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BOOK REVIEW

NLRB Representation Elections—Law, Practice & Procedure. By John D. Feerick, Henry P. Baer & Jonathan P. Arfa. New York: Law & Business, Inc./Harcourt Brace Jovanovich. 1979-80. Pp. xxii, 876. $55.

To write a comprehensive book about labor law is a formidable challenge. Identifying just one dominant obstacle, a leading scholar has written that "[m]any a potential author has been deterred from trying to write a labor law book by the risk of being out of date before the ink is dry."[1] Yet, some books need to be written despite such challenges, and this book was one of them.

The subject of representation elections is one of the two principle concerns of the National Labor Relations Act; the other is the prevention of unfair labor practices. These dual concerns are closely interwoven, particularly because most unfair labor practice cases arise in the context of representation efforts. Despite its significance, the subject of representation law, especially in the actual context of NLRB election procedures, has not received commensurate, or even adequate attention from the academic community. Individually, of course, there have been some notable exceptions, but the void is undeniable. Some academic commentators have candidly attributed this to the supposed lack of theoretical challenge.[2] Whatever the reason, the major task of exploring and explaining this area has fallen to the practitioner.

Certainly, the practitioners have responded with some valuable contributions to the literature in this "bread and butter" area. A brief sampling would include discussions of discreet segments of representation law, such as appropriate bargaining units, articles on the law of organizing, handbooks on strategic considerations from a partisan standpoint, useful, but dated, discussions of procedural issues, and publications of papers and speeches delivered at seminars. Most noteworthy are the excellent chapters on this subject contributed by practitioners in the landmark treatise on labor law edited by Professor Charles Morris.[3] Finally, there is the NLRB's own Case Handling Manual. This attempt to enumerate examples of the worthwhile literature in the field serves to illustrate the persistent absence of any

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1. Sovern, *Foreword* to A.B.A. Section of Labor Relations Law, The Developing Labor Law at viii (C. Morris ed. 1971).

2. *Id.*; St. Antoine, *Foreword* to J. Feerick, H. Baer & J. Arfa, NLRB Representation Elections—Law, Practice & Procedure at ix (1979-80).

3. *See* A.B.A. Section of Labor Relations Law, The Developing Labor Law 153-267 (C. Morris ed. 1971).

single comprehensive book on the subject. It is this void that the authors, all practitioners, have sought to fill in over 700 pages.

The comprehensive nature of the book invites the inquiry as to the actual sufficiency of the treatment. Initially, we can take note of the sobering fact that the task itself was monumental. The collaboration of three authors and supporting staff may explain the prior absence of such an undertaking by any active practitioner individually. In this instance, the extensiveness of the book was assured by two underlying considerations. First, the obvious realization was that to write an in-depth book on NLRB representation elections (R cases), necessity demanded the inclusion of many overlapping areas. Thus, it was essential to discuss all the provisions of the Act, the operations of the National Labor Relations Board, conduct which would constitute unfair labor practices (C cases) and its impact on R cases, and the role of the various circuit courts of appeals who may review R case issues in the course of determining whether or not to enforce Board orders in C cases.[4] In this respect, it is virtually impossible to write a labor law treatise confined solely to R cases. When this overall task of drawing together overlapping areas was completed, the authors were more than half-way through a treatise on the entire subject of NLRB law. Second, the authors chose a wide audience that was neither confined to practitioners for the management or union side, nor confined to members of the Bar. This objective, I believe, contributed to a thoroughness in attempting to balance the "legal" discussion with practical tools.

The practical tools consist of over one hundred pages of appendices containing charts, checklists, samples of campaign letters, and NLRB forms. As an example, for purposes of determining eligibility to vote, the authors have provided invaluable checklists. These include a checklist of thirty-nine criteria for supervisors, nineteen criteria for managerial employees, fifteen criteria for professionals, twenty-four criteria for independent contractors, sixteen criteria for guards, eighteen criteria for technical employees, eleven criteria for laid off employees, eighteen criteria for part-time, casual or temporary employees, fourteen criteria for probationary employees, eleven criteria for relatives of management, and nine criteria for agricultural employees.[5] There is also an extensive checklist for handling com-

4. For example, an employer who loses an election in a unit that it claims is inappropriate may normally seek court review only by a technical refusal to bargain that results in an appealable Board order finding that the employer committed an unfair labor practice.

