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IS THERE A NEED TO AMEND THE NATIONAL LABOR RELATIONS ACT?

REMARKS OF JOHN J. SWEENEY*

In 1979, when President Carter was still in office, an organizing drive began among the employees of a restaurant in the midwest. I have no idea why this drive began, but I suspect it was for the same reason that most organizing begins—workers believe that life is better with a union contract. Regardless of the reason, however, the drive began and approximately sixty percent of the employees authorized the union to petition for an election. The union filed a petition with the National Labor Relations Board (NLRB or Board), and after the now-normal delays, an election was held. The employer was adamantly opposed to the organizing campaign and did everything he could to discourage his employees from voting for a union. The union lost the election.

In reviewing the organizing campaign, the Board found the activities of the employer so outrageous that it issued a bargaining order, something that is seldom done these days, instructing the employer to deal with the union.¹ The employer appealed, and last month, nearly four years after the organizing efforts began, the court held that the employer was not required to bargain with the union.² In reaching its conclusion, the court cited the large turnover in the workforce that had occurred since the original organizing drive in 1979.³

I do not think that it is legitimate to base an argument on selected horror stories such as this one. Nor do I contend that this result would have been avoided if we had passed the National Labor Relations Reform Act six years ago. But I do believe that a modern industrial nation cannot survive in the years ahead without a system of labor relations that can depend on an impartial and effective legal mechanism available to both labor and management.

The recent NLRB decision in *Milwaukee Spring*⁴ is simply the last nail in a coffin that has been prepared for the National Labor Relations Act for many years. The appointment of right-to-work attorneys to the General Counsel's office was the announcement of the pallbearers. If you speak to the front line leadership of my union, or of any

* President, Service Employees International Union.

1. Village IX, Inc., 1982-83 NLRB Dec. (CCH) ¶ 15,288, at 25,947 (1982), *enforcement denied*, 723 F.2d 1360 (7th Cir. 1983).

2. NLRB v. Village IX, Inc., 723 F.2d 1360, 1373 (7th Cir. 1983).

3. *Id.* at 1372.

4. Milwaukee Spring Div. of Ill. Coil Spring Co., 268 N.L.R.B. No. 87, slip op. (Jan. 23, 1984), *rev'g* 1982-83 NLRB Dec. (CCH) ¶ 15,317 (1982).

union, you hear the same refrain: The NLRB is useless; we must find other ways to do business.

So my answer to the question whether the National Labor Relations Act should be amended is simple: NO! The National Labor Relations Act (NLRA or Act)⁵ is, for all practical purposes, now dead and should be either buried or resurrected. The NLRA has already been effectively amended, not by legislative or even judicial edict, but by power politics and management strategies that have destroyed the balance of power that had existed between labor and management for nearly fifty years.

We should pause to remember what it was like prior to the passage of the NLRA: when long and sometimes violent strikes were the rule, rather than the exception; when there were massive boycotts, and city-wide shutdowns and picketing. The NLRA changed all that because it provided a legitimate forum for the orderly settlement of labor/management difficulties. And it has served us fairly well.

The labor movement did try to amend the NLRA in 1977. Delays in handling unfair labor practice charges and in adjudicating representation matters were eroding the effect of the Act and the effectiveness of the Board. The attempt failed. Since that time, delays caused by overwork, increasing case load and management militance have doubled the median time necessary to obtain a Board decision. There is presently a gridlock at the NLRB, and employers have discovered the advantages of this gridlock. With the aid of union busting consultants, these employers have found more and more ways to achieve delays.

The recent politicization of the Board by the Reagan Administration confirms judgments made three and four years ago that corporate America intended to dismantle the National Labor Relations Act. President Reagan has been their instrument. The President once said he came to Washington to "drain the swamp." He and his colleagues quickly realized that the way to drain the swamp at the NLRB was to flood it by encouraging employers to disregard the law, and simply ride-out any charges filed.

What is to become of all of this? If President Reagan is re-elected, perhaps he will see that a healthy economy must have cooperative labor/management relations, and will moderate his policies so that some of these excesses are reversed. Or perhaps the right-wing will convince him to repeal the Act so our legal system more accurately reflects reality. Or perhaps there will be a Democratic administration more sympathetic to the rights of workers and to the principles of collective bargaining.

5. 29 U.S.C. §§ 151-169 (1976 & Supp. V 1981).

