After 70 Years of the NLRB: Warm Congratulations -- and a Few Reservations

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By Theodore J. St. Antoine

The following essay is based on a talk the speaker was invited to deliver to the National Labor Relations Board on June 3 in Washington, D.C., on the occasion of the agency's 70th anniversary.

At one time or another, the National Labor Relations Board (NLRB) has been almost everybody's whipping boy. But on a celebratory occasion like this, we should accentuate the positive. I'll start off by citing a lecture several years ago at the Michigan Law School by Harvard's Louis Jaffe, one of the country's foremost authorities on administrative law. Professor Jaffe voiced the opinion that the NLRB and the Securities and Exchange Commission were the two best federal administrative agencies. If, as seems appropriate, we classify the agencies as primarily either adjudicative or regulatory, then I think the NLRB could rightfully claim that Professor Jaffe ranked it the No. 1 federal adjudicative agency. That is a proud heritage for all of you associated with the Board. Like all legacies, of course, it should be wisely invested and augmented, not squandered.

Now let me go further with a salute for everyone involved in the labor relations field. When students have asked me about choosing a career, I tell them there are three good reasons for going into labor and employment law rather than some dreary specialty like tax or antitrust. First, labor law is intellectually challenging. Wending one's way through the labyrinthine secondary boycott provisions, or even unpacking such a seemingly simple but slippery concept as "discrimination," can be every bit as demanding as anything in the Internal Revenue Code. Second, labor and employment implicate profound human and philosophical values. At stake are matters of social justice and sound economic policy, the effort to balance fairly the assorted vital needs and interests of employees, employers, and the general public. And finally there is the colorful, engaging cast of characters, from both the union and the management sides, that one finds in this ever lively field.

About this third element, the cast of characters, I cannot resist the temptation to give a few examples. Several corporation or union presidents would provide memorable stories but I am going to stick to the group I know best, the lawyers. Tom Harris was a tall, handsome Southern aristocrat with a rapier wit, a former clerk for Justice Harlan Fiske Stone, who wound up as the Associate General Counsel of the AFL-CIO. Arthur Goldberg
said he was looking for a new partner, and specifically he wanted "an Irishman who can talk loud and fast about things he knows nothing about!" Harris immediately responded, "That's David Feller!" And so began a partnership that had a major hand in the shaping of American labor law, most notably with the Steelworkers Trilogy of 1960. Needless to say, Harris had no misconception about the ethnic ironies of recommending Dave Feller (who most definitely did not spring from the Emerald Isle). Harris once remarked to me, way back in pre-Vatican II days as I was duly eating my seafood on a Friday at the old Chez Francois, "You know, St. Antoine, I may be the only union lawyer in the District of Columbia who can eat pork on Friday!" Fred Anderson was a very brilliant, able, and quite conservative management lawyer from Indianapolis. He and I worked together on the ABA Labor Section's Practice and Procedure Committee. After I went into teaching, he began urging me to do some arbitrating. I put him off for a while but finally thought he deserved an explanation. "Fred," I said, "I really think I need to let some time elapse to wear off the taint of my union-side practice before I try to arbitrate." "Oh, no, Ted," Fred replied. "Quite the contrary. You let me know as soon as you start arbitrating. I want to have you while you are still leaning over backwards to be fair!"

On a more serious note, I should mention the warm personal and professional relationship that has existed over the years between Christopher Barreca, formerly General Electric's top labor attorney, and Max Zimny, a leading New York union lawyer. Both Chris and Max represented their respective clients with great skill and dedication. Yet they have jointly put together numerous conferences on labor arbitration and co-edited a couple of books on the subject. They also co-chaired the drafting of the 1995 Due Process Protocol on the Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship. Chris and Max represent the very best of the practicing bar in the labor field, demonstrating that highly successful advocates can rise above ideology or client interests to promote the greater good of the legal profession and the public at large.