5. J. Feerick, H. Baer & J. Arfa, NLRB Representation Elections—Law, Practice & Procedure 617 app. C (1979-80).

munity of interest questions.[6] Each practitioner must devise precisely these kinds of checklists in preparation for a hearing in an R case.

Another worthwhile appendix contains fifty pages of comparisons of actual campaign literature found to be lawful or unlawful, along with case citations.[7] Charts of case law dealing with *Gissel*[8] bargaining orders and NLRB jurisdictional yardsticks are also included. Almost every NLRB form used in an R case is also contained in the appendix.[9]

In the six hundred pages of the text, the reader is led through all the NLRB procedures and mechanics in representation cases. In subsequent segments, the book deals with the fundamental legal issues which arise, such as unit and eligibility questions, and the regulation of campaign conduct. It is difficult to pinpoint any significant area that has not been discussed or noted. In short, it is easily the most comprehensive book on the subject of which I am aware.

What about the question of timeliness and the dry ink syndrome which has deterred many potential authors? This is an inherent problem, and the authors have reminded us that their research was "frozen" as of mid-1979. Indeed, within a few minutes after an initial scanning of the book, I discovered a reference to one of my own cases which did not reflect that justice had prevailed on appeal—after the book had gone to press.[10] Nonetheless, the reference still reflected Board law which, in most instances, must be the anchor point for description of the present law. The various circuit courts may differ among themselves so that to explain the present law, authors are frequently required to use lengthy footnotes to reflect the treatment of a particular Board view by various circuit courts. In some instances, judicial rejection of the Board's view is so uniformly overwhelming that it is inappropriate to relegate it to footnote treatment. An example is the Board's *Midwest Piping*[11] doctrine forbidding an employer from extending recognition to one of two rivals despite the clear majority support of the recognized union. The Board has steadfastly adhered to this doctrine despite uniform rejection by every circuit court that has considered the question. The authors did recognize this

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6. *Id.* at 613 app. B.
7. *Id.* at 631 app. D.
8. NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).
9. J. Feerick, H. Baer & J. Arfa, *supra* note 5, at 684 app. F.
10. Newport Div. of Wintex Knitting Mill, 223 N.L.R.B. 1293, 92 L.R.R.M. 1113 (1976), *enforcement denied*, 610 F.2d 430 (6th Cir. 1979).
11. Midwest Piping & Supply Co., 63 N.L.R.B. 1060, 17 L.R.R.M. 40 (1945).

in their text although they might have given even greater weight to the court's view in that particular instance.

In any event, the problem of timeliness and obsolescence has not, thus far, been significant. For example, the Supreme Court's decision in *Yeshiva University*[12] did not seriously affect the text since the authors had included a discussion of the Second Circuit's decision which had been upheld by the Supreme Court. Even the Board's long awaited decision in *United Dairy Farmers Cooperative Association*,[13] rendered after publication of the book, did not change the law nor did it affect the accuracy of the textual discussion. It is apparent, however, that there have been, and will be, cases which will represent a change in the law. Although labor law may be especially volatile, this book is sufficiently comprehensive and free of polemics that the changes may be easily assimilated. Moreover, a great number of doctrines are sufficiently implanted so that a major change is not likely to escape the attention of the practitioner. A thorough and well written book on this subject in 1979 will surely survive the vicissitudes of Board representation law and changes in Board membership.

