Proposed Labor Reform: "Brave New World" or "Looking Backward"?

Theodore J. St. Antoine

University of Michigan Law School, tstanton@umich.edu

Follow this and additional works at: https://repository.law.umich.edu/other

Part of the Labor and Employment Law Commons, and the Legislation Commons

Recommended Citation

Proposed Labor Reform: "Brave New World" or "Looking Backward"?

THEODORE J. ST. ANTOINE
University of Michigan

By now it is a commonplace in the labor relations community that there are two significant deficiencies in the administration of the National Labor Relations Act. Neither is a matter of substantive law in the usual sense. The first is the inordinate delay in securing a remedy in contested cases, and the second is the inadequacy of the remedy in certain critical situations. I should like to examine a few key recommendations of the NLRB Task Force, and a few key provisions of the proposed Labor Reform Act, in light of those two central concerns.

In my assessment I shall also take into account two other factors I consider of similar importance. These include the need to maintain and enhance the acceptability of Labor Board decisions, and the need to ensure the full freedom of employee choice and genuine neutrality toward union and employer interests in view of today's industrial realities. If I were to offer one general criticism of H.R. 8410, the Labor Reform bill, it is that, for all its virtues, it is out of date before it is passed. It provides long-overdue solutions to the worst of yesterday's labor relations problems, which may not be typical today, and it does so in terms that are overly explicit and thus likely to hamper the flexibility of future Board decision-making. At the same time, it fails to acknowledge some of the changing patterns of more progressive labor relations, and so fails to provide a legal framework for tomorrow's probable industrial developments.

Having said all this, I must salute the practical savvy of the bill's drafters and sponsors. They were trying to create the smallest possible target by concentrating on the problems of delay and the most urgently needed remedies, especially in situations involving unorganized employers, rather than on substantive regulation that would shift the balance of collective bargaining power as between unions and organized employers. Here they succeeded so admirably that I am at a total loss to explain the outpouring of inflated rhetoric from some organized em-

Author's address: Law School, University of Michigan, Ann Arbor, MI 48104.
ployers and their trade associations in opposition to the bill. On balance, H.R. 8410 is a good bill, a reasonable bill, a generally fair bill. If the Senate and the subsequent Conference cannot improve it, the least Congress can do is to pass it.

As NLRB Chairman Fanning indicates, the most controversial issue considered by the Task Force regarding unfair labor practice procedure was pretrial discovery. It was so controversial, in fact, that it actually generated little controversy. There was quiet acceptance by most union and management representatives that accord on broad recommendations was impossible. The best that could be achieved was a comprehensive statement of the pros and cons of discovery, together with some suggestions for its use in relatively limited circumstances. These included greater specificity in complaints, advance disclosure of the names of outside experts, advance exchange of documentary evidence not revealing the names of individual employees, and the identification of the positions of the parties at a pretrial conference on the day of the hearing.

The principal arguments in favor of discovery are that it will speed up the process, encourage settlements, and be fairer to respondents by minimizing the burden of preparing a case while being in the dark about the General Counsel’s line of attack. On the other hand, discovery engenders fears of reprisal against individual employees and of witness tampering. Many think discovery is too formal for NLRB proceedings, unduly burdensome and expensive, and time-consuming. I suspect the concerns about employee fear may be somewhat exaggerated, but I am troubled about the potential for abuse and delay. The quagmire produced by discovery in the federal courts should be instructive.

I shall leave most comments on union representation elections to my colleague Bill Murphy. I must say, however, that I am a bit skeptical about some of the House bill’s shorter time-limits. As passed by the House, the bill improved on the initial proposal by extending the time for holding an election in supposed “union majority” situations from two weeks to 25 days after a petition is filed. But an employer may still have only one week to campaign from the date the election is ordered. Every month or so I get a call from a small employer in a place like Paw Paw, Michigan, plaintively inquiring if I know of a labor lawyer who can help him out now that a union has sought or obtained an election. While recognizing the need for expediting the election process, I prefer the more flexible approach of the Task Force, which stresses tight time targets but with exceptions for good cause shown.

