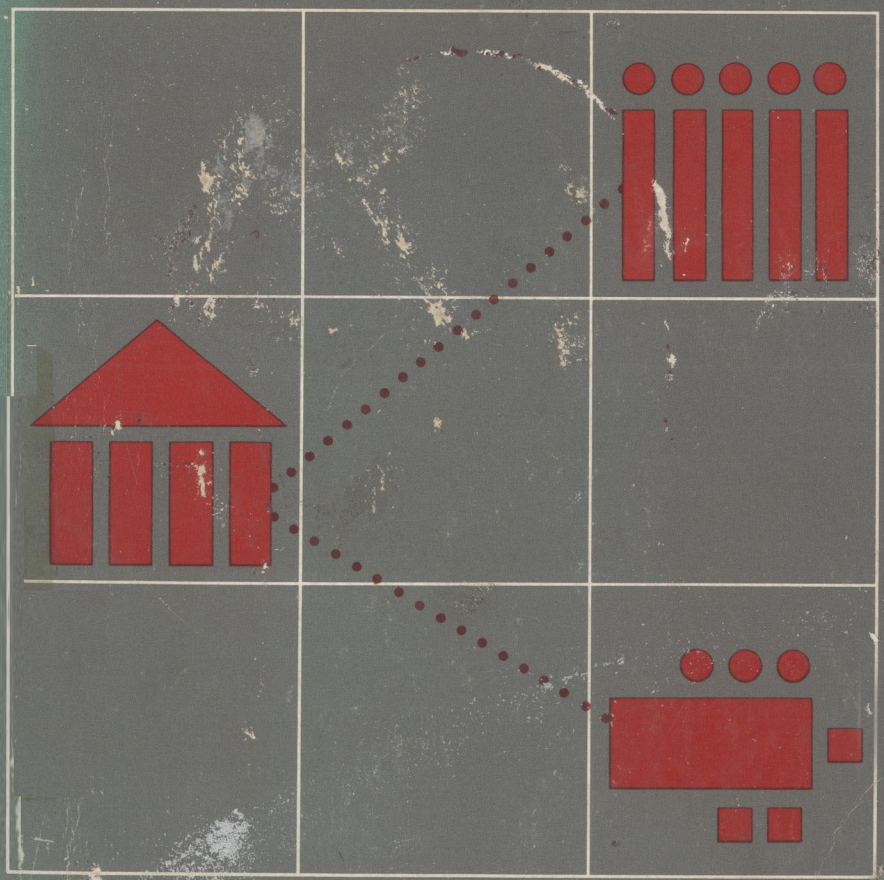
A Primer on American Labor Law

William B. Gould



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For Ed, who always wanted me to write a book that would reach a large and diverse audience.

Preface

The idea of this book grew out of lectures that I gave more than a decade ago at the AFL-CIO Labor Studies Center in Washington, D.C., and at the University of Illinois Institute of Industrial Relations in Champaign, Illinois. The audiences were trade unionists (mostly local officers and shop stewards), and the subject was labor law and labor arbitration. The discussions were lively and the questions stimulating. I became aware that many people had an institutional incentive to learn about labor law, and I quickly realized that the existing literature was not reaching them; in fact, there really was no book aimed specifically at such an audience. This impression has been confirmed by a series of talks that I have given to similar audiences during the past ten years at the Institute for Industrial Relations at the University of California at Berkeley. My contact with corporate representatives at some of the institute's functions made it clear that both sides of the bargaining table were interested in obtaining a basic outline of the labor law system, but nothing so encyclopedic as to be intimidating.

About seven years ago I began to lecture on American labor law to labor academics, American-studies special-

ists, trade unionists, employers, and government officials in various countries in Europe, Asia, Africa, and Latin America. In most of these countries I was asked to recommend a book that provided foreigners with an outline of American labor law. My inability to recommend such a book finally induced me to write *A Primer on American Labor Law.* Structured seminars sponsored by the United States Department of State and the United States International Communications Agency in such countries as India and Brazil and lectures given under the auspices of the Kyoto American Studies Seminar helped organize my thinking for this book, as did some of my lectures to my Labor Law I classes at Stanford Law School.

There are other books on American labor law that are more detailed and involved than this one. Readers who wish to go farther should consult the lengthier volumes aimed at university students, such as *Labor and the Law* by Charles O. Gregory and Harold A. Katz (third edition), or those written for American academics and lawyers, such as *Basic Text on Labor Law* by Robert A. Gorman and *The Developing Labor Law,* edited by Charles Morris. Those who desire to explore employment-discrimination problems further may wish to consult my *Black Workers in White Unions: Job Discrimination in the United States.* The most encyclopedic text in this area is *Employment Discrimination Law* by Schlei and Grossman. The best case book aimed at American law students as of this writing is *Employment Discrimination Law: Cases and Materials* by Arthur B. Smith.

