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Labor Law Section

The Wagner Act: Labor Law's Signal Event

by Theodore J. St. Antoine

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There's no fun in stating the obvious. Sophisticated professionals bestow few kudos on those who declaim the conventional wisdom. Even so, one would have to be far more perverse than I, in this fiftieth anniversary year of the National Labor Relations Act, to suggest that the Wagner Act¹ wasn't the most important (and at the time of its passage the most controversial) development in the last half-century of labor law.

Today a bold young group of scholars who call themselves critical legal theorists insist that the Wagner Act was the most radical piece of legislation ever adopted by Congress. It had the potential, they say, to transform the American workplace, breaking down age-old patterns of hierarchical domination and elevating the rank-and-file worker to a position of authority rivaling that of management.

In this view, a seemingly progressive but ultimately conservative and hostile U.S. Supreme Court

thwarted the design of the statute. The strike weapon was sapped of much of its force by the license granted employers to replace strikers permanently, workers were denied property rights in their jobs, and unions were installed as management's enforcers of order and discipline on the shop floor.

But if the Wagner Act's actual accomplishments pale by comparison with the visionary goals claimed for it by the critical legal theorists, the statute's impact on American society was still profound and long-lasting. And it was not accepted without a stiff fight.

Shortly after passage of the Wagner Act, a blue-ribbon panel of corporate lawyers advised their clients that they could safely ignore its prohibition of employer reprisals against employees for joining unions or engaging in strikes, and its requirement of collective bargaining with majority representatives. That was not unreasonable advice, in light of existing

precedent on the scope of the commerce clause of the Federal Constitution. Indeed, the Supreme Court eventually upheld the validity of the Wagner Act by the narrowest possible margin, five votes to four.²

The effect of the new legislation may have been almost as much psychological as legal. Workers' placards in the coal fields, for example, proudly proclaimed, "President Roosevelt wants you to join the union." If not literally true, that boast was well within the bounds of poetic license. Section 1 of the Wagner Act declared the policy of the United States to be one of "encouraging the practice and procedure of collective bargaining."

Sparked by this governmental endorsement, the labor movement went on to enjoy the most spectacular decade of growth in its history. Union membership, 2.9 million (11.5 percent of nonagricultural employment) in 1933, increased five-fold by 1945 to 14.8 million (35.8 percent of non-▶

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agricultural employment).

The massive wave of strikes which swept the country at the end of World War II dramatically changed grassroots attitudes toward unionism. The Taft-Hartley Act of 1947³ rewrote the National Labor Relations Act, inserting a code of union unfair labor practices and limiting one of labor's major organizing devices, the secondary boycott. Further restrictions on the boycott and on organizational picketing were added in 1959.⁴

Enactment of Taft-Hartley coincided with an abrupt halt in the forward progress of unionization throughout the country. The decline has continued almost uninterrupted since then. By the early 1980s, although total union membership was approximately 20 million, the labor force had expanded so much more rapidly that the union share of nonagricultural employment had fallen to about 22 percent. Were it not for the remarkable growth of public employee unionism during the past two decades, the figures would be even more devastating.

A principal reason for this decrease, undoubtedly, is the continuing shift of jobs from the blue-collar to the white-collar sectors. Nonetheless, various studies (including comparisons of the superior membership gains of unions in Canada and most other Western nations) suggest that Taft-Hartley and amendments to it may have played a substantial role in impeding organization.

Ideally, our labor laws should be closely attuned to the needs of workers

and unions in using persuasion and certain economic weapons to organize and bargain effectively, and to the competing interests of employers, employees, and the general public in being free from injurious pressures. Much evidence suggests that these needs and interests may differ considerably from industry to industry, and that different balances should be struck accordingly. This now is done to some extent in construction and garment manufacturing.

Even within the existing statutory pattern, the NLRB and the courts ought to pay less heed to armchair speculation, and more to particular facts and empirical studies, in assessing union and employer conduct. Arguably, both sides have suffered as a result of administrative or judicial unwillingness to grub for a better sense of the real impact of such tactics as lockouts, "hard bargaining" and employer communications, and limited union access to employees in organizing campaigns.

Grave procedural and remedial deficiencies remain in the National Labor Relations Act. The NLRB's processes are clogged by an overwhelming number of cases and by lack of discretion to deny review of trial-level decisions. An intransigent employer can evade for years, if not indefinitely, its duty to bargain with a majority union, and the employees receive no monetary award for the contract benefits they presumably have lost.

The focus of public interest in labor relations, and the corresponding focus of our enacted legislation, has

shifted significantly over the decades. From the thirties through the fifties, the emphasis was on workers' institutional rights, their freedom to organize or not without employer or union coercion, and their entitlement to democratically run unions. In the sixties and the seventies, the emphasis was on workers' individual rights. They were entitled to equal employment opportunity, to a safe place to work, to various safeguards for their pensions and similar employee benefits. In the foreseeable future even the nonunionized worker may win protection against arbitrary and unjust discipline.

Yet perhaps one may still harbor the hope that this quite healthy concern for individuals will not wholly obliterate concern for organizations. The post-industrial world, hardly less than the industrial world, may be a bleak place for the isolated individual. Whether called a guild, a union, or a professional society, a settled institutional means has usually afforded working people the fullest expression of their common goals and the greatest capacity for realizing them. Neither the worker nor society should forget that basic lesson of the Wagner Act. ■

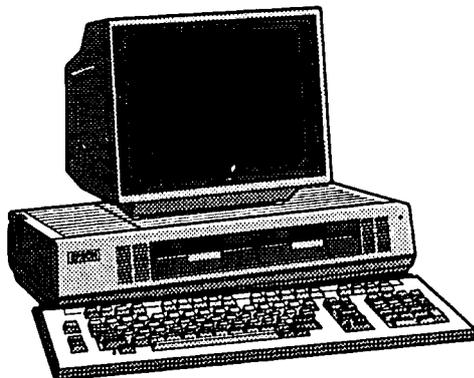
Footnotes

1. 49 Stat 449 (1935), as amended, 29 USC § 151.
2. *NLRB v Jones & Laughlin Steel Corp.*, 301 US 1 (1937).
3. 61 Stat 136 (1947), as amended, 29 USC § 141.
4. 73 Stat 519, 542-45 (1959), 29 USC § 158, 160, 187.

Gideon v Wainright

(cont. from pg. 111)

7. Mann, *Representation of Indigent Defendants in Michigan*, 57 Mich SBJ 848, 851 (1978).
8. See, e.g., President's Commission on Law Enforcement and Administration of Justice *Task Force Report: The Courts* p 69 (1967); State Bar Committee on Criminal Justice, *Defense Services in California*, p 9 (1977); 57 Mich SBJ 249 (1978); American Bar Association Project on Minimum Standards for Criminal Justice, *op cit*, Standard 5-2.4.
9. *State v Boyken*, 637 P2d 1193 (Mont, 1981); *In Re Petition For Fees In: People v Johnson*, 93 Ill App 3d 848 (1981); *Parrish v Denato*, 262 NW 2d 281 (Iowa, 1978); *Hulse v VanWifvat*, 306 NW 2d 707 (Iowa, 1981).
10. *In the Matter of Ritter*, 63 Mich App 24 (1975); *rev'd* 399 Mich 563 (1975); *In the Matter of Hayes*, 55 Mich App 30 (1974); *In the Matter of Burgess*, 69 Mich App 689 (1976).
11. *Kam'sar, Betts v Brady Twenty Years Later: The Right to Counsel and Due Process Values*, 61 Mich LR 219 (1962). ■



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