Edited by
Samuel Estreicher and Daniel G. Collins

LABOR LAW AND BUSINESS CHANGE

Theoretical and Transactional Perspectives

LABOR LAW AND BUSINESS CHANGE

Theoretical and Transactional Perspectives

Edited by
SAMUEL ESTREICHER
and
DANIEL G. COLLINS

QUORUM BOOKS
New York • Westport, Connecticut • London

Library of Congress Cataloging-in-Publication Data

Labor law and business change : theoretical and transactional perspectives / edited by Samuel Estreicher and Daniel G. Collins.
p. cm.
Bibliography: p.
Includes index.
ISBN 0-89930-199-1 (lib. bdg. : alk. paper)
1. Industrial management—Employee participation—Law and legislation—United States. 2. Trade-unions—Law and legislation—United States. 3. Labor laws and legislation—United States. 4. Industrial relations—United States. 5. Business enterprises—United States. 6. Organizational change—United States. I. Estreicher, Samuel. II. Collins, Daniel G.
KF3369.L28 1988
344.73'0189—dc19
[347.304189] 88-12401

British Library Cataloguing in Publication Data is available.

Library of Congress Catalog Card Number: 88-12401
ISBN: 0-89930-199-1

First published in 1988 by Quorum Books

Greenwood Press, Inc.
88 Post Road West, Westport, Connecticut 06881

Printed in the United States of America

The paper used in this book complies with the Permanent Paper Standard issued by the National Information Standards Organization (Z39.48-1984).

10 9 8 7 6 5 4 3 2 1

PREFACE

This book evolved from the 1984 "Workshop on Labor Law and Business Change" at New York University School in which we and many of the other chapter authors participated. That workshop was made possible by financial assistance from the Law School, for which Dean Norman Redlich and Director of Continuing Legal Education Loula Barkas were responsible.

The chapter authors acknowledge their appreciation for research and other assistance at the beginning of their chapters. In the preparation of the book as a whole, we wish to express our appreciation for research assistance to Richard Epstein, Felice Farber, Bob Haroche, Jonathan Mothner, and Eileen Shields, all J.D. graduates of New York University. We are particularly indebted to Jeanetta Ross not only for typing the manuscript but also for her patient, unstinting assistance in every aspect of the book's preparation. The book would never have materialized but for her dedication. We also wish to thank Michele Jennings for her assistance in typing the Index and Bibliography, as well as our wives and children for their forbearance.

LABOR LAW AND BUSINESS CHANGE

CONTENTS

INTRODUCTION

Not too long ago, collective bargaining was a fairly stable, predictable matter of administering contracts and gearing up for periodic crises at contract renewal time. Organizing drives would often involve pitched battles, but once recognition rights were obtained, labor and management worked out a set of mutual accommodations. Organized labor, enjoying relative institutional security, would endeavor to organize all of the competitors in the product market to ensure the security of negotiated improvements. Management, having made its peace with labor, would install human resources specialists to facilitate contract administration and would absorb increased labor costs either through capital improvements or price increases. The sphere for collective bargaining was clearly defined: Labor would seek improvements in wages and working conditions, while management would pursue its entrepreneurial objectives without direct restraint from the labor contract or the collective-bargaining agent. This scenario was, after all, the goal of the National Labor Relations and Railway Labor Acts—"industrial peace" brought about by a routinization of labor conflict in place of the industrial warfare that marked much of the nineteenth and early twentieth centuries.[1]

Each day the newspaper articles suggest, however, that we are entering a new era of industrial relations in this country. Labor's representative share of American employment has steadily declined from a high of 35 percent of the nonagricultural work force in 1945 to 19 percent as of 1984 (a drop in union density in the private sector that becomes even more dramatic if labor's gains in the public sector are excluded).[2] Management opposition to unionism even in heretofore organized sectors of our economy has intensified, with the emergence of vibrant nonunion firms in previous union strongholds, such as construction, coal, and transportation,[3] and an ever-increasing willingness to "take" strikes by hiring