The House bill tackles delay at the Board and reviewing court levels
in three ways. The first is to expand the Board from five to seven members, thus enabling more panels to operate. I have reservations about this proposal. A smaller membership makes for greater ease and uniformity in administration. This may be especially important in view of H.R. 8410's new charge to the Board to exercise its rule-making power to define appropriate units, to set guidelines for union access to employer's premises, and so on. Providing for summary affirmances by the Board of administrative law judges' decisions is, however, a step in the right direction. So is the requirement that an aggrieved party must file a petition for court review within 30 days of the entry of the Board's order.

More attention should be directed to delay at the ALJ stage. The average decision takes about three months. H.R. 8410 ignores the problem. The Task Force urged additional staff support, shorter opinions, and more production. I applaud these suggestions, but I think more could be expected from the ALJs even without extra assistance. No full-time arbitrator worth his salt would be satisfied with the current ALJ average production of 13 or 14 decisions a year.

Under the House bill, a whole series of novel remedies is prescribed for unfair labor practices in organizing campaigns or first-contract negotiations and for repeated violations of the law. I have one basic objection to this approach. While it may be good political tactics to confine stiff new sanctions to the most egregious offenders, such specificity will inevitably tend to curtail the NLRB's existing power to fashion innovative remedies in other situations. Sometimes it is the long-organized employer that turns rogue. At least it should be declared that the newly spelled-out remedies are illustrative only, and do not impair the Board's authority to issue similar (or different) affirmative orders in appropriate circumstances.

H.R. 8410 authorizes a form of the "make-whole" remedy for employer refusals to bargain which a 3–2 majority held beyond the Board's power in Ex-Cell-O Corporation, 185 NLRB 107 (1970). Most disinterested persons have recognized the inadequacy of the traditional cease-and-desist order in such cases. It amounts to little more than a pious exhortation to go and sin no more. In the meantime, the employees have lost the benefit of collective bargaining for one or two years or longer. The new legislative remedy would be restricted to organizing or initial contract situations. It would apparently not be restricted, however, to situations in which an employer has only "frivolous" objections to a union's certification. Hence, an employer that "tests" a Board certification in the only way now available—by refusing to bargain and thus
inviting an 8(a)(5) charge—would also seem subject to a possible make-whole remedy. That is not as unfair as it may sound. Customarily a litigant who, in good faith, "stands on his rights" only to learn later from a court that he hasn't any, must pay the price for resisting the other party's valid claim. Someone has to lose in these cases, and it's better to have it the employer that guessed wrong than the employees whose rights have been sustained.

The purpose of the "make-whole" remedy, of course, is to restore the employees to where they would have been if the employer had not engaged in its unlawful refusal to bargain. It is, in essence, a damage remedy reflecting the employees' lost opportunity to secure contractual benefits. Relief in antitrust cases is analogous. The make-whole remedy is not, as some employers charge, a contract imposed on the parties by the Board. On the other hand, I have sympathy for employers who object that it is unfair to measure the loss to employees of small employers by the standard of major collective bargaining settlements, involving much larger companies. Moreover, on a technical note, I cannot understand the mathematics of the bill's formula for relief. As I read it, in the event of a protracted refusal to bargain, it sounds as if the employees could wind up owing the employer money.

An employee who is discriminatorily discharged during an organizing effort is entitled, under H.R. 8410, to double back pay. The House bill would have provided for no mitigation on the basis of the employee's outside earnings, but on the floor an amendment was accepted covering compensation actually received. I think the floor change went in the wrong direction. "Double back pay" smacks of punitive damages. Compensation, not penalty, has long been considered the theme of the NLRA, and I think that theme should ordinarily be preserved. At the same time, back pay without mitigation would be the simplest possible standard to apply, would not breach the nonpunitive principle, and would accomplish about the same thing as the House bill as passed.

Employees discriminatorily discharged in organizing drives or first-contract negotiations also get the benefit, under H.R. 8410, of Section 10(1)'s mandatory injunction provisions. The principle here is surely laudatory. I only hope the NLRB has the personnel to make it work.

"Willful" violators of a final Board or court order are subject to an H.R. 8410 provision for blacklisting from federal contracts for a period of three years. Again, I am uneasy about the punitive implications of this remedy, and even more uneasy about the deleterious effects it may have on the very employees it is purportedly designed to help. I understand, however, that a similar scheme for dealing with wage and hour
offenders has proved reasonably effective, and so perhaps my theoretical misgivings are unfounded.

