I L R B U L L E T I N

66

AN INTRODUCTION TO LABOR LAW

Michael Evan Gold

AN INTRODUCTION TO LABOR LAW

Michael Evan Gold

ILR Bulletin 66

ILR Press
New York State School of Industrial and Labor Relations
Cornell University

Design by Kat Dalton

Library of Congress Cataloging-in-Publication Data

Gold, Michael Evan.
An introduction to labor law.

(ILR Bulletin ; 66)
Includes index.
1. Labor laws and legislation—United States.
I. Title. II. Series: ILR bulletin ; 66.
KF3319.G62 1989 344.73'01 89-1703
ISBN 0-87546-146-8 347.3041

Copies may be ordered from
ILR Press
New York State School of Industrial and Labor Relations
Cornell University
Ithaca, NY 14851-0952

Printed in the United States of America
5 4 3

PREFACE

The purpose of this bulletin is to introduce the reader to the federal law of unions and employers. This law is composed of two major elements. The first element is the statutes enacted by Congress: the National Labor Relations Act of 1935, the Labor-Management Relations Act of 1947, and later amendments. The second element is the decisions of the National Labor Relations Board and of the federal courts; these decisions interpret and apply the statutes.

The statutes are long and complex, and the decisions of the Labor Board and of the courts number in the hundreds of thousands. As a result, this bulletin cannot cover all of the law. Only the most important areas of the law are discussed, and the discussion of these areas is purposefully simplified. Although all of the following statements about the law are accurate, many are incomplete. Much more could be said about every topic addressed below.

Two types of reader are likely to benefit from reading this bulletin. One is the person who knows little or nothing about the law; the other is the person whose knowledge has become rusty with disuse. The former can learn, the latter can relearn, the basic principles and structures of the law. (These persons might also find useful another bulletin, *Industrial and Labor Relations Terms: A Glossary*, by Robert E. Doherty.)

One type of reader is unlikely to benefit from this bulletin: the person who needs to know whether specific conduct, arising in a context of many other facts, is legal or illegal. Too many rules have been omitted, too many qualifications have gone unstated, for this bulletin to serve this purpose. The reader who needs to know the law in a specific case should consult a comprehensive treatise on labor law or, better yet, a labor lawyer.

A number of persons were kind enough to the author, and concerned enough about the reader, to review a draft of this bulletin. The author is grateful to Alan Davidoff, to Julius Getman, and especially to Samuel M. Kaynard, the last of whom examined every statement in the manuscript and improved many of them. Some rewriting occurred after these gentlemen read the draft, and any errors or misleading statements that occur are the author's responsibility.

CONTENTS

1

LABOR LAW BEFORE THE LABOR ACT

MEANING OF "LABOR LAW"

The term "labor law" does not mean what it seems to. It seems to mean all of the law that applies to workers and employers. In fact, "labor law" refers to only a part of this law, namely, the law that applies to unions and private employers. The reason for the confusion is that, when the term "labor law" came into use, the major laws that existed regarding workers applied to unions and private employers. In the last fifty years, the law has grown to include topics such as minimum wages, health and safety on the job, unemployment insurance, pension plans, race and sex discrimination, and so forth. A new term, "employment law," has been coined for these laws. But "labor law" still means the law of unions and private employers, and this bulletin is about labor law.

EARLY LABOR LAW AS MADE BY THE COURTS

Most Americans believe that legislatures make the law and that courts apply the law to individual cases. As any lawyer will tell you, this belief is more false than true. It is somewhat true because legislatures do enact statutes, which the courts interpret and apply. But the belief is false because most law is actually made by the courts.

Courts make law in two ways. In the first way, which was more prevalent in the past, judges simply announced the law; we might say (though the judges never admitted it) that they invented the law. There were few statutes passed by legislatures, and the judges applied their own ideas of right and wrong to cases. Such lawmaking is known as the "common law." The common law continues to affect our lives today, though less powerfully than in the past.

In the second way that courts make law, the starting point is a statute passed by a legislature. Now, if the case of *A v. B* falls squarely within the words of the statute, we may say that the legislature has made the law that governs that case. But what if the case of *C v. D* is just slightly outside the words of the statute? In this event, the judge must decide whether or not the statute applies to the case. In making this decision, the judge is making law for the parties to the case. Because of the doctrine of precedent, this new law will also control future cases that are similar to *C v. D*. Then the case of *E v. F* will come along, and it will be slightly different from any previous cases; once again the judge will make new law in deciding this case. And then the case of *G v. H* will come up, and so on.