Finally, I must tell you how I owe to a staff member here at the Board my only chance to represent a principal party, as distinguished from an amicus, before the U.S. Supreme Court. My clients consisted of several African American civil rights leaders who were convicted of trespass for sitting in at a "whites-only" lunch counter in Alexandria, Virginia. I won't name the friend who passed the case on to me because he may have been violating some General Counsel edict in representing the group at the state level, even though he did so on his own time and of course pro bono. But whether or not the Board staff member involved had technically run afoul of some agency rule, he represented for me the finest traditions of our profession, doing just the sort of thing I would expect from a member of the labor bar, private or governmental. As for me, the result was a bittersweet victory. The Supreme Court summarily vacated and remanded the Virginia Supreme Court's affirmance of the conviction — without oral argument.

You now have a sense of the respect and even affection in which I hold most of the persons who, like those in this room, have devoted themselves to such a richly human field as labor relations rather than some more mundane but also more remunerative specialty. It's time to talk about the NLRB as an institution. Most commentators focus on the controversial decisions and the deficiencies as seen from one perspective or another. I wish to start by stressing the routine tasks performed day after day by the Board, without fanfare or headlines, in both Democratic and Republican administrations, in routing out employment discrimination perpetrated by either employers or unions. In the decade beginning in 1994, the Board entertained more than 300,000 unfair labor practice charges. During that period discriminatees received a total of over $900 million in back pay. In a fairly typical recent year about 2,400 victims were entitled to reinstatement. The same decade saw the handling of around 5,000 to 6,000 election petitions each year.

There is, unhappily, a dark side to all this. Fifty years ago only about 6,000 unfair labor practice charges were filed in a year while today that figure is around 30,000, or five times as many. Perhaps not entirely coincidentally, union density in the private-sector workforce today is less than eight percent while it was about 35 percent in the mid-1950s, or almost four and one-half times as great. This dramatic and deplorable decline in union membership continues even though the officially declared policy of the United States remains "encouraging the practice and procedure of collective bargaining." There is no need to elaborate on the many reasons for the long downhill slide of the American labor movement. They include the loss of mass production jobs, the movement of industry to the nonunion South and Southwest, technological advances, the rise of the union-resistant service sector, employee apathy, and aging, unimaginative union leadership.

There are, however, other reasons for union weakness that I believe have something to do with the law and employer conduct. In my one and only oral argument before the full Board, shortly before leaving for the academic world in 1965, I presented the carefully prepared position of the AFL-CIO and made a major concession. We were arguing for greater access by union organizers to employees on employer premises, at least when employers had made captive audience speeches a week or two prior to a representation election. But we also practically invited the Board, as a trade-off, to spend less time scrutinizing employer speeches for supposedly coercive or threatening statements. In short, our professional organizers had reached the conclusion that unions were losing elections not so much because of employer-incipited fear but because of an inadequate opportunity to get the union message across to the employees.

Although I still feel that lack of access to the employees has
been a severe handicap in labor organizing, I now believe I was
dead wrong in dismissing or downplaying the factor of employer
intimidation, subtle or otherwise. I would point to two sets of
facts. First, on the basis of my own extrapolations from figures
presented to Congress by Harvard’s Paul Weiler, I concluded that
workers in the early 1980s were about four to six times more
likely to be fired for involvement in organizing drives than their
counterparts in the halcyon days of the 1950s (depending on
the particular year). Second, I cannot escape the realization
that unionization in the public sector has stood at a steady 36 – 37
percent while it has plummeted to less than eight percent in
the private sector. And the public sector contains entire groups
that would formerly have been regarded as “unorganizable” —
doctors, lawyers, and technicians, for example, not to mention
schoolteachers. Why such a difference? Almost surely one of the
explanations is that once a legislature and a chief executive have
adopted a statute authorizing employee organization and collective
bargaining, no agency head is going to try to thwart it. And
despite the current low rate of private-sector unionization, several
studies indicate that a substantial percentage (44 – 57%) of the
country’s employees would actually prefer to be unionized.

