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THE NLRB: WHAT WENT WRONG AND SHOULD WE TRY TO FIX IT?

Julius G. Getman[*]

For eighty years, national labor policy as set forth in the National Labor Relations Act (NLRA) has been committed to overcoming the "inequality of bargaining power between employees . . . and employers" by "encouraging the practice and procedure of collective bargaining" and by "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives."[1] The basic tenants of national policy may be restated in terms of a series of commands directed at the National Labor Relations Board (NLRB or Board) and the courts. These may be stated as follows:

1. Promote and protect the right of workers to organize for the purposes of collective bargaining.
2. Prevent employers from using their economic power to inhibit free choice by workers.
3. Leave the parties free to negotiate their own agreements.
4. Recognize and protect the right to strike.

The key to turning these commands into a living reality was the establishment of the NLRB, an expert agency that was to use its understanding of labor relations reality to establish national labor policy by defining more precisely the general terms of the NLRA subject to minor and supportive review by the courts.

When the law was first enacted, its drafters probably assumed that the Court would be instructed in the realities of labor relations by the newly established NLRB and its presumed expertise. That has failed to happen, in part because the expertise of the Board is largely fictional and because the Court regularly ignores and overrides even sensible Board opinions.

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[1] 29 U.S.C. § 151 (2012).

This positive vision of an expert Board and a supportive Court has been supplanted by the reality of an activist Court, ignorant of labor relations, making key policy decisions, many in conflict with the basic concepts of the NLRA. The Board has become a controversial, often politicized, agency whose best efforts are denounced by politicians and often overruled by the Supreme Court.

The greatest problem for unions today is organizing. The Supreme Court has played a major role in constructing the current system under which employers have immediate and constant opportunity to make the case against unions to its employees, and the NLRB is forbidden to grant union organizers the right to come on an employer's parking lot to speak to employees. In its *Jean Country* decision, the Board attempted a sensible and modest effort to balance Section 7 rights of employees with property rights of employers.[2] In its key ruling on access, *Lechmere, Inc. v. NLRB*, the Supreme Court rejected the Board's effort to balance "the degree of impairment of the Section 7 right [to organize] if access should be denied" against "the degree of impairment of the private property right if access should be granted."[3] The Supreme Court denied the Board the ability to employ such a balancing test primarily on the ground that "[b]y its plain terms . . . the NLRA confers rights only on *employees*, not on unions or their nonemployee organizers."[4] The value to the employees of learning the union's arguments in favor of organization is barely mentioned. Indeed, paying almost no respect to the concept of informed choice, the Court said that it would be enough if the employees knew that there was a campaign. In the study that I did with Professors Goldberg and Brett, we were able to measure campaign familiarity and, not surprisingly, discovered a major employer advantage based on attendance at meetings.[5]

In the early days of the Wagner Act, the Court, by way of dictum, declared that employers could not only hire replacement workers to do the work of strikers but were entitled to give them employment rights superior to strikers, without regard to seniority or business needs.[6] The Court has regularly reaffirmed this dictum without examining either the need for it or how it can be

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[2] *See* Jean Country, 291 N.L.R.B. 11 (1988).

[3] 502 U.S. 527, 536 (1992) (quoting *Jean Country*, 291 N.L.R.B. at 14).

[4] *Id.* at 532.

[5] JULIUS G. GETMAN, STEPHEN B. GOLDBERG & JEANNE B. HERMAN, UNION REPRESENTATION ELECTIONS: LAW AND REALITY (1976); Stephen B. Goldberg, Julius G. Getman & Jeanne M. Brett, Union Representation Elections: Law and Reality*: The Authors Respond to the Critics*, 79 MICH. L. REV. 564 (1981).