Employers took their labor troubles to court almost as soon as America became independent. We are a nation of many states; each state has its own courts, and they often disagreed with one another about labor cases. As a result, accurate generalizations about labor law in the eighteenth and nineteenth centuries are hard to make. Nevertheless, most students of early labor law would probably agree that the courts in those days were unsympathetic to unions. Whenever unions devised an effective new tactic against employers, or found a way around existing laws, the courts responded to employers' complaints with new laws to control labor.

The courts did not outlaw unions as such, but the courts did outlaw the tactics used by unions to improve their members' wages and working conditions. At the beginning of the nineteenth century, a common union tactic was for union members to agree among themselves how much in wages they would accept from their employers; the members also refused to work in the same shop as any other worker who accepted less than union scale. But the courts held that this tactic was a criminal conspiracy, and juries composed of shopkeepers convicted and fined union members for striking over wages.

By the end of the nineteenth century, employers realized that prosecutions for criminal conspiracy were ineffective in controlling labor unions. There were several reasons for this realization. First, a criminal case was too slow. The workers could not be punished until after an indictment was issued and the case had gone to trial. This process often took several months, during which the strike or boycott was damaging the employer's business. Second, juries were increasingly made up of workers, not shopkeepers, and workers were hesitant to find co-workers guilty of the crime of trying to improve their wages and working conditions. Third, the law was changing so that in many places a strike was not considered an illegal conspiracy.

Employers, therefore, took their complaints to the civil courts, and here they found the perfect weapon for fighting unions: the injunction. An injunction is an order from a court requiring a person to do or not do specific acts. A person can be sent to jail for violating an injunction. Injunctions are fast: one can be issued the very day it is requested. And injunctions are issued by judges, not juries. In the past, the law permitted judges to issue injunctions against unions freely. For example, the law authorizes an injunction to control violence and intimidation. Courts held that picket lines were "morally intimidating" and issued injunctions against picketing, even though the picketers merely walked back and forth and tried to talk workers and customers into going elsewhere.

ROLE OF ANTITRUST LAW

In 1890, Congress passed the Sherman Anti-trust Act in order to control monopolies in business, but the wording of the law was so general that it could be applied to labor unions as well. The statute outlawed "every . . . combination . . . or conspiracy in restraint of trade or commerce among the several states." Although this act was not used against strikes over wages and hours, it was used to control union organizing. In the infamous *Danbury Hatters* case, the union sought to organize all the fur hat makers of America by boycotting the products of nonunion manufacturers. One manufacturer sued, arguing that the boycott was a "restraint of trade." The courts found that the boycott did diminish trade among the states and awarded hundreds of thousands of dollars of damages—payable by the individual workers! (The American Federation of Labor later raised the funds necessary to settle the case.)

Twenty-five years later, in 1914, Congress passed the Clayton Act, which stated that "the labor of a human being is not a commodity or article of commerce" and that "no . . . injunction shall be granted in any case between an employer and employees . . . growing out of a dispute concerning terms or conditions of employment." Union leaders regarded the Clayton Act as a great victory for organized labor, but the courts turned the victory into defeat by holding that Congress did not mean to permit boycotts in support of organizing campaigns. Once again, employers, with willing aid from the courts, found a way to restrict the power of workers.

NORRIS-LAGUARDIA ACT

The modern law of labor relations begins with the Norris-LaGuardia Act of 1932, which is still in force today. With some exceptions, this statute restricts the power of federal courts to issue injunctions in cases growing out of labor disputes. One reason for this statute was that federal judges had created so much unfavorable law and issued so many crippling injunctions that the federal judiciary became, in the eyes of labor, the symbol and the instrument of anti-unionism. Another, perhaps more important reason for the statute was the Great Depression. Unemployment reached 25 percent or more, and today's social insurance programs (such as unemployment insurance and welfare) did not exist then. As a result, workers and their families suffered terribly. Organized labor spoke on their behalf. The Norris-LaGuardia Act was a step toward recognizing unions as the legitimate representatives of workers.