In seeking to explain the law in this area, which I have often attempted to do in two hours, or in about thirty-five pages,[14] I have obtained some working knowledge of the prodigious effort that would be involved in authoring a treatise on the subject and consequently, have joined with those who have firmly resisted the impulse. As I view it, the obstacle, or "trick," is to achieve four fundamental objectives. The first objective is to state, accurately and coherently, what the law is. The second objective is selectivity in determining which areas require the greatest emphasis. The third objective is to provide the reader with practical assistance in terms of citations for further research, or with sample forms and checklists. The fourth and most elusive objective is to provide and share with the reader certain nuances and insights drawn from the author's experience which will enable the reader to travel the extra step if he or she chooses to do so. By applying these criteria, the book succeeds admirably. My only reservations concern the fourth objective.

With respect to the first objective, the book is commendable in its accuracy. I would, however, quibble on some minor matters. One such example is the reference to *Banner Bedding*[15] as the exception

12. NLRB v. Yeshiva Univ., 444 U.S. 672 (1980).

13. 242 N.L.R.B. No. 179, 101 L.R.R.M. 1278 (June 12, 1979).

14. Linnick, *NLRB Law and Practice in Organizing and Representation Cases*, in Basic Labor Relations 19 (1976).

15. Banner Bedding, Inc., 214 N.L.R.B. 1013, 87 L.R.R.M. 1417 (1975).

to the *Norris-Thermador*[16] rule requiring that eligibility stipulations concerning individuals be in writing. Although the Board permitted an oral stipulation in limited circumstances, the Ninth Circuit denied enforcement. Neither that denial nor the Board's remand decision were cited. In my view, neither that case nor subsequent development would justify a feeling of confidence in the vitality of that exception. Another minor example is the reference to *Dilene Answering Service, Inc.*[17] as establishing a $50,000 jurisdictional yardstick in that industry. Although the yardstick will probably be applied, the Board conspicuously avoided establishing a yardstick for the industry in that case. It merely noted that the employer met both the retail and nonretail standard.[18] I was also uncomfortable with the use of the term "showing of interest" in conection with a card majority for bargaining order purposes in C cases.[19] The term, I believe, is normally used in connection with R case petitions and when it is used in the discussion of misrepresentation of authorization cards in C cases, it could be confusing. These comments, however, certainly do not detract from the unusual degree of accuracy in this book.

The major strength of the book is its clarity and coherence. The sentences are, for the most part, short and readable. Run-on sentences, burdensome qualifications, or parenthetical expressions have been conspicuously avoided. The book is a tribute to the notion that legal propositions can be expressed without pedantic prose. An outstanding example of the clarity and coherence of language appears in the discussion concerning the Board's Rules and Regulations. This can be very dry reading. What the authors have done is to paraphrase these rules so that they can be digested without inducing sleep. Finally, the authors closely adhere to the concept of objectivity. There are no distracting polemics or any apparent tongue-in-cheek sarcasm. For the reader who may feel deprived of being provided with a point of view, the field abounds with brief articles espousing the personal views of their authors.

In terms of coherence, my only negative reaction concerned the structure of one segment of the book. Specifically, I was distracted by the attempt to divide the discussion of the Board's regulation of election campaign tactics into two parts, speech and conduct. In my view, this is an artificial distinction for this purpose. Thus, improper in-

16. Norris-Thermador Corp., 119 N.L.R.B. 1301, 41 L.R.R.M. 1283 (1958).
17. 216 N.L.R.B. 669, 88 L.R.R.M. 1586 (1975).
18. *Id.* at 670, 88 L.R.R.M. at 1587.
19. J. Feerick, H. Baer & J. Arfa, *supra* note 5, at 71-73.

ducements to employees may constitute conduct, but they often take the form of speech, oral or written. This separation had the effect of disjointing the treatment of an area which was otherwise handled well on a substantive basis.

