met crises before. We can meet them still. But we must let our voices be hard.