Fordham Law Review

Volume 52 | Issue 6 Article 8

1984

The Role of Unions in the 1980s, Symposium, Discussion

DISCUSSION

MR. KAYNARD, MODERATOR: I knew that both John Sweeney and Jay Siegel would be exciting speakers, but frankly, I never thought that they would reach this height. I must commend both John and Jay for a thoughtful and innovative approach to the need to amend the National Labor Relations Act—although I am not sure whether I have a job left. I am glad that this was the end of the session rather than the beginning so that we have more time to go into greater detail if anyone has questions that they wish to pose to the speakers.

AUDIENCE COMMENT: I would like either speaker to comment on whether they think there would be any merit to either (1) increasing the size of the Board, or (2) allowing the Board on a prospective basis to adjust some of their self-imposed jurisdictional standards.

MR. SWEENEY: I would agree that the Board is understaffed and that the delays can partially be attributed to the fact that the Board needs additional funding and additional staff and that some attention should probably be given to that.

MR. SIEGEL: I could not disagree more. When I was Chairman of the American Bar Association Section on Labor and Employment Law in the late seventies, we had before us at various times proposals to enlarge the size of the Board from five to seven or nine. More Board members are not what is needed. Enlarging the Board will create this problem: The Board makes decisions, not on on the basis of its full five members as a group, but rather through three-member panels. The panels are drawn by the Executive Secretary's office, and this is done in a rather arbitrary fashion. For example, when *Collyer* was a big issue at the Board, the Executive Secretary would never put Fanning and Jenkins, the two Board members who were opposed to *Collyer*, on a panel with a single Board member who was in favor of *Collyer*. To do so would have resulted in a panel decision of the Board overruling *Collyer* when three of the five members of the Board favored *Collyer*. If you go to nine people, you will then have to have a whole series of three-member panels. What are you going to do over problems of conflict with Board policy? You will have to, in effect, abandon the three-member panels, and go to a nine-member panel. If you think it is tough getting case decisions out of five Board members, try getting them out of nine. The alternative is what we have in the U.S. Court of Appeals where there are nine judges, three-member panels and en banc decisions when the panels come down with diametrically opposed views.

So, I do not think the answer is adding more Board members. I once proposed that if you are going to enlarge the Board, go to a seven-member Board with two three-member panels and a non-voting

chairman. And if you have a difference between the panels, you resolve it then through the full complement of seven Board people. I thought that was a compromise that might help. Today, I am not so sure that even my own suggestion would make sense.

As to the second part of the question, the jurisdictional standards, there were two Board members who believed that everything was within the jurisdiction of the National Labor Relations Board. The problem was that the Board has entered many peripheral areas, such as day care centers. That type of philosophical approach, that everything is subject to the Board's jurisdiction, has resulted in the Board being overloaded with cases.

MR. KAYNARD, MODERATOR: I would point out that under section 14,[1] the Board is locked into the current standards as of August 25, 1959, and in areas over which the Board had asserted jurisdiction prior to that date, the Board cannot now relieve itself of jurisdiction. I might also indicate that there is before the Board the question whether the Board will modify *National Transportation*,[2] which deals with the question whether the Board should assert jurisdiction over "private entities" that are intertwined with public entities. Having said that, I think that Bruce Simon was making a point of personal privilege.

MR. SIMON: I was just going to suggest to Jay that if he is going to go back to initial principles regarding the 1935 notion of what happens in the bargaining room, that it is also rather inconsistent to say that only when the union is successful is the Act working. There still remains section 1 of the Act, which is a public policy declaration encouraging collective bargaining. I would suggest that any fair reading of the Act in its early history suggests that the statutory founding fathers, as it were, did recognize an affirmative good in collective bargaining, and an affirmative good in the institution of the exclusive collecting bargaining representative. That too is an initial principle that I suggest we all go back to.

MR. SIEGEL: You are correct, Bruce, as far as you have gone. That was the 1935 intention and declaration of policy. But in 1947, the Congress added another statement to the declaration of policy indicating that the purpose of the Act was not just to encourage collective bargaining, but also to encourage the right of employees to self-determination. That statement was added to the preamble in 1947 by Senator Taft who was very much concerned that the statute was becoming too one-sided. We can debate all we want, but Congress wrote it into the statute. So, we have two principles, and all I am

1. 29 U.S.C. § 164(c)(1) (1976).
2. National Transp. Serv., Inc., 240 N.L.R.B. 565 (1979).

suggesting is that we take the law as it presently exists and has existed since 1947, a period of now thirty-five years, with both of those fundamental principles. I did not say the Act does not work if the union wins. I said the Act works whether the union wins or if the union does not win, because the issue is not which side is victorious. The issue under the Act is the employee's right of choice. Freedom of choice is an issue that I think everybody understands very well today in more contexts than this one.

MR. SIMON: Uncoerced by management action.