As for the second objective, selectivity and emphasis, this is a matter of considerable subjectivity. Since I am in agreement with the points of emphasis and deemphasis, I was especially enthusiastic. Thus, I was delighted to be spared, at the outset, an unnecessarily prolonged discussion of the legislative history of the Act.[20] Twenty pages seemed quite adequate, particularly when written concisely. On the other hand, the treatment of the controversial topic of campaign misrepresentations was so thorough and timely that there was little, if anything, to be added other than to warn the reader that the Board may adopt a different doctrine in the case before it rather than prospectively. Campaign misrepresentation is one topic that has attracted the attention of academic commentators. This is reflected in the discussion of the demise of the Board's short-lived *Shopping Kart*[21] doctrine (which had eliminated most of the grounds for setting aside an election based upon campaign misrepresentations) and the reemergence of the *Hollywood Ceramics*[22] approach in the *General Knit*[23] case.

Equally extensive is a discussion concerning the Board's regulation of no-solicitation and no-distribution rules. This is an area of considerable confusion and is in need of the well organized and complete review it received. Although some recent refinements concerning hospitals could not have been incorporated at the time, the accuracy of the segment remains intact.

Predictably, topics such as appropriate bargaining units, eligibility, voting procedures, and campaign conduct received special emphasis and were exceptionally well handled. In addition, there were useful surprises. For example, the authors included a discussion of the possible sources of information that an employer may check concerning a union and the sources of information that a union may consult in gaining information about a particular employer.[24] Although a Dun & Bradstreet report may represent standard information, a Form 10-K report filed by a public company with the SEC does not. As a result, some employers are shocked to see the detailed financial information appear in a union's campaign literature. Similarly, a brief reminder about the filing requirements for persons, including attor-

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20. *Id.* at 3-23.

21. Shopping Kart Food Market, Inc., 228 N.L.R.B. 1311, 94 L.R.R.M. 1065 (1978).

22. Hollywood Ceramics Co., 140 N.L.R.B. 221, 51 L.R.R.M. 1600 (1962).

23. General Knit of Cal., Inc., 239 N.L.R.B. No. 101, 99 L.R.R.M. 1687 (Dec. 6, 1978).

24. J. Feerick, H. Baer & J. Arfa, *supra* note 5, at 391-97.

neys who engage in "persuader" activities, is timely in the light of recent efforts by the Labor Department to increase its enforcement activities. Two other gems of information deserve mention. There is a lengthy footnote explaining, by example, all of the mathematical possibilities involved in rerun and run-off elections.[25] Initially, it occurred to me that this discussion should have been placed in a later segment of the book. It does, however, seem appropriate for the authors to discuss it while reviewing Board rules so that the reader can know in advance what would be the consequences of a lack of majority. After all, clients will want to know the answer to this question before the final ballots are tallied. As for post-election objections, the book provides a valuable service by warning readers about the Board's *Johnnie's Poultry*[26] rule which may subject employers and their representatives to charges of interrogation when they seek to question without proper safeguards, such as advising employees of the purpose of the inquiry, the voluntariness of any response, and the lack of reprisals.

Finally, the authors have taken pains in their organizational structure to emphasize that a formal election with Board certification is not the only means by which a union may obtain recognition. Voluntary recognition is reviewed with a lengthy discussion of a *Midwest Piping* doctrine. In addition, almost thirty pages are devoted to recognitional picketing and Section 8(b)(7).[27] This serves as a reminder that it is naive to assume that a union will necessarily confine itself to gaining recognition through a Board conducted election.

The third objective of providing research and practical aids to the reader was amply met in the case of the practical tools in the appendices. The case citations as a source of detailed research were ample, although somewhat uneven. While this may reflect the case activity in those areas, it may also reflect the reality that some areas are more interesting than others. My only point of disagreement concerned the particular cases cited for certain propositions. Although these cases are not inappropriate, some cases are more readily known than the particular case cited by the authors. Thus, in reading the text, I had the tendency to look to the footnotes expecting to see a familiar case name. Instead, I often discovered an unfamiliar case citation even though it stood for the same proposition. Perhaps, familiarity does breed contempt, and the time has arrived for me to rely, in written briefs, on a case with a different name when the old case does not seem to work anymore. In any event, the accomplishment in terms of

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25. *Id.* at 252 n.294.