Meanwhile, as we wait to see what political solutions are forthcoming, we in organized labor are returning to our roots, and to the tactics that helped us wring simple economic justice from the hands of the rich and powerful in this country not so many years ago. There are other ways to organize workers than to use the National Labor Relations Act. We do not need union representation elections sanctioned by the NLRB. We have the ability and the tactics to force employers to recognize our unions—tactics such as massive boycotts, coordinated strikes and city-wide shutdowns. We can conduct corporate pressure campaigns that cause economic damage to corporations that are not willing to deal with us fully and fairly. The Service Employees International Union has already had success with such campaigns against Beverly Enterprises, the largest chain of nursing homes in the country, and the Equitable Life Assurance Society, the third largest insurance company in the world.

These tactics are as expensive as they are effective. Moreover, they create severe repercussions by discarding the “civilized” labor relations system in favor of fighting in the streets. It is a disastrous price for the labor movement and for our country to pay to ensure that workers are represented. But it is a price we will have to pay unless either public policy or the present Administration is changed.

If one or the other of these does not happen, I am afraid that we will be sitting here three or four years from now having a lively debate on who is responsible for the demise of the National Labor Relations Act.

American workers have always been loyal to our modern capitalistic economy. We have organized and bargained hard, but we were always willing to make compromises. Workers in general want to work and want to enjoy their work. They want their employers to prosper. They want their nation to prosper. American workers are, above all, pragmatic and non-ideological. When we create a labor/management system that does not build on these attitudes—that encourages confrontation instead of cooperation—then we have taken a significant step toward fundamentally reordering our economy and our democracy. I do not think that is something that will please either management or labor.

REMARKS OF JAY SIEGEL*

My answer to the question—is there a need to amend the National Labor Relations Act—can best be expressed by discussing with you Maslow's hierarchy of needs. You will remember that Maslow constructed a pyramid to symbolize the various degrees of needs that man experiences. At the lowest level, the needs are food, clothing and shelter; as one moves up, the needs include less essential things; and at the top of the pyramid, the level of needs is more esoteric. If you asked me in 1978 where we were in this hierarchy, as a management lawyer I would have said that we were at the lowest level—it was a question of survival. Today, however, as we return to normalcy at the National Labor Relations Board (NLRB or Board), I am happy to say we are at a much higher level. The recent appointees are bringing back some of the established doctrines that both labor and management had learned to live with.

A prime example of this return to normalcy is *Milwaukee Spring*.¹ Until the Board's first decision in *Milwaukee Spring* in 1982, management and union attorneys knew exactly what the rule was and could structure their actions accordingly. In *Milwaukee Spring*, the Board held, for the first time in forty years, that section 8(d)² prohibits an employer from moving his plant during the term of a collective bargaining agreement without consent of the union.³ This interpretation of section 8(d) by three members of the National Labor Relations Board drastically changed the law in a way that neither labor nor management had ever anticipated. The Board's recent reversal of *Milwaukee Spring* merely reinstates the traditional interpretation of the employer's duty to bargain.

The same problem has occurred repeatedly in the last five years. After the failure of the labor law reform movement, I predicted that the unions would try to broaden the National Labor Relations Act (NLRA or Act)⁴ by bringing selected cases before the Board prior to the new members being appointed to the agency by the Reagan administration could assume control. That is exactly what happened.

For example, the "no-solicitation" rule, which had always exempted the United Way, went down the drain.⁵ Likewise, the well-delineated and time-worn distinction between "working time" and

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1. *Milwaukee Spring Div. of Ill. Coil Spring Co.*, 268 N.L.R.B. No. 87, slip op. (Jan. 23, 1984), *rev'g* 1982-83 NLRB Dec. (CCH) ¶ 15,317 (1982).

2. 29 U.S.C. § 158(d) (1976).

3. 1982-83 NLRB Dec. (CCH) ¶ 15,317 at 26,036.

4. 29 U.S.C. §§ 151-169 (1976 & Supp. V 1981).

5. *Hammary Mfg. Corp.*, 111 L.R.R.M. (BNA) 1346 (1982)

“working hours” for general solicitation purposes was eliminated.⁶ We had Board decisions restricting the well-established *Collyer* doctrine⁷ of deferral to arbitration and its concomitance, the *Spielberg*⁸ post-arbitration review doctrine.

Rules that management and labor had come to understand as clearly-defined codes of conduct were being turned on their head. What we have today is a return to normalcy at the Board, a return to those “liveables” that both sides had learned to accept. What would happen if the Board were suddenly to take the twenty-four hour rule in election campaigns and subject it to a case-by-case analysis? We have all learned to live with the twenty-four hour rule. The unions know what is expected of them, management knows what is expected of it, and nobody has any problem with that. We do not need the Board, regardless of who is in control, to turn these well-understood guidelines inside out. Such action breeds only instability. It adds an element of politicization to the Board, and helps neither the Agency nor the administration of the Act.