I break no new ground when I assert that the most serious
problem with the National Labor Relations Act is probably the
inadequacy of remedies and the long delays in getting any relief.
Especially for an employee out of a job, with a family to feed and
clothe and house, lack of a timely remedy is tantamount to no
relief at all. A recalcitrant respondent can easily prevent a
discriminatee from getting an enforceable backpay order for two or three
years or more. Yet in recent times the Board has seemed reluctant
to seek the immediate balm of Section 10(j) injunctions and the
courts have seemed hesitant to grant them. In addition, the most
recent figures I have seen indicate that during the last decade the
time from the filing of a charge to the issuance of a complaint has
gone from 52 days to 90 days. That may simply reflect the staffing
problems of a severely underfunded agency but it is a distressing
symptom nonetheless.

In my opinion the Board missed a major opportunity to put
some genuine teeth in an order to bargain when it declined by a
3-to-2 vote to fashion a make-whole remedy in *Ex-Cell-O Corp.*, 185 N.L.R.B. 107 (1970). Why should a rogue employer bother
to bargain when it knows that all it faces, after two or three
years of Board and court proceedings, is a judicial pronouncement
to the effect: “Go ye and sin no more”? By then the union
has probably disintegrated anyway. But here too the courts
have been at least as timid as the Board in promoting or countenancing realistic remedies. There are both theoretical and
practical arguments against make-whole orders in a Section
8(a)(5) context. But against the imperative of ensuring meaningful remedies for proven wrongs, often egregious wrongs, I
find it easy to answer those arguments. In essence, a make-whole
remedy would not be imposing a contract on the parties; it would
be a backpay award from the date of the refusal to bargain to the
resumption of good-faith bargaining. And the amount awarded,
based on the contracts of similar parties in the industry and
geographical area, would be no more speculative than the damages
regularly assessed in antitrust cases. Employees’ rights to organize
and bargain collectively are just as precious and as entitled to
protection as the right of businesses to compete without being
subjected to unlawful restraints of trade.

Most parties before the NLRB, especially the victims of union
or management coercion or discrimination, are probably most
concerned about Board processes and remedies in the run-of
the-mill case. But the media, the scholars, and all manner of
conferences tend to concentrate on the big, headline-making,
controversial decisions. About these I have quite mixed feelings.
First of all, I do not think they are the product of some sinister
political affiliation, was deeply committed to enforcing the
law. Let me be specific. It happens that I have personally known
rather well seven Chairmen of the NLRB: Frank McCulloch, Ed Miller, Betty Murphy, John Fanning, Bill Gould, John Truesdale, and Bob Battista, ’64. They were very different people and they had quite different ideas
about certain aspects of the law. But anyone acquainted with them
would vouch that each in his or her own way, and whatever their
political affiliation, was deeply committed to enforcing the law
as best they could. On such fundamental matters as extirpating
coercion or discrimination against employees from whatever
quarter, all seven would have stood united. Yet in an area as
divisive, even polarizing, as labor law, it was inevitable that at the
margins they would diverge on just what constituted coercion
or discrimination or a refusal to bargain or what was an appropriate
remedy. The big, headline-making cases are nearly always at the
margin.

That brings me to my second point. Much as I value unions
and collective bargaining, I find it hard to be shocked or outraged
by any one of the Board (or court) decisions of recent years that
have made it more difficult to organize or that have otherwise
reduced the Act's protections. I might have disagreed with most of these results but I could not consider them irrational or malicious. They reflected differing philosophies, differing values. Any one of them might be justified on its own and might be considered no more than a nibble at established doctrine and accepted union or employee rights. What is vitally important, however, is the cumulative effect of these decisions. A multitude of smallish nibbles can add up to a large bite and eventually to a badly chewed organism. Against the background of a national policy "encouraging the practice and procedure of collective bargaining," anything that might have contributed to a drop in the organized private-sector workforce from 35 percent to less than eight percent surely ought to be closely scrutinized.