MR. SIEGEL: I have no problem with that, but as you know, it is arguable whether it is coercion or a matter of free speech and persuasion. I can accept no coercion, but you have to agree that an employer is entitled to present its position fully and completely to the employees. If the employer can lawfully persuade the employees that they should reject the union and continue to deal directly with the employer, then (a) the Act has worked and nothing unlawful has happened, and (b) the employees have, in effect, expressed their desires, not the employer's and not the union's. The problem is that the unions are not able to persuade workers that they ought to be unionized. Management has found that if it does its homework, treats its people fairly and pays competitive wages and benefits, that the employees will probably not be interested in unionizing. It is the employer who gets himself or herself into trouble who finds that the employees want to go union, and that is a failure of management. I can give you quote after quote by international organizers who will tell you that they do not organize, the employer organizes. The problem is that as the unions continue to lose more and more elections, their frustration builds up. The total level of unionized employees in the work force is now down to about twenty percent and it has been dropping. I admit that if I were a union organizer, a union lawyer, or the president of an international union, I would be upset by that. I would say: "We are slipping, we are losing our share of the market, something must be wrong. Is our product out of date? Are we marketing it correctly? What is wrong? Why are we losing?" It is to the credit of John Sweeney that his people went out and negotiated an affiliation in California and picked up almost 100,000 workers just like that, without a Board election and without any employer problems. He, at least, has decided to change his product base and from a management standpoint, that is the way to go.

MR. SWEENEY: I have been listening to this long enough. Nothing that you can say shocks me, Jay. I just want to speak on behalf of our own union, which was known as the Building Service Employees International Union until the 1960's. In about 1964, our name was

changed. We deleted the word "building" from the title and became the Service Employees International Union. We were then a union of about 250,000 members; we are a union today of 850,000 members. And yes, we were successful in negotiating an affiliation for the California state employees who had decided to go with an AFL-CIO union. But our growth has been a very consistent growth through the years in which the service sector of the economy has also been growing, and our expansion has been in the areas of health care and public employment. And it has not been just through affiliation, although we have been fortunate to have some affiliations. In the three years since I have been President of the union, we have grown by 250,000 members. We have gone from about 600,000 up to the number that we are at today. We are probably, together with the Teamsters, among the most active participants at the National Labor Relations Board and we have been winning a substantial number of our elections. We have a pretty good track record on that and it is not just by affiliations. We are organizing workers. We do not have the problems that some of our basic industrial unions have for other reasons that are not associated with the National Labor Relations Act or the National Labor Relations Board. And I do not think that you can say that we are in a time of normalcy when people who have spent their professional careers working for right-to-work committees, or who have had professional background and expertise in union-busting consultant firms are being appointed to the National Labor Relations Board. I do not think that the Board can function as its creators intended with personnel and with members who have that kind of background. Nor do I think that any member of the Board or any employee of the Board should come out of the labor movement. People like Sam Kaynard, who are career employees of the Board, could very ably serve as Board members and could bring great credit to that Board. I really think that the present administration's actions and appointments have created the problems that we now have. The employers are on the winning side, and management controls the policies of the Board by the appointments that have been made, to the detriment of working people who want to organize and who want to have expedited means of representation. Until the administration changes in Washington, the National Labor Relations Act and the National Labor Relations Board is going to continue to go downhill.

PROFESSOR SUMMERS: I think, Jay, you are oversimplifying a number of things and disguising a number of things. When the National Labor Relations Act was passed in 1935, it reflected an affirmative policy to encourage and protect collective bargaining. And if one reads the history of that time, there was an implicit assumption that with such legal protection, employers would accept the process of collective bargaining and that, after a period of transition, collective

bargaining would become the natural, normal, accepted way of handling employment relationships. In retrospect, that was gross optimism because employers never accepted collective bargaining. They never recognized that unionization and the collective bargaining process was an advantageous way to run an enterprise. Now, I want to point out one thing again, since you allude to comparative law, or comparative labor situations. There is no western country, other than the United States, in which employers do not accept and recognize collective bargaining as the normal, natural and appropriate way of doing things. The character of the operations used by American employers has no analog in Europe. If a Swedish employer behaved as many American employers do, he would be considered a pariah and would be effectively banned. One can explain this on the grounds that unions are ninety percent organized in Sweden. But in Germany, although unions account for only thirty-five to forty percent of the workforce, ninety to ninety-five percent of all employees are covered by collective bargaining because the employers accept collective bargaining. We are the only country in the world in which employers engage in systematic anti-union persuasion or tactics. As Jay knows, there are firms, including law firms and other consultant firms, that go to the boundaries of the law, and in some cases beyond, to discourage people from joining unions. It seems to me a little strange that Jay would go back and pick out one idea that was expressed by one side in 1935—to have no duty to bargain. What he envisions is a scenario in which, that even though the union won, the employer could go into the room and say to the union: "I don't give a damn what you say, I'm not going to even listen," put up his feet on the table and read the Wall Street Journal. That is what Jay proposes. We do not need a duty to bargain if employers accept collective bargaining. But if they do not, it seems to me that the only recourse a union would have would to be to strike to compel the employer to talk. Now I will make Jay a trade. I will surrender the legal duty to bargain if he will surrender the legal right of the employer to hire replacements in a strike. No other country in the world recognizes that as a method of doing business.