[6] *See, e.g.*, NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963); NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).

reconciled with the oft stated policy of insulating job rights from union activity. Thus, Justice O'Connor was able to state accurately that employees who strike in support of union bargaining positions "gamble" their jobs.[7] And despite ample precedent for treating picketing as a form of free speech in other contexts, the Court has continued to enforce restrictions on peaceful picketing when undertaken by unions. The Court has regularly upheld provisions of the law denying workers the right to appeal, either to customers or other workers, for support.[8] To further limit union economic power, the Court has narrowed the broad language of Section 7 by excluding from its coverage tactics that the Court, with no basis in the statutory language, decides are "disloyal" or "indefensible."[9]

Nor has the Court supported the process of collective bargaining. By its decision in *H.K. Porter*, denying to the Board the power to effectively remedy employer failures to bargain in good faith, the Court has given encouragement to the widespread practice by employers of refusing to come to agreement with newly certified unions.[10]

The Court's decisions have been marked by bias combined with ignorance of labor relations realities and a consistent willingness to assume critical facts. Nowhere is this more apparent than in its opinions structuring the law's relationship to arbitration. The Court's initial effort to put the law behind the successful system of dispute resolution, developed through collective bargaining, seemed a positive development. But it was apparent from the first opinions that the Court misunderstood the nature of the process, the expertise of arbitrators, and the goals and understandings of the parties.[11] The Court's untutored enthusiasm for the process inevitably led to its transformation from a system of private ordering to a system by which basic rights were adjudicated through an inferior process. And the Court soon turned its support for the process into a reason for limiting the right to strike.[12] Most worrisome has been the Court's unquestioning support of private agreements under the Federal Arbitration Act (FAA).[13] The Court has plainly suggested that, under its misguided interpretation of the FAA, employers will be permitted to use

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7 Trans World Airlines, Inc. v. Indep. Fed'n of Flight Attendants, 489 U.S. 426, 438–39 (1989).

8 *E.g.*, NLRB v. Retail Store Emps. Union, 447 U.S. 607 (1980).

9 *E.g.*, NLRB v. Local Union No. 1229, Int'l Bhd. of Elec. Workers, 346 U.S. 464 (1953).

10 H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970).

11 Bernard D. Meltzer, *The Supreme Court, Arbitrability and Collective Bargaining*, 28 U. CHI. L. REV. 464 (1961).

12 *See* Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962).

13 *E.g.*, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

standard form contracts to limit employee rights and access to courts and agencies.[14]

In sum, the Supreme Court has played a major role in transforming the NLRA from a law meant to empower workers to a law that helps to sustain the power of employers. What went wrong?

First, it was unrealistic to expect any meaningful deference from the Supreme Court to the Board. Second, the Board has played a major role in its demise and is not blameless in the failure of the Act to achieve the goals of its drafters. The Board has done little to acquire significant understanding of labor relations—its doctrines have been relentlessly legalistic and its vision of employee behavior patronizing. It has devoted an enormous amount of time and energy in an effort to regulate the contents of employer speech. I believe based on considerable amount of data and interviews with hundreds of employee voters that this effort is futile. Employee perception of threats does not vary significantly, if at all, with content, and those who perceive threats are most likely to vote in favor of unionization.

More and more scholars, lawyers, and union officials question the structure of the law. Is the NLRB an idea whose time has passed? Some union leaders have urged repeal of the NLRA.[15] The impulse is understandable, but the idea of returning labor law to the states seems likely to make the law more confused and even more unfavorable to workers and unions.

I believe the proposal with the greatest potential to help unions was the Work Place Fairness Act, which by overturning the *Mackay* doctrine would have helped to revitalize the strike weapon.[16] Not only would it have prevented the terrible unfairness of workers losing their jobs for behaving as the Act contemplates, but such a law would deprive employers of what many organizers consider their most effective argument, i.e., some version of the following: "If you unionize, I will bargain hard to protect this enterprise. The only way the union can force me to make concessions is by pulling you out on strike. If you strike, I can permanently replace you." And I believe it would be relatively easy to win the battle for public opinion, by emphasizing the testimony of replaced strikers and their families. In addition, the simple

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[14] *See id.*

[15] *See, e.g.*, Harry Bernstein, *Creativity Needed to Stem Unions' Decline*, L.A. TIMES, Sept. 19, 1989, at C1, *available at* http://articles.latimes.com/1989-09-19/business/fi-266_1_union-leaders.