Somewhat paradoxically, I regret that neither the NLRB nor the Congress has seen fit to pay much heed to the use of contempt as a remedial device. Contempt, of course, has even more punitive overtones than blacklisting and double back pay. But at least it can be nicely tailored to flagrant individual situations, and does not rely on broadly inclusive categorizations. A few months in jail once had a sobering effect on some high-level antitrust offenders in the electrical industry. A similar experience might prove therapeutic for some of the executives of recalcitrant textile manufacturers.

In addition to reducing delay and improving remedies, I have suggested that labor law reform should encompass enhancing the acceptability of NLRB decisions. The House bill's increase in the term of Board members from five to seven years is a modest but positive contribution to that end. I should have preferred terms of at least nine years. After more than 40 years of swinging pendulums, I feel it's about time for a little more stability and continuity in our labor relations law. Longer tenure would promote that. It would also downplay the political element or the appearance of the political element in Board decision-making. Ugly rumors have occasionally emanated from the Labor Board about switched votes in key cases following presidential elections. Even if those are untrue, the appearance of such political considerations tends to discredit the Board and to reduce the acceptability and finality of its decisions. Board members are in a precarious stance. They make few friends where they are, they rarely if ever advance their careers upon leaving the Board, and, with the exception of the redoubtable John Fanning, they seldom get reappointed. The least we can do is keep them in their august roles long enough to make it all worthwhile. I think we would also make their decisions substantially more acceptable, in the bargain.

Lastly, I have stressed the need for full freedom of employee choice and the evenhanded regulation of employer and union conduct. To achieve those goals in today's industrial setting, options must be available for movement in several quite different directions. Some of those options are recognized by H.R. 8410, but some are not. The provision for permitting union access to employer premises to respond to captive-audience speeches is an example of a sound response to an industrial reality. In the case of a large employer, especially one located in a metropolitan area, the plant is the natural forum for employee discussion. A union is seriously handicapped if confined to handbills, home visits,
and the like. On the other hand, the one-week period following the di-
rection of an election in "majority union" cases may be unrealistically
short for some employers. Even if the union has a card majority, the
employer still understandably feels entitled to a chance to talk his em-
ployees out of it. He needs time to find a lawyer, arrange an appoint-
ment, put together his arguments, and make his pitch. All this may
sound like a dream world to some hardened combat veterans, but that's
the way my employer out in Paw Paw sees it.

More broadly, H.R. 8410 is deficient because it is so intent on seek-
ing to right ancient wrongs that it overlooks future possibilities. Let me
cite just one example. There are today in this country both large and
small companies whose employees, by their own free choice, are un-
organized. Whether they have been beguiled by wily, duplicitous em-
ployers is not for me to say. At least insofar as any of us can be said
to exercise free choice, they have exercised it. Moreover, many of these
employees are in highly technical fields, and their numbers are bound
to grow. Now, even though they are not unionized, their employers do
not wish to ignore them. Indeed, companies often wish to solicit their
views in a systematic way. Inevitably, the employer or some worker
will come up with the idea of a "representative committee." The com-
pany is even happy to provide an office and a typewriter. We have this
sort of thing all over the country. And of course nearly every one of
these arrangements is, under the wooden logic of the applicable NLRB
decisions, a violation of Section 8(a)(2) of the Labor Act. As some
federal courts of appeals have realized, however, Section 8(a)(2) was
aimed at quite different targets, at the shabby "company unions" of the
1930s and at the employer who gave aid and comfort to his favorite as
between two or more competing unions. If, in the contemporary situation
I have described, the employees chose freely and knowingly and the
committee or other body acts truly on their behalf and for their benefit,
no reason exists for objection save ideology. Should the weight of prece-
dent be too heavy to permit validating such arrangements, the law
should be changed.

In a scant seven years, provided we all survive 1984, we shall be
celebrating the Fiftieth Anniversary of the Wagner Act. The abuses we
are discussing now were supposedly treated then, and the remedies cur-
rently proposed are thus long, long past due. Indeed, in some respects
it is a sorry spectacle to see us all here today earnestly analyzing a set
of procedures and remedies, nearly all of which, under just a mildly
generous reading of the Wagner Act, the NLRB could long since have
adopted on its own. But if H.R. 8410 is necessary to rout out the last of
the intractables in certain benighted industries, it should certainly be passed, with or without modifications of the type I have proposed. And then we must start thinking about the kind of law that will be needed to regulate the more enlightened labor relations of the next half century.