But Norris-LaGuardia was a small step, and it applied only to the federal courts. State courts were still free to issue injunctions in labor disputes (though some states later passed "little Norris-LaGuardia acts"). Also, both federal and state courts remained free to hold unions liable in civil suits, for example, for violation of antitrust laws. Perhaps most important, employers remained free to discharge workers who led, joined, or as much as sympathized with unions; and employers had no duty to bargain with unions, even if they represented a majority of workers. Further steps were necessary to empower labor unions.

2

AN INTRODUCTION TO THE LABOR ACT

In 1935, Congress recognized unions as legitimate representatives of workers. The National Labor Relations Act (sometimes called the Wagner Act) required private employers to deal with unions and prohibited discrimination against union members. (Public employers—federal, state, and local governments—are not covered by the Labor Act.) Employers who violated the Labor Act could be tried before the National Labor Relations Board, which had the power to order them to stop the illegal behavior and compensate the victims for lost pay. As a check on the power of the Labor Board, the law provided that appeals from the Board's decisions could be taken to the federal appellate courts. The courts were instructed to respect the Board's special expertise in labor affairs.

By 1947, unions had grown in power, and public opinion toward them turned hostile. Perhaps the greatest cause of this hostility was the wave of strikes after World War II. During the war, strikes were prohibited, and wages were controlled. Afterward, many unions struck to make up for what they lost during the war. There was also a steep rise in inflation, which the public blamed on unions. In addition, management organized itself to fight the growing power of unions. The result was the Labor Management Relations Act (often called the Taft-Hartley Act). Its most important feature was that it outlawed certain practices by unions. Starting in 1947, the Labor Board and the courts had the power to order unions to stop unfair labor practices and to compensate the victims of that behavior.

Taft-Hartley was amended by the Labor-Management Reporting and Disclosure Act of 1959 (the Landrum-Griffin Act) and by the Health Care Amendments of 1974, but the basic structure of the law was not changed. In this bulletin, the term "Labor Act" will be used to refer to the law as it stands today. The main elements of that law are discussed below.

COVERAGE OF THE LABOR ACT

Most employees working for private firms are protected by the Labor Act. "Protected" means that the law shields employees against unfair labor practices and requires their employers to bargain with a union if it is chosen by a majority of the employees.

Some employees, however, are not protected by the Labor Act. The following classes of employees are not protected:

- employees of federal, state, or local governments;
- employees of railroads or airlines;
- agricultural workers;
- domestic servants working in their employer's home;
- spouses and children of employers; and
- anyone who acts in behalf of the employer, for example, managers, supervisors, and confidential employees.

In some cases, employees who are not protected by the Labor Act are protected by other laws. For example, the Railway Labor Act covers employees of railroads and airlines, and some states have laws that apply to agricultural or governmental employees. Of course, such laws may differ from the Labor Act; therefore, the rules discussed in this bulletin may not apply to those workers.

Also, some classes of workers—for example, construction workers and health care workers—are covered by the Labor Act, but special rules apply to them. This bulletin does not include these special rules.

What happens if an employee who is protected by the Labor Act goes on strike? The Act specifically states that strikers remain employees, so strikers continue to enjoy the protection of the Act. But strikers lose their status as employees of the struck employer if they take permanent jobs in other firms.

EXCLUSIVITY OF REPRESENTATION

In the United States and Canada, the majority of workers in an appropriate bargaining unit decides whether or not all the workers in that unit will be represented by a union. (A fuller definition of the term "appropriate bargaining unit" is given in chapter 4. For now, a "bargaining unit" is a group of workers.) If a majority of workers in a bargaining unit chooses to be represented by a union, the employer must bargain with the union regarding *all* the workers, even those who would prefer to bargain individually with their employer. The union becomes the exclusive bargaining agent of the unit; the employer must bargain with this union and none other. But if the majority chooses *not* to be represented by a union, the employer need not bargain with the union, even though many workers might be members of it.

It is important to realize that *representation by* a union is separate from *membership in* a union. Membership is controlled by the union's own rules; the Labor Act says nothing about who may join a union. This fact affects representation in two ways that are illustrated by the following cases. First, Harry is the only person in his shop who is interested in joining a union. The union is free to accept Harry as a member. However, if the union tries to bargain in his behalf with his employer—for example, by trying to get a raise for Harry—the employer may ignore the union because it does not represent a majority of workers in the shop. Second, Mary wants to be a member of union A, but a majority of workers in the shop wants to be represented by union B. Mary is free to join union A, and it is free to accept her. However, the employer must bargain with union B regarding all workers, including Mary, because a majority has chosen union B. (Union security is discussed later in this chapter. Here it should be noted that, if the employer and the union agree to a union shop or an agency shop, Mary could be required to pay dues to union B. But she need not join union B, and she may remain a member of union A.)