[16] *See* Workplace Fairness Act of 1999, H.R. 1980, 106th Cong. (1999); *see also* NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).

argument that a worker should not lose her or his job because they act as the law contemplates is relatively easy to defend and capable of appealing to the public's general sense of fairness.

Even now with the unfriendly Roberts Court, there is hope for positive change through carefully selected litigation. In particular, an appeal to recognize the First Amendment rights of union picketers might succeed. The current Court has found First Amendment rights in corporations, money, and hateful picketing.[17] It might feel compelled to include union picketers in its ambit.

Another area calling out for change, which might be possible without substantial changes in the Court or Congress, is the composition and role of the NLRB. The status of the Board is at a low ebb in the wake of decades of judicial activism and, at best, limited deferral to its rulings. The Court's disdain for the Board in effect invited the courts of appeals to anticipate rejection of Board decisions and doctrines, even those that are soundly reasoned and faithful to the basic policies of the law. Nowhere is this more evident than in the refusal by the courts of appeals to accept the thoughtful analytically sound decision by the Board in *D.R. Horton*.[18] Instead, the courts of appeals are looking to the Supreme Court's *Concepcion* ruling for guidelines concerning the legitimacy of employment contracts limiting joint action.[19]

While the courts have taken charge of establishing labor policy, the role of the Board has withered. The Board is partly to blame for its diminished role. It has interpreted the statute inconsistently and with little understanding of the consequences of its myriad of technical rules. At times, the Board has either lost sight of or sought to limit unnecessarily the rights it was intended to vindicate. The sadly diminished role of the NLRB has made it a safe target for false charges and misleading political rhetoric, as happened when the Board's General Counsel, following precedent, issued a complaint against Boeing Co. for moving an assembly line for its 787 Dreamliner to South Carolina in retaliation for passed strikes.[20] The General Counsel's decision was attacked

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[17] *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014); Snyder v. Phelps, 562 U.S. 443 (2011); Citizens United v. FEC, 558 U.S. 310 (2010).

[18] D.R. Horton, Inc., 357 N.L.R.B. No. 184, 2012 WL 36274 (Jan. 3, 2012).

[19] *See, e.g.*, D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 358–60 (5th Cir. 2013); Owen v. Bristol Care, Inc., 702 F.3d 1050, 1054 & n.3 (8th Cir. 2013) ("[N]early all of the district courts to consider [*D.R. Horton*] have declined to follow it." (citing cases)).

[20] Complaint and Notice of Hearing, Boeing Co., Case No. 19-CA-32431 (NLRB Region 19 Apr. 20, 2011), *available at* http://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3310/cpt_19-ca-032431_boeing__4-20-2011_complaint_and_not_hrg.pdf.

by politicians, academics, and conservative publications throughout the country, even though Boeing had basically announced that its move was retaliatory from the first moment.[21]

The Board is appointed by the President, whose choice is invariably political and aimed at reassuring one side or the other of his or her concern for their interests. The political process by which the Board is constituted automatically establishes that the Board will not be an impartial, consistent decider entitled to the respect of the courts that will review its decision. The process would work far better if the President were required to make his or her choice from among those who have established themselves as respected labor management neutrals, such as members of the National Academy of Arbitrators. The current process of review by the circuit courts, whose attitudes vary from circuit to circuit, also ensures a variety of different rules in different areas. A special labor review court or limiting review to the District of Columbia Circuit would help to restore a sense of a consistent, truly national labor relations law. There is great need for change but little hope in the present climate that sensible voices will prevail.

[21] Julius G. Getman, *Boeing, the IAM, and the NLRB: Why U.S. Labor Law Is Failing*, 98 MINN. L. REV. 1651 (2014).