A Primer on American Labor Law is more descriptive than analytical. It is intended for those who would not otherwise be exposed to the American labor-law system: labor and management representatives, foreigners, neutral parties involved in labor dispute resolution with a

special interest in the United States or industrial relations, general-practice lawyers who occasionally represent a union or a company but are not specialists in the field, students of labor relations and labor law, and even practicing labor-law specialists who have some interest in a brief comparison with foreign systems.

Many people have helped make this book a reality. My audiences and classes made me think and rethink my material and its presentation. William Keogh of Stanford Law School, Robert Flanagan of Stanford Business School, and Norman Amundsen of the University of California's Institute of Industrial Relations read and commented on my drafts. I am grateful to the Stanford Law School students who provided valuable research and footnote material: Debra Roth, Todd Brower, Alan Reeves, and Karen Snell. I am particularly appreciative of the work done by Mr. Reeves, who suggested some textual changes and shouldered the major burden of the notes. And it would have been impossible to produce this work without the extremely valuable and skillful typing and organizational work of Clarie Kuball and Mary Enright.

The research for this book was supported by the Stanford Legal Research Fund, made possible by a bequest from the estate of Ira S. Lillick and by gifts from Roderick E. and Carla A. Hills and other friends of the Stanford Law School.

Finally, I could not have completed the book without the patience of my wife, Hilda, and my three sons, Bill, Tim, and Ed, during my long absences abroad and in my office at Stanford Law School.

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An Overview

American labor law and the American industrial-relations system have a symbiotic relationship, and neither can be understood without reference to the other. This should come as no surprise; after all, law, lawyers, and litigation play a major role in our society. Our collective bargaining system has been devised predominantly by labor and management, however, not by the government and the courts. In fact, we often forget—and foreign observers fail to grasp—that our most important tool in dispute resolution in labor is our private arbitration system, which operates outside the formal legal system of courts and administrative agencies. Before examining the history and substance of American labor law, then, let us begin with their impetus in the American industrial-relations system: organized labor.

As a result of the evolution of the industrial-relations system in the United States, the unions have a remarkably different attitude toward law than, for instance, those in Britain. This is not to say that American trade unions do not have a healthy and often well-founded distrust of lawyers; one can see this attitude manifested in countless ways. But the unions are not against the law here. And

this is because the American unions—especially the industrial unions that emerged during the Great Depression in the 1930s—obtained political power before industrial power. They were willing and eager to look to the law as a useful adjunct to their growth and the achievement of recognition and bargaining relationships with employers.

Trade unionism came late to the United States. There were stirrings among American workers toward the end of the nineteenth century (particularly in the 1880s)—first under the banner of the Knights of Labor, which attempted to organize unskilled as well as skilled workers (a venture doomed to failure). The second major effort was by the American Federation of Labor, initially led by Samuel Gompers, who espoused an approach to trade unionism that focused on what labor could achieve at the bargaining table. The AFL, a central federation to which various unions were attached, strove to avoid becoming formally affiliated with a political party as the European unions had. Gompers's refrain, "We shall reward labor's friends and punish its enemies," reflected a philosophy that involved labor in the political process with political parties but did not provide for formal affiliation. To this day, however, the AFL-CIO, the umbrella organization for national unions, plays an active political role; except in 1972 the AFL-CIO has supported every Democratic Party presidential candidate since Adlai Stevenson.

At the turn of the century, the power and prestige of Gompers and of the AFL were being used on the behalf of skilled craftsmen organized on an occupational basis. The masses of workers, who had often been shunned by the craft unions as unorganizable, were not affiliated with major industrial unions (or with unions of any kind) until the 1930s. At that juncture new unions, such as the

United Auto Workers, the United Steelworkers, and the United Rubber Workers, came forward. They sought to organize and represent production workers and skilled tradesmen under the umbrella of a new federation, the Congress of Industrial Organizations (CIO), and they grew with the law. To some extent their structure was shaped by the law as the National Labor Relations Board, operating under the National Labor Relations Act, fashioned units or categories of job classifications, for the purpose of bargaining on an industrial basis, that permitted the inclusion of semiskilled and unskilled workers in the same bargaining unit with tradesmen.[1]

All of this is in contrast with the history of organized labor in Britain, where great general unions that organized workers without regard to job classification or industry reached out to organize the semiskilled and the unskilled through the "new unionism" of the 1880s. In Britain the unions had industrial power before political power, and so they used their position and strength to fend the law off and to keep it out of their affairs. This was a central thrust of labor legislation in the first Asquith Liberal government, in which the trade unions had some influence. The Trades Disputes Act of 1906 was designed to create immunity in the courts for trade-union activities.[2] In the United States a similar policy of laissez-faire was adopted at the time of the Norris-LaGuardia Act[3] but was quickly abandoned in 1935 with the passage of the National Labor Relations Act, which provided for the right to engage in collective bargaining. For better or for worse, to this day the American trade unions continue to look to the law, and to the National Labor Relations Board in particular, for sustenance.