permanent replacements and ultimately withdrawing recognition.[4] Collective bargaining is moving away from what Samuel Gompers, founding president of the American Federation of Labor, termed the governing ideology of the American working class—the insistent demand for "more," for ever-escalating wages and benefit packages.[5] "Concessionary bargaining"—scaling back negotiated improvements—is increasingly the theme at contract renewal time.[6] Management's commitment to multiemployer bargaining units—a principal means by which union scales have been insulated from competition—is on the wane. The incidence of assets sales and corporate takeovers has tended further to erode the stability of bargaining relationships. And the ability of companies to secure relief from collective-bargaining agreements through reorganization under Chapter 11 of the Bankruptcy Code has undermined the sanctity of the labor contract.

Unions have had to adjust to this new bargaining environment by tolerating arrangements such as "two-tier" wage structures,[7] and more flexible job classifications,[8] and by refashioning their objectives to embrace contractual guarantees of job security,[9] stock rights,[10] participation in management and labor representation on the board[11]—in exchange for concessions. They have also had to move away from an exclusively bilateral focus on the signatory employer to make provision for the eventuality of shifts in corporate control: by seeking to negotiate restrictions on, or attempt to enjoin, sales to firms unwilling to assume the labor contract; by meeting and attempting to reach agreement with prospective purchasers; by insisting upon the right to reopen contracts in the event of takeover bids and the right to match or top such bids[12]; and by dealing directly with hostile bidders and even, in some cases, by successfully pressing for changes in corporate management as the price for support of incumbent officers and wage concessions.[13]

These new developments derive from a number of sources. Management's willingness to take on organized labor is certainly attributable in part to the fact that the nation's presidency for over a decade has been in relatively sympathetic hands, as reflected in the administration's prompt dismissal of striking air traffic controllers and its appointments to the National Labor Relations Board. But the underlying causes seem more fundamental and enduring: deregulation of the basic transportation industries; an ever-growing internationalization of product market competition in the basic manufacturing industries; volatility in the market for corporate control with its accompanying emphasis on short-term improvements in stock prices in order to stave off corporate raiders; and a shift in employment patterns away from traditional blue-collar jobs to service, knowledge-based occupations, historically infertile terrain for unions.

Whatever the causes, what appears to be a structural revamping of labor-management relations in the United States will require changes in the body of legal rules and practical considerations that practitioners will need to master in order to represent properly their respective clients. An exclusive preoccupation with the details of the National Labor Relations and Railway Labor Acts will no longer suffice. Labor lawyers and personnel specialists not only need a work-

ing knowledge of these laws and other federal and state workplace regulations, such as the Employee Retirement Income Security Act (ERISA) and the common law of "wrongful discharge," but also need to keep abreast of corporation law and developments in other countries that may be harbingers for the United States. They also need to be able to think in transactional terms—to be masters of the interplay of legal rules and practical constraints in the context of particular transactions, whether plant closings, assets or stock sales, corporate restructuring, technological overhaul, or corporate reorganization.

This book attempts to meet the challenge posed by these changes in the practice of labor law and industrial relations by offering a comprehensive treatment of business change in the context of the federal labor laws.

Part I of this book considers in detail those aspects of the federal labor laws that are likely to be of critical importance to business change decisions: the sphere of compulsory bargaining, information sharing, successorship obligations, arbitration of business change disputes, and ERISA. In addition, a chapter is devoted to corporate law considerations, including legal restraints on the seating of union representatives on boards of directors. The opening chapter of Part I presents an overview, on the whole rather optimistic, of the role of collective bargaining in the current "era of economic restructuring." The final chapter of Part I compares the American labor law's treatment of business change with that of certain Western European countries and Japan, taking up in some detail the foreign law treatment of "worker participation" in management, an institutional approach that has begun to emerge as a key union demand in concessionary bargaining in the United States. All of the chapters in Part I have been written by law professors (or, in one instance, a former academic) who are specialists in this area and who have attempted, if not total impartiality, at least to place their subjects in a theoretical perspective.

