Broken Promise

The Subversion of U.S. Labor Relations Policy, 1947–1994

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For Linda, Jim, John, Justin, and Caitlin

Preface

In 1935 Congress passed the Wagner Act, intended to democratize vast numbers of American workplaces so that workers could participate in the employment decisions that most directly affected their lives. Under the Wagner Act the right of workers to participate in these decisions was considered essential for social justice, and worker organization and collective bargaining were considered essential for a free and democratic society. The Wagner Act also committed the federal government to the encouragement of the practice and procedure of collective bargaining. Industrial democracy was to replace employers' unilateral determination of matters affecting wages, hours, and working conditions. The Wagner Act, therefore, enabled a major redistribution of power from the powerful to the powerless at U.S. workplaces covered by the statute.

Although the Wagner Act's statement of purpose was carried over to the Taft-Hartley Act of 1947, labor never came close to achieving the system of industrial democracy that was envisioned by Senator Robert Wagner and was promoted by the act that bears his name. This book explains why the expectations of the Wagner-Taft-Hartley labor policy were never fulfilled. It shows how a policy that encouraged the replacement of industrial autocracy with a democratic system of power sharing was turned into government protection of employers' unilateral decision-making authority over decisions that greatly affected wages, hours, and working conditions. It discusses the destructive consequences of the contradiction that has been inherent in U.S. labor policy at least since the passage of the Taft-Hartley Act: Congress, by statute, promotes and protects employees' self-organization "for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection"; at the same time, by statute and National Labor Relations Board (NLRB) case law, it legitimizes employer opposition to the organization of employees, collective bargaining, and industrial democracy. Although the NLRB greatly facilitated the growth of organized labor in the United States in its early Wagner Act years, this study demonstrates how the NLRB has contributed to the decline of organized labor, particularly since about 1970.

This study of the events leading to the current state of national labor policy focuses on the NLRB. However, the research approach used differs from that of

the conventional labor law and labor relations literature. The latter tends toward an exclusive concentration on the procedures and doctrines of such administrative agencies as the NLRB and on judicial review of their decisions. This book analyzes how the NLRB's making of labor policy and labor policy making in general have been influenced since 1947 by the president, the Congress, and the Supreme Court, the manipulation of public opinion, resistance by organized employers, the political and economic strategies of organized labor, and the ideological dispositions of NLRB appointees. This approach provides a unique inside look at the process of government regulation of this most important aspect of workplace labor-management relations. And it demonstrates how labor policy can be made without legislative changes through presidential appointments to the NLRB.

The NLRB engages in lawmaking by giving specific meaning to broad statutory language and by filling in gaps in the legislation. In the years since Taft-Hartley, different NLRBs appointed by successive administrations have interpreted the law in sharply contrasting ways. This lack of consistency has resulted not only in conflicting and confusing case law that flip-flops over the meaning of many important provisions of the act but also in complete disagreement between Republican- and Democratic-appointed Boards over the fundamental purpose of the law.

This study examines how the roles of Congress and the Supreme Court in making labor policy have become blurred as a result of Congress's abdication of its legislative responsibility and the Court's propensity (particularly in the 1980s) to substitute its own labor policy preferences for those of the legislative branch. It discusses the failure of the White House, through all its occupants since 1947, to provide the politically risky leadership needed to recommit the country to a labor policy with a precise set of objectives. It includes a thorough discussion of the long-standing and determined opposition of U.S. employers to unionization and collective bargaining, which discloses a coordinated, secret, nationwide effort by the country's most powerful employers to end threats to their management prerogatives posed by what they saw as the Kennedy-Johnson Board's codetermination concept of collective bargaining. To U.S. employers, industrial democracy and free enterprise are fundamentally incompatible. The Kennedy-Johnson Board marked the last time an NLRB was committed to the encouragement of organization and collective