Strikers should not be replaced. If the majority of the union votes for a strike, the enterprise should be closed. If Jay will accept that way of conducting collective bargaining, we might accept his notion. But the question is whether employers are going to continue their systematic and organizational opposition to the process of collective bargaining. There are employers who systematically violate the law. How in the world can we have a system of collective bargaining in a society in which employers year in and year out oppose that process?

MR. SIEGEL: I do not reject the principle of collective bargaining. If the employees vote in a Board election that they want to be repre-

sented by a union, and have their wages and terms and conditions of employment set on a collective basis, I have no problem with that. I have negotiated, as you know, several hundred contracts for clients over the years. Half of my clients are organized employers, and we come every two or three years to the table, sit down and negotiate new agreements. Sometimes we cannot agree and we have a strike. When the strike is over we go back and negotiate new contracts in succeeding years. I have no problem with that and I am not suggesting that we do away with that process. What I am suggesting is that the recommendations made by the Committee for Economic Development to get the Board out of the nit-picking monitoring of the bargaining process would in effect free up a lot of Board resources to deal with the more vital issues, such as discharges and representation elections, where there are many complaints about delay. I am suggesting that this is one limited way of doing it. With respect to your trade, it would be like asking me to give you Wayne Gretzky for Barry Beck of the New York Rangers. There is no comparison. The employees have the right to strike. The employer has the right to continue to operate, and whether you like it or not, our system favors the side with the greater economic leverage. I was talking to John earlier about a situation involving a strike by one of his locals against one of my clients. When I came into the picture, we were really up against the wall, and we paid through the nose to end that strike. The leverage was on the union's side. At that point, being a realist, I sat down and negotiated the best deal out I could for my client. I also had to get Sam Kaynard's people off my back because the Board was in on it, and I did the best I could to get that situation restored to some condition of normalcy. I had no problem with that and I did not complain that we were abused or anything of that kind. The system is that the side with the economic leverage is going to win out. Did you see the picture of the 2,500 people waiting to sign up with McDonnell Douglas the other day for jobs? There are people out there that want to go to work and they do not care that a union is on strike; they want jobs, and that is what gives the employer leverage today. That is why Greyhound was able to operate as it did and force the union to take concessions. Yet, when I started in this business in the fifties and sixties, the unions had the economic leverage and we paid some pretty high and fancy settlements. The settlements were high because management did not have the economic leverage to tell the unions no, and shut down the auto or steel industry. The result today is that the price of labor is so high in the basic industries that we have a very serious economic crisis in this country. Now, maybe that is an argument for changing the system, but that is the system we have in the law, and that is the system we have to live by, for better or for worse. I get upset at people who complain that the system is against them because the results are going against them. You have to take the bad with the

good. And in the non-basic industries, there are peaks and valleys, cyclical changes in economic leverage and in the power struggle. I agree that it is very different from Europe. Look at England, where the unions had all of the leverage, and look at the position of their economy today. The Swedish example is no bargain; they have had many problems over there. The Danes have had trouble, and in fact, all the European countries have had trouble. The question is whether our system is basically working over the long term? My answer is: I think it is.

PROFESSOR SUMMERS: I think what Jay has said obfuscates the problem. It is true that collective bargaining is based upon relative economic force, and that I accept. But what defines the permissible uses of economic force is not economy—it is law. It is the legal right of the employer to hire replacements that enables Greyhound to win. If the legal rule were different, the economic outcome would be different. When the Taft-Hartley Act was passed, it was intended to make boycotts illegal and thereby deprive the unions of one of their weapons in the economic contest. The decision that allows the employer to lock-out is a legal rule that defines the economic force. It is nonsense to talk about balance of economic force without asking what legal rules define that force. What is troublesome is that we have constructed a web of legal rules that work to the disadvantage of the unions and to the advantage of the employer in breaking strikes, in reducing organizations and in the whole bargaining process. It seems to me that the issue today is whether to amend the Taft-Hartley Act, and what I am suggesting here is that we ought to think of amendments that go to the question of the use of economic position, so that we have a comprehensive system of collective bargaining. Unlike Jay, I am not neutral as to whether we should have a system of collective bargaining. I think we ought to have a comprehensive system of collective bargaining and I think the law ought to be constructed to encourage and protect that process. That is where the difference lies, and it will not be disguised by saying that it is a question of balance of economic force. It is a question of law.

MR. KAYNARD, MODERATOR: Well, I am sure that we could continue this dialogue indefinitely. John and Jay, on behalf of all those present, let me again thank you both for a thought-provoking and exciting presentation and exchange.