To understand the present state of the NLRA, it is necessary to take a brief look at the history of labor legislation. The National Labor Relations Act was passed in 1935⁹ as a result of the efforts of both Senator Wagner and Senator Walsh. Twelve years later, in 1947, it was amended by the Taft-Hartley Act.¹⁰ In 1959, Congress passed the Landrum-Griffin Act¹¹ based on the outcome of the hearings investigating misconduct within labor unions.

Those of you who are stock market technicians or chartists may note that there is a rhythmic pattern under which we have the Act amended approximately every twelve years. Fifteen years later, in

6. T.R.W. Bearings Div. of T.R.W., Inc., 257 N.L.R.B. 442, 443 (1981) (discarding distinction that made no-solicitation rule presumptively valid if applied to “working time” and presumptively invalid if applied to “working hours,” in favor of presumption of invalidity in both cases), *overruled*, Our Way, Inc., 268 N.L.R.B. No. 61, slip op. (Dec. 20, 1983).

7. *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971); *e.g.*, General Am. Transp. Corp., 228 N.L.R.B. 808, 809-10 (1977); Kansas Meat Packers Div. of Aristo Foods, Inc., 198 N.L.R.B. 543, 543 (1972). The Board recently repudiated *General American Transportation* and resurrected the *Collyer* doctrine. United Technologies Corp., 268 N.L.R.B. No. 83, slip op. (Jan. 19, 1984).

8. *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955); *e.g.*, Professional Porter & Window Cleaning Co., Div. of Propoco, Inc., 263 N.L.R.B. 136, 137-38 (1982); United Parcel Serv., Inc., 252 N.L.R.B. 1015, 1015 (1980); Suburban Motor Freight, Inc., 247 N.L.R.B. 146, 146-47 (1980).

9. Ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1976 & Supp. V 1981)).

10. Labor Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-188 (1976 & Supp. V 1981)).

11. Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified as amended at 29 U.S.C. §§ 401-531 (1976 & Supp. V 1981)).

1974, we had the health care amendments,¹² and if you follow the averages, in 1987 we should have the next series of amendments to the National Labor Relations Act. The problem with the Labor Law Reform Bill¹³ was that no real need for amendment of the Act had built up. It was a matter of force-feeding on the part of labor unions that were frustrated because they were not able to organize successfully.

The union complaint that I hear most frequently today is that the national labor policy, as expressed in the National Labor Relations Act, is in a shambles. When a labor union successfully organizes employees, unions claim the Act is working. But when they are unsuccessful at organizing, they charge the Act is not working. I suggest that the Act is working just as well when employees vote "no" as when they vote "yes."

The basic objective of the National Labor Relations Act is not the unionization of all workers in the United States. Rather, the Act guarantees to workers the right of self-determination to decide if they want a union. Not all workers in this country feel honestly that they would be better off with a labor union or that they need a union to protect themselves. The key point is that the Act guarantees, not unionization, but the right to decide if you want to be unionized.

The National Labor Relations Board is supposed to provide a measure of security for the workers of this country. Is there a need to amend the Act? In my opinion, no: I think the system is working pretty well.

After the failed labor reform movement, the Board attempted to amend the NLRA through case decisions, and for some time was successful. Ironically, now that the Board is retreating from these decisions, it faces charges of politicization. Professor Derek Bok, now the President of Harvard University, wrote in 1971:

In a decentralized, adversary system of labor relations, there are no union and management organizations with the authority or the will to join together to improve the quality of legislation and the administration and staffing of legal institutions. Without such cooperation the enactment of labor legislation becomes highly controversial, and the laws that result tend to be viewed, with some justice, as a body of rules which one side has succeeded in enacting at the expense of the other.

12. Act of July 26, 1974, Pub. L. No. 93-360, 88 Stat. 395 (codified as amended at 29 U.S.C. §§ 152, 158, 169, 183 (1976 & Supp. V 1981)).

13. S. 1883, H.R. 8410, reprinted in *Labor Reform Act of 1977: Hearings on S. 1883 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 3, 26 (1977).

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The lack of high-level cooperation between American business and labor has further affected the legal environment by forcing the government to take major responsibility for resolving the basic issues of value that divide the parties.