DUTY OF FAIR REPRESENTATION

From time to time, individual workers are bound to become unhappy with the union that represents them. Any organization run by majority rule has this problem; a minority can become dissatisfied. We are normally free to quit organizations that make us unhappy. But because of the principles just discussed, a dissatisfied worker cannot escape representation by a union (unless he quits his job); as long as the majority wants the union, it bargains for all workers, including those who are discontented.

Recognizing this problem, the law has created the duty of fair representation. As its name implies, this duty requires a union to represent each worker fairly; that is, the union must always have good reasons for what it does. The duty of fair representation applies both to negotiating contracts and to enforcing them.

Contract negotiations often force a union to make hard choices. For example, suppose skilled workers in a bargaining unit earn nine dollars an hour, and unskilled workers in the unit earn five dollars an hour. The union must decide the kind of pay increase to demand. On the one hand, if the union tries to get a 5 percent raise for everyone, the skilled workers will get a forty-five-cent raise, while the unskilled workers will get only a twenty-five-cent raise. On the other hand, if the union tries to get thirty-three cents for everyone, the unskilled workers will get a 7 percent raise, but the skilled workers will get only 4 percent. Whichever choice the union makes, some workers will probably complain; yet it must make a choice. In such situations, the law permits the union a "wide range of reasonableness." Some workers win more than others in collective bargaining, and sometimes there are real losers. The union's choices are legal as long as they are made in good faith, that is, without a malicious intent to harm anyone. But if the union makes the decision based on bad reasons—for instance, decides that supporters of the winning candidate in the last union election will get big raises, while opponents will get laid off—the duty of fair representation would be violated.

Enforcing contracts also forces unions to make hard choices. The most common situation involves a grievance over discipline. Suppose, for example, that Mary is fired for insubordination. She files a grievance, but it cannot be settled. The question then becomes whether the union should take the case to arbitration. The grievance committee votes to drop the matter because the committee believes an arbitrator would deny the grievance. Mary, of course, is furious. Has the union represented her fairly? The law requires the union to investigate the grievance and make an impartial decision. Therefore, if the committee honestly believes the arbitration would be lost, the duty of fair representation would be satisfied. But if the committee's real reason is illegitimate—for instance, the committee members dislike Mary as a person, or they want to get even with her because she supported the loser in the last union election—then the decision would be based on bad reasons, and the duty of fair representation would be violated.

The duty of fair representation covers all workers who are represented by a union. The duty applies whether or not the worker is a member of the union.

A worker who believes the duty has been violated can pursue either of two remedies. One remedy is to file a lawsuit against the union. If the employer is involved in the case, the worker may also sue the employer. Thus, in Mary's case, she believes that the employer violated the contract by firing her without just cause and that the union breached the duty of fair representation by refusing to arbitrate the matter; so she would sue them both in court. The other remedy is for the worker to file a charge of unfair labor practice against the union with the Labor Board. The Board would dismiss a charge against the employer in a case like this, however.

Which is the better remedy for the worker? There are two considerations. First, the worker who goes to the Labor Board incurs no cost because the government pays for the investigation and trial, whereas the worker who hires an attorney to file a private lawsuit might incur substantial costs. Second, the Labor Board will usually not act against an employer in a fair representation case. Therefore, if only the union is at fault, a charge filed with the Board might be sufficient; but if the employer is also at fault, only a lawsuit could provide complete relief.

SECTION 7: PROTECTION FOR CONCERTED ACTIVITY

The heart of the Labor Act is its section 7. The central idea of section 7 is to give workers the legal right to negotiate with their employer as a group instead of as individuals. Congress created this right because individuals have little bargaining power when they deal with employers, particularly large corporations. The result of this lack of power is that workers can be forced to accept low wages and poor working conditions. But if workers can band together and, as a group—usually, through a union—negotiate with their employer, they have a better chance to achieve a living wage and decent conditions of work.