Another important feature of the American industrial-relations system is that it is (again, particularly by Euro-

pean standards) a decentralized bargaining structure. In Europe, particularly on the continent, the pattern is multiemployer or industrywide bargaining. In Germany, the primary function of the unions since World War II has been to bargain regional tariffs or agreements establishing a minimum rate for a geographical area of the country. In Sweden, wage bargaining takes place on a centralized basis—initially between the Central Labor Federation (LO) and the Swedish Employers Federation—and along industrywide lines with the involvement of the major industrial unions.[4] Industrywide bargaining is also the rule in Britain, although to a lesser extent. In all of these countries there is a local organization to represent employees, but the local entity usually does not possess nearly as strong a presence or as much contact with the national trade union as in the United States. In Britain, shop stewards bargain for pay rates and sometimes for other conditions of employment—often in committees that are independent of the national trade-union structure. In Germany, *Betriebsräte* (shop committees, or works councils) are involved by statute in a wide variety of employment decisions and sometimes have veto power over employers' decisions.[5] In recent years German unions, particularly in the metals industry, have come to play a more substantial role in the plant and to be more integrated with the system of works councils as a matter of law. In Sweden there are local clubs (roughly equivalent to American local unions) that operate on a plant basis, but many plants are too small to have one.

In the United States the percentage of eligible workers who are organized into trade unions is lower than the percentages in Europe and Japan.[6] Where organization exists, though, it is clear that a plant-level presence tied

to the national union structure is much stronger in the United States than in any of the other industrialized countries. The local union, which has a formal affiliation in its dues-sharing structure with the national or international union, is often organized at the plant level. Depending on the number of members and the amount of dues, some of the officials of the local, such as the president and the secretary-treasurer, may be employed full-time by the local and paid out of the workers' dues. However, in many locals all of the officials are full-time employees of a company; when they are involved in negotiations or grievance handling, their wages may be paid either by the company (the collective bargaining agreement often provides for this) or from the local union's treasury.

Most collective bargaining agreements in the United States are negotiated at the plant level, with the involvement of the local union. The agreements are relatively detailed and comprehensive. One of the most important functions of locals relates to the processing of grievances over an agreement's interpretation. Locals are sometimes involved in the final step of the procedure, arbitration. The local usually pays the union's share of the costs of arbitration, and if the local and the employer are particularly disputatious this can be a considerable drain on the local's treasury. However, because most disputes are resolved at the lower steps of the process, the local is quite dependent on members of grievance committees, which are composed of full-time employees. Similarly, the local depends for grievance processing on the shop stewards, who also are full-time company employees involved in a vital function on behalf of the union.[7]

Another structural variation arises from the union's basis of organization and its organizing rationale. So far,

we have only considered locals that are organized on a single-plant basis. Locals may also be organized on a multiplant or a multicompany basis ("amalgamated locals"). More broadly, they may be affiliated with a national craft, industrial, or general union. General unions are somewhat exceptional in the United States; the best example is the International Brotherhood of Teamsters, the largest American union (which does, however, have a base in one industry: transportation). Officials of national unions may be involved in the bargaining of the agreement, but most of the negotiating staff will be local officials. In such industries as automobiles, steel, and rubber, unions have negotiated companywide agreements—but even there, local-plant supplemental agreements are negotiated on certain issues.

Today most unions are affiliated with the merged AFL-CIO, which was formed in 1955. This federation has a no-raiding agreement that is binding on its affiliates. The craft unions play a dominant role in its leadership and policy. The Teamsters are not affiliated with the AFL-CIO; they were expelled in 1957 because of a controversy relating to corruption in their union. The United Mine Workers and the International Longshoremen and Warehousemen (the West Coast dockers) are also unaffiliated. In 1968 the United Auto Workers withdrew because of dissatisfaction with the AFL-CIO's policy and leaders, but in 1981 they returned to the fold.[8]

Another important aspect of the American system is the wage consciousness of the trade unions.[9] Historically, American trade unionism has been hard-hitting in its economic demands. In part, this is thought to be attributable to the lack of class solidarity among many American workers. Because a labor organization cannot appeal to workers on a class basis, the appeal must be based on