26. Johnnie's Poultry Co., 146 N.L.R.B. 770, 55 L.R.R.M. 1403 (1964), *enforcement denied on other grounds*, 344 F.2d 617 (8th Cir. 1965).

27. J. Feerick, H. Baer & J. Arfa, *supra* note 5, at 119-45.

accuracy was so impressive that I hesitate to bemoan the reference to *Lerner Stores*,[28] rather than the traditional reference to *Sav-On Drugs*[29] as establishing the presumptive appropriateness of a single store unit.

As I noted earlier, my major point of difference with the authors concerned the fourth objective concerning the extra nuances which might have been included. As I noted, this is an elusive concept, and these are my objectives rather than those of the authors. On the other hand, a reviewer is susceptible to the same tugs or subjectivity as is the author. In illustrating this difference, it is important to recognize that this book is not a handbook of specific suggestions to either management or labor for winning elections. Thus, the book does not purport, for example, to offer strategic advice to employers about how to involve supervisors in the election campaign or arranging meetings or pre-election dinners. On the other hand, the authors have set forth the legal framework in such a way that the solution will often suggest itself. An example is dealing with the phrase "bargaining from scratch." The discussion of the *Plastronics*[30] case readily suggests the solution. In that sense, the authors have provided, in the context of legal analysis, significant insights for the reader. Because of the framework of the book, however, some opportunities for analysis of strategy, from a legal standpoint, may have been missed.

Some of the opportunities for strategic analysis can be considered in the situation in which a union permits time to elapse between the demand for recognition and the filing of the representation petition. If certain unlawful or impermissible conduct occurs in this time gap, it might not, under the rule of *Ideal Electric*,[31] be a basis for setting aside an election since it occurred before the critical time of the filing date of the petition. Because setting aside an election may be a prerequisite for a bargaining order under *Irving Air Chute*,[32] this time gap may represent a barrier to the imposition of a *Gissel* bargaining order. In this same connection, the book does not appear to draw the distinction between the date when a demand for recognition is sent and when it is received. The date of receipt governs the determination of majority status and can be a signficiant consideration.

Another example was the discussion of the UD or deauthorization petition, which seeks to rescind the operation of a union security clause. The book did not highlight—or at least I did not discover

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28. NLRB v. Lerner Stores Corp., 506 F.2d 706 (9th Cir. 1974).
29. Sav-On Drugs, Inc., 138 N.L.R.B. 1032, 51 L.R.R.M. 1152 (1962).
30. Plastronics, Inc., 233 N.L.R.B. No. 23, 96 L.R.R.M. 1422 (Nov. 1, 1977).
31. Ideal Elec. & Mfg. Co., 134 N.L.R.B. 1275, 49 L.R.R.M. 1316 (1961).
32. Irving Air Chute Co., 149 N.L.R.B. 627, 57 L.R.R.M. 1330 (1964), *enforced*, 350 F.2d 176 (2d Cir. 1965).

it—that in UD elections, unlike other representation elections, the petitioner must receive a majority of the votes of those *eligible* to vote, rather than those actually voting. Thus, a "no-show" is a vote for the union and a campaign can be devised accordingly. This is not to suggest that these particular examples should have been included, but to indicate that there was further room for legal, as opposed to partisan, analysis.

I would also have preferred to see an additional sentence or two included in some other cases. For example, I was pleased to see a discussion concerning the AFL-CIO No-Raiding pact. This is a topic which, in my experience, most management attorneys, and some union attorneys, tend to ignore. It can make the difference between winning and losing a case when the AFL-CIO orders one of two rival unions to cease a particular organizing effort. Having had my appetite whetted, I was sorry to see that there was no reference to Article XX of the No-Raiding pact, which requires that the union seeking to invoke the procedures have a bargaining relationship of at least one year.

In retrospect, I suppose that had I been given a head start of 600 pages and been allowed to add all these extra sentences, it is unlikely that the book would have reached publication by now. Rather, I would be one of those deterred by the prospect of ink not drying while the law changed. All that aside, the book is a major accomplishment by any set of criteria.

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