Part II of this book offers transactional presentations by leading labor and management lawyers. In these chapters, the authors not only offer an analysis of the applicable law but also suggest practical approaches to dealing with that law in a manner that furthers the objectives of their respective clients. The transactions treated are plant closings, relocations, and transfers of unit work; sales of assets, mergers, and acquisitions; automation and technological change; employee stock option plans and pension plan financing; and Chapter 11 reorganization.

NOTES

1. For a critique from a left-wing perspective, see Stone, "The Post-War Paradigm in American Labor Law," 90 Yale L.J. 1509 (1981); Klare, "Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941," 62 Minn. L. Rev. 265 (1978).

2. See T. Kochan, H. Katz & R. McKersie, The Transformation of American Industrial Relations 31 (Fig. 2.1) (1986); R. Freeman & J. Medoff, What Do Unions Do?

222 (Fig. 13–1) (1984); Adams, "Changing Employment Patterns of Organized Workers," 108 Monthly Lab. Rev. Feb. 1985, at 25–31 & Table 1.

3. See T. Kochan, H. Katz & R. McKersie, supra note 2, at 49–50.

4. See R. Freeman & J. Medoff, supra note 2, at 239–40; Estreicher, "Strikers and Replacements," 3 Lab. Lawy. 897 (1987); Weiler, "Striking a New Balance: Freedom of Contract and the Prospects for Union Representation," 98 Harv. L. Rev. 351 (1984); Weiler, "Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA," 96 Harv. L. Rev. 1769 (1983).

5. See S. Perlman, A Theory of the Labor Movement (1928); S. Gompers, Seventy Years of Life and Labor: An Autobiography 130 (N. Salvatore ed. 1984).

6. See generally Barbash, "Do We Really Want Labor on the Ropes?," Harv. Bus. Rev., July-Aug. 1985, at 10 ff.

7. Two-tier pay scales present considerable problems for unions in terms of their ability to maintain solidarity and for managements in terms of employee morale and job commitment. See Wessel, "Split Personality: Two-Tier Pay Spreads, but the Pioneer Firms Encounter Problems," Wall St. J., Oct. 14, 1985, at 1, col. 1; Brown, "American Air's Flight-Attendant Accord Will End 2–Tier Wage Carrier Pioneered," Wall St. J., Dec. 24, 1987, at 2, col. 1.

8. See, e.g., Holusha, "A New Spirit at U.S. Auto Plants," N.Y. Times, Dec. 29, 1987, at D1, col. 1.

9. See, e.g., "U.A.W. Proposed Ford Guarantee Jobs in New Pact," N.Y. Times, Sept. 9, 1987, at A16, col. 3; "A Demanding Year for Labor: In Most Industries, It Faces Fierce Fights to Win Job Security," Bus. Week, Jan. 11, 1988, at 34.

10. See Majerus, "Workers Have a Right to a Share of Profits," Harv. Bus. Rev. Sept.–Oct. 1984, at 42 ff.

11. See T. Kochan, H. Katz & R. McKersie, supra note 2, at 146–205; T. Kochan, H. Katz & N. Mower, Worker Participation and American Unions: Threat or Opportunity? (1984); McKersie, "Union Involvement in Entrepreneurial Decisions of Business," in Challenges and Choices Facing American Labor 149–66 (T. Kochan ed. 1985). For the Eastern Air experience, see "Eastern Air Union Head Is Nominated a Director," Wall St. J., Mar. 2, 1984, at 35, col. 5; "Eastern Air's Borman Badly Underestimated Obduracy of Old Foe," Wall St. J., Feb. 25, 1986, at 1, col. 1; Salpukas, "The Maneuvering at Eastern Air," N.Y. Times, Dec. 24, 1987, at D2, col. 1.

12. See Salpukas, "Labor Pact Could Foil United Bids," N.Y. Times, Nov. 24, 1987, at 1, col. 6.

13. See Salpukas, "Pan Am, in a Union Deal, Ousts 2 Top Executives," N.Y. Times, Jan. 22, 1988, at A1, col. 2; Salpukas, "Western to be Sold by Allegis, "N.Y. Times, Oct. 28, 1987, at D1, col. 6; Stevenson, "United's Pilots Pick Acquisition Chief," N.Y. Times, Aug. 14, 1987, at D1, col. 4.