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This process is most clearly illustrated by the history of the National Labor Relations Board. Throughout its life, the NLRB has been pilloried on three grounds. It has been consistently accused of bias, its personnel have been criticized for incompetence, and its procedures have been attacked for moving at a tortoise-like pace.¹⁴

The problem with the NLRB that John Sweeney talked about today is not the fault of employers, unions or Congress—it is the fault of the Board. The agency's own internal procedures encourage delay. They encourage a decision-making process that is frustrating to both management and labor. A typical example is the "red flag" system. For many years, if you were a Board member and a decision was being circulated, you could "ice" the decision simply by putting a red-flag memo on it. In effect, this memo would hold that decision until the Board discussed the majority ruling or perhaps until a dissent was written. At one point, there were hundreds of cases that were iced because of disagreements among the Board members. I have been told that there are Board agendas at which there are five positions because there are five Board members, and that the Board members jockey for position to try to put together a majority or a coalition on particular policy decisions.

The internal decision-making process at the National Labor Relations Board is the real reason that we have such delay. The Board has opposed rule-making over the last thirty years, due principally to the avid opposition of John Fanning, who is no longer there. The Board's involvement in de minimis cases has been consistently criticized by the courts of appeals for wasting the time of members and taxpayers on points of law that really do not have any major impact. Every factual dispute in the regional office based on affidavits in an unfair labor practice case is required to go to hearing under the orders of the General Counsel. The regional directors are not allowed to resolve factual disputes based on their investigation. The result is we have case after case involving determinations of detailed factual issues.

My law firm has won the last five trials we have had before administrative law judges, all on complaints that never should have been authorized, but nobody seems to pay any attention to streamlining the Board procedures.

This may be a case of Washington against the rest of the country, and I am not about to make a plea for the present occupant of the

14. Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 Harv. L. Rev. 1394, 1448-49, 1451 (1971) (citations omitted).

White House, but certainly it is time that somebody sat down and got the Board to streamline their procedures. It is to the credit of Chairman Dotson that the Board has enacted the thirty-day rule on dissents. No member may hold up a majority decision from leaving the agency for more than thirty days. Of course, those who do not like the Board's new policies criticize the dissent rule. But what goes on at the agency is bureaucratic in-fighting and bureaucratic policy-making of the highest order. That is why we have delay at the National Labor Relations Board. And these problems were ignored during the Labor Reform hearings in 1977, 1978 and 1979.

There is one area in which amendment of the Act might afford the Board some relief. The Board has injected itself into the bargaining process. Its caseload could be lessened by amending the Act to prevent the parties from using the unfair labor practice procedure as a tactical device in collective bargaining negotiations. The artificial categories of mandatory subjects of bargaining, permissive subjects of bargaining, good faith bargaining, and bad faith bargaining overwhelm the Board with cases involving exhaustive records, subjective interpretations of what was said at the table, and analysis of the bargaining notes of each side. Adjudicating these cases consumes a great deal of time. I suggest that we consider amending the National Labor Relations Act to eliminate some of the bargaining requirements of section 8(a)(5).¹⁵ The Board should get the parties to the table, leave them there, and from certification to ratification, stay out of the bargaining process. What happens at the table should depend not on the legal sideshow, but on the economic leverage and the skill of the negotiators for both sides.

It is interesting that when the Act was first passed in 1935, Senator Walsh, then Chairman of the Senate Committee on Education and Labor, said that after the employees have chosen their organization and selected their representatives, all the bill proposed to do was to escort them to the door of the employer and present them as the legal representatives of his employees.¹⁶ The Act was not intended to inquire into what happens behind the doors of the negotiating room.

The 1961 report by the Committee for Economic Development (CED Report) examined this question of the Board's involvement in the bargaining process. The report found that matters such as the subjects to be covered by bargaining, the procedures to be followed, and the nuances of strategy involving the timing of offers are best left to the parties themselves. Indeed, the workload of the National Labor Relations Board and of the parties could be substantially reduced by returning the issues to the employer and union, where Senator Walsh wisely left them.

15. 29 U.S.C. § 158(a)(5) (1976).

16. See 79 Cong. Rec. 7672-73 (1935) (remarks of Sen. Walsh).

The CED Report is as sensible and as far-sighted today as it was then. As the Committee recognized, the only way to relieve the pressure on the NLRB is to remove it from some of the areas into which it has intruded. If we can get a sense of balance in the Board, a sense of streamlining the process, then I think some of the problems that John Sweeney has complained about would be substantially relieved.

Every Board member has a staff of twenty legal assistants. A Board member in the 1960's once said that he did not need twenty legal assistants, and that by having so many he had to provide work for them. The old adage that work expands to fill time clearly applies here. This member proposed that Board members could get along with five or six legal assistants, with smaller staffs, and as a result cases would move more quickly.

The bottom line is that I am against amending the National Labor Relations Act, except in the one area I indicated. Instead, I think the Board must streamline its own procedures. As the old New England expression says: If it ain't broke, don't fix it.