Protections of the NLRA begin, of course, only with the classification of an individual as an "employee" rather than a supervisory or managerial worker or an independent contractor. A miserly approach to statutory coverage can be said to have begun with the Taft-Hartley Congress, which excoriated the Supreme Court for having treated newsboys at fixed street locations as "employees" and which proceeded to create the new category of "independent contractors" to exclude them. More recently, the Court in several 5 – 4 decisions has checked the Board's inclusion of licensed practical nurses and registered nurses as "employees" and instead excluded them as "supervisors." NLRB v. Health Care & Retirement Corp., 511 U.S. 571 (1994); NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706 (2001). See also NLRB v. Yeshiva University, 444 U.S. 672 (1980) (faculty of "mature" university excluded as "managerial employees"; 5 – 4 decision). These precedents concededly diminish the Board's culpability, but in my view do not fully exonerate it, for its recent decision in Brown University, 342 N.L.R.B. No. 42 (2004) (3 – 2 decision), holding that graduate student teaching and research assistants are not employees. Ask some professors in a major research university (under terms of confidentiality) whether the place could handle the rest of the students without employing teaching assistants and see what they have to say. See also Brevard Achievement Center, 342 N.L.R.B. No. 101 (2004) ("disabled" persons from sheltered workshop assigned to janitorial jobs in training program not employees; 3 – 2 decision). Brown and Brevard are quite logical and understandable, like the Supreme Court's nurses and faculty cases, but their net effect is to reduce the potential number of organizable employees. In my view, they are resolving the doubts in borderline cases in the wrong direction.

A somewhat similar situation arose in IBM Corp., 341 N.L.R.B. No. 148 (2004), still another 3 – 2 decision, which overruled Epilepsy Foundation of Northeast Ohio, 331 N.L.R.B. 676 (2000), and held that the Weingarten right of an employee to have a representative present at a disciplinary interview did not apply to a nonunion employee. It seems to me that if a Section 7 right of the individual is at stake, then the right to representation, like the right to strike itself, should accrue regardless of the existence of a union. On the other hand, if the right is more a matter of the bargaining rights of the union under Sections 9(a) and 8(d), then a quite logical case can be made that the right does not extend to a nonunion worker. The latter, however, does not seem to be the analysis employed by the Board. In any event, my basic point is that once again a marginal case is being decided in a way that nibbles away at the rights protected under the Act.

Nonetheless, I continue to sympathize with the Board because it has often been rebuffed by the courts when it dares to extend employees' rights. For the judiciary, employer property rights have traditionally trumped organizational rights under the NLRA, keeping unions from gaining access to employees in plants, shops, stores, and other work sites. Exceptions have been recognized when a plant and the employees' living quarters were so isolated that there were no reasonable alternative means for the union to communicate. In Lechmere, Inc., 295 N.L.R.B. 92 (1989), enforced, 914 F.2d 313 (1st Cir. 1990), a unanimous panel of Reagan-appointed Board members found such an exception. The union had placed handbillers on a parking lot jointly owned by a retail store in a shopping plaza in a large metropolitan area. When ordered to leave, the organizers relocated to a grass strip of public property abutting a four-lane divided turnpike, and tried to pass out leaflets to cars entering the parking lot. There were also some attempts to contact employees by mailings, telephone calls, or home visits. None of these efforts were fruitful. The Board concluded the employees were effectively inaccessible to the union by means other than on-site approaches, and held the employer in violation of the NLRA for barring organizers from its parking lot.

A 6 – 3 majority of the Supreme Court reversed Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992). Speaking for the Court, Justice Thomas declared that the burden of establishing the "isolation" necessary to justify access to an employer's property was "a heavy one." It wasn't satisfied by "mere conjecture or the expression of doubts concerning the effectiveness of nontrespassory means
of communication.""Signs or advertising" were suggested as "reasonably effective." In light of the realities of the wide dispersal of employees throughout large metropolitan areas, and the difficulty of luring them from their television sets or backyard barbeques to gather at a union meeting hall, one might fairly ask whether the workplace is not the most natural forum for the exchange of views about the merits of unionization. At the same time, however, Justice Thomas is entitled to more than "mere conjecture." A national union would be well advised to invest in some genuine sociopsychological studies to demonstrate empirically the futility of attempting to reach today's urban, suburban, and ambulatory work force by the conventional methods that the majority of the Supreme Court apparently feels are still adequate. One hopes that the Board would be receptive to such a presentation.