PART I
THEORETICAL PERSPECTIVES

1

THE POTENTIAL OF COLLECTIVE BARGAINING IN AN ERA OF ECONOMIC RESTRUCTURING

Lewis B. Kaden

Editors' Note. Mr. Kaden regards the assumptions of the New Deal labor law structure as being sorely tested by economic change and "assaulted by both business and labor, as well as by scholars on the far left and the far right." He looks carefully at the reformist critique, which would maintain the essentially procedural nature of that law while enhancing union bargaining power, and at the rejectionist view of the critical legal studies movement. The alternative to collective bargaining, the author cautions, is governmental "standard setting." Kaden concludes, though, that our system of collective bargaining is far from moribund, but instead has demonstrated remarkable vitality in coping with deregulation in the airline industry and the new competitive forces confronting the steel, rail, and auto industries.

Fifty years after the Wagner Act,[1] the United States may be on the verge of a new era in labor-management relations. Changes in the economy are forcing a new look at the interaction between unions and employers at all levels and are compelling a sweeping review of the laws and regulations affecting industrial relations.

The future is likely to be marked by new forms of employee or union participation on the shop floor and in the corporate boardroom; by new patterns of cooperation, giving unions more of a stake in the success of the enterprise in exchange for reductions in fixed costs and increased flexibility for employers; and by a reduced reliance on unions' traditional economic weapons, including strikes. As a result of these changes in their relationship with employers, some

unions have had to acquire new expertise in corporate finance, law, and international economics to cope with the new economic order.

For the most part, these dramatic changes affect employers and unions in industries with mature relationships, where the union's role has been accepted over a long period of time but competitive changes in the enterprise and in the economy have forced labor and management to alter their relationship. In other sectors, the traditional adversarial model prevails—unions seek to organize the work force, to bargain over the terms of labor contracts, and to protect their status, while employers are increasingly prepared to use aggressive antiunion tactics against them. Here, legal reforms are needed to maintain a balance in the relationship and protect the values that have framed labor-management relations since 1937.

The structure of American labor relations now faces more thoroughgoing criticism than at any other time in the past half century. The assumptions and values which shape the system have been assaulted by both business and labor, as well as by scholars on both the far left and the far right. The labor movement itself often seems hesitant, unsure of its own role and defensive about its declining membership and the low repute in which unions as institutions are held (according to surveys of public opinion). In this climate, managers are emboldened to make full use of antiunion tactics, either to defeat union organizing efforts or to fight back against strikes.

Without doubt, the forces of economic change are sufficient to test any institutional process. The manufacturing sector in the United States, long the source of our economic strength, may account for the same 20 percent of gross product at the end of the century as it does today,[2] but these goods will be produced with five million fewer workers. From 1981 to 1986, 10.8 million workers were displaced as a result of plant closings, business failures, automation, and other restructuring.[3]

In the private economy, the labor movement has not had much success in organizing the rapidly expanding service sectors.[4] Although the work force in services includes many women and minorities, groups naturally inclined to support unions, the pace of organizing them continues to lag. Overall, the pressures of international competition, technological change, and new demands for worker participation add to the strains on the established order of industrial relations.

It is time for a fresh examination of the assumptions underlying the labor law, the extent to which its promise has been matched by experience, the validity of its principles today, and the capacity of the legal process to respond to the challenges of the future.