To reach these goals, section 7 guarantees employees the right to engage in concerted activity, which means the right to act together to improve their working lives. The right to concerted activity includes the rights to assist and to join labor unions, and employers are forbidden to interfere with these activities. For example, it would be an unfair labor practice for an employer to fire a worker for going to the union hall to hear a speech.

Congress recognized that some workers prefer not to engage in concerted activity. Therefore, section 7 also guarantees employees the right to refrain from assisting and joining unions; and unions and employers are forbidden to interfere with this right as well. (An exception to this right is the union security clause, which is discussed later in this chapter.) For example, it would be an unfair labor practice for a union to threaten to use violence against a worker who refused to join the union.

The protection of concerted activity in section 7 includes workers on the job. In one case, an employer called a worker into the office and accused her of stealing. She asked to have her shop steward present during the rest of the interview; the employer refused. The Supreme Court held that a worker who reasonably believes an interview will lead to discipline has a right to have a union representative present. (The Court also held that the employer may choose to cancel the interview and investigate the matter without hearing from the worker, rather than let the union representative attend the interview.) The Labor Board has ruled that a worker has no right to have a union steward present if the purpose of the interview is merely to inform the worker of discipline that the employer has already decided upon. The Board has also ruled that a worker in a nonunion shop does not have a right to a representative.

A question that is still unresolved is whether section 7 protects sympathy strikers, for example, workers who refuse to cross a picket line at another employer's place of business. Some courts hold that sympathy strikers are not engaged in concerted activity because they have nothing in common with the workers of the other employer; therefore, the employer may fire the sympathy strikers. Other courts hold that workers are entitled to make common cause with any other workers; therefore, sympathy strikers may not be fired, because honoring a picket line is like going on strike. But even these latter courts limit the workers' protection in two ways. First, workers who refuse to cross a picket line have the same status as the picketers. Thus, if the picketers are on an illegal strike, a worker who honored the picket line could be fired. If the picketers are on a lawful economic strike, a worker who honored the picket line could be permanently replaced. (The rights of economic strikers and the difference between being fired and being permanently replaced are discussed in chapter 4.) Second, if sympathy strikers are covered by a labor contract that contains a broad no-strike clause—that is, a promise by the union not to strike during the life of the contract for any reason—the employer may fire them for violating the contract.

Even workers who are engaged in concerted activity can get themselves in trouble if they go too far. Suppose the union is on strike over wages, and Mary is walking the picket line in front of the shop. Striking is concerted activity, and the employer may not punish Mary for it.

Now suppose a customer tries to enter the shop, and Mary blocks the door; or suppose a delivery truck pulls up, and Mary puts tacks under the tires. In cases like these, workers are no longer protected by the Labor Act. They have engaged in misconduct, and the employer is free to fire them.

Section 7 also guarantees the right of employees to engage in collective bargaining through the union of their choice. This right would be violated, for example, if an employer tried to force workers to join union A instead of union B.

SECTION 8: UNFAIR LABOR PRACTICES

Up to this point, a few specific unfair labor practices have been mentioned, but the general categories of unfair labor practices have not been described. These categories are contained in section 8(a), which pertains to employers, and section 8(b), which pertains to unions.

Before we discuss the categories, a word about responsibility is in order. An agent is someone who acts in behalf of someone else. Employers and unions are responsible for the acts of their agents. This rule holds if the employer or union is unaware of the agent's illegal conduct; the rule holds even if the employer or union has a policy prohibiting the illegal conduct. Thus, if a foreman fires a worker because she favors the union, the employer cannot escape responsibility by arguing that he did not know what the foreman was doing; the company has committed an unfair labor practice. If a business agent of a union threatens to pulverize a worker if he does not join at once, the union cannot escape responsibility by arguing that the union has a policy against intimidation; the union has committed an unfair labor practice.

Interference with Concerted Activity

Section 8(a)(1) prohibits an employer from interfering with employees as they engage in concerted activity. At the same time, the right of the employer to operate an efficient business must be respected. The employer's right is important because many actions taken by an employer interfere with concerted activity to some extent, yet they are justified by genuine needs of the business. In general, therefore, the right of workers to engage in concerted activity must be balanced against the right of the employer to run the business. For example, suppose a firm normally closes at 5:00 P.M., and its workers decide to hold a meeting at 5:30 on Tuesday to discuss whether to form a union. On Monday