Looming next are cases that could make for some very big, headline-making, and extremely controversial decisions. In Dana Corp. and Metaldyne Corp., Cases 8-RD-1976, 6-RD-1518, and 6-RD-1519 (2004), and Shaw's Supermarkets, 343 N.L.R.B. No. 105 (2004), the Board invited argument on such issues as the validity of an employer's voluntary recognition of a union as a bar to a decertification petition and the validity of an "after-acquired" clause as a waiver of the employer's right to an election. I suppose not far behind could be an invitation to argue the validity of employer "neutrality" clauses. As I see it, a perfectly logical argument, in an abstract sense, could be constructed that any agreement is invalid that precludes employees from voting in a secret-ballot election concerning union representation, or that precludes them from hearing all the employer's reasons for opposing unionization. Indeed, I might even find some practical appeal in such a position if we were dealing with a well-entrenched labor movement exercising overwhelming power, instead of one that, in the words of a partisan, is "flat on its back." But I think one must be realistic about the social, psychological, and economic pressures that operate in the world in which we live. The lawyers on the staff of the NLRB are unionized. The young associates in the great Wall Street and LaSalle Street law firms are not. Assuming that the voluntary agreements of some employers and unions do provide a little counterweight favoring unionization for certain employees, I would not be all troubled if the agency enforcing a statute officially encouraging collective bargaining allowed those agreements to stand.

Lastly, a few quick words about the future. It may well be that a substantial part of the American workforce is no longer desirous of traditional representation by an exclusive bargaining agent. Yet I cannot believe it is healthy for any group to be deprived of all voice in something as essential to their personal identity and human dignity as the occupations by which they make their living and indeed by which they define their very being. I can easily envisage a whole range of developments. At one end of the spectrum we may see a loosening of the strictures of Section 8(a)(2) and increasing resort to employee involvement committees or quality-of-life programs. At the other extreme there might be more full-fledged bargaining by minority unions, either voluntary or mandatory. Or a future Congress could look to Europe and require all employers of any size to establish the equivalent of work councils, selected by the employees to perform varying functions, from the merely consultative to some form of co-determination.

If I may be allowed to peer ahead a few decades, I see an American workplace in which all types of status or categorical discrimination, based on race, sex, religion, age, and the like, have been reduced to such insignificance that they no longer call for a separate agency to police them. Nevertheless, I feel there will always be a need, human nature being what it is, for some governmental oversight of the employer-employee relationship. The United States, for example, will eventually join most of the rest of the civilized world in requiring employers to have "good cause" for discharging workers after some reasonable probationary period. What should be more natural than that the granddaddy of federal labor agencies would take on the whole gamut of these tasks, with of course the new title of the National Labor and Employment Board? And so the golden age of this great agency may not, after all, have been the 1930s or thereabouts. Perhaps the golden age of the NLRB is yet to be.

Theodore J. St. Antoine, '54, is a graduate of Fordham College and the University of Michigan Law School. He also spent a year as a Fulbright Scholar at the University of London. He practiced in Cleveland, in the U.S. Army, and for a number of years in Washington, D.C. St. Antoine is known for his writing in the field of labor relations and has engaged in arbitration. He was President of the National Academy of Arbitrators in 1999 - 2000. He began his academic career at the University of Michigan Law School in 1965 and served as its Dean from 1971 to 1978. He is the James E. and Sarah A. Degan Professor Emeritus of Law. He has also taught as a visitor at Cambridge, Duke, George Washington, and Tokyo Universities, and in Salzburg.