THE WAGNER ACT: VALUES AND PREMISES

Both the premises and the values incorporated in the Wagner Act are evident from the findings set forth in Section 1:

> The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest. . . . [T]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers . . . substantially burdens . . . commerce and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.[5]

Although these words were undoubtedly chosen with an eye to the certain constitutional challenge the draftsmen foresaw, they betray with remarkable clarity the values as well as the solutions established by the new legal order in 1935:

1. The primacy of industrial peace and, more specifically, the idea that the industrial stability necessary for sustained economic growth requires public regulation of the decision-making process between labor and management.[6]

2. The principle that the marketplace is an inadequate determinant of the wage bargain, since individual employees lack the power to deal effectively with their employers. Thus, government needs to create, nurture, and protect a countervailing force more nearly to achieve equality in bargaining power.[7] A corollary of this premise was the belief that government intervention to reduce inequality would have a positive economic effect in two specific ways: By increasing wages (the share of income going to labor), the law would help increase purchasing power or demand; and by standardizing wage rates and working conditions, it would shift economic competition to other factors.[8]

3. The principle that the solution to these two threats to the economic order—unequal bargaining power and industrial strife—should be found not in public determination of the substantive terms of employment, but rather through public intervention to ensure freedom of association and a collective rather than individual liberty of contract.[9] By assuring the procedural right to organize and bargain collectively, Congress intended to achieve the substantive goal of increasing labor's share. The determinant of collective liberty of contract was the principle of majority rule. Unlike the European practice, in which several unions each represent their supporters,[10] in the United States the majority representative was granted the sole and exclusive right to deal with the employer concerning the terms and conditions of employment.[11] In this peculiarly American solution to the dilemma of how to correct unequal bargaining power without succumbing to governmental wage determination lay the seeds of continuing tension, which have been reflected in over fifty years of judicial and administrative experience of applying the Wagner Act.

The idea of increasing purchasing power by redressing unequal bargaining power is hardly nonsubstantive. But that substantive—indeed, radical—objective was to be realized entirely by procedural means. The Wagner Act was not neutral on the value of organization and bargaining. Its theory was that enforcement of

these procedural guarantees would, in turn, generate enough countervailing force to change the market-based outcome of the bargains struck between employees and their employers. At the same time, the legislators' traditional regard for economic liberty of contract and the protection of private property impelled them to stop there, and to leave the collective forces of capital and labor "free" to make their own bargain.

Of course, as unions, managers, and judges immediately perceived, substantive outcomes were inevitably influenced by procedural rules. The National Labor Relations Board (NLRB or Board) and the courts were soon wrestling with a range of disputes under the new law whose resolution would necessarily affect the balance of power. Was a sit-down or other partial strike protected?[12] Could an employer continue operations during a strike by assigning supervisors to do the work of strikers?[13] Could he hire replacements?[14] If so, could he assure these replacements the opportunity for continued employment after the strike was over?[15] What rights did an employer have to campaign against a union during a representational election?[16] What limits should apply to an employer's ability to implement changes in benefits or conditions while he was bargaining over a new contract?[17] Conversely, what limits should there be on a union's capacity to use its economic leverage during the bargaining period?[18] Should either party be limited in the subjects pressed across the bargaining table?[19] To what extent is the "good faith" of a negotiator to be judged by an objective appraisal of the positions taken in bargaining?[20]

The new statute did not clearly answer these questions, or many others of similar import. Nor did the purposes or values of the legal system established by the Wagner Act, the original enactment of the NLRA, provide certain guidance. Instead, the Act created conflicts between competing goals which the Board and the courts were obliged to sort out, and the resolution of these tensions materially affected the results reached in collective bargaining.

Among the crucial and distinctive features of the labor law, one emerged as much by judicial innovation as by congressional intention—the development of grievance arbitration as a virtually universal method for interpreting and applying the terms of a collective-bargaining agreement during its term, and the availability of judicial power to compel resort to this system of private enforcement.

Although the labor movement opposed Section 301 of the Taft-Hartley Act,[21] which provided federal jurisdiction to enforce labor contracts, the unions came to see benefits in this access to the judicial process for compelling employers to follow the contractual machinery for grievance determination. In 1960, in three cases involving the United Steelworkers,[22] the Supreme Court gave a wholesale, unqualified endorsement of the virtues of grievance arbitration, its broad jurisdiction, and the narrow scope for subsequent judicial review. The extension of these principles to permit specific enforcement of the union's promise not to strike over an arbitrable grievance—a narrow exception to the legislative prohibition against labor injunctions to stop strikers[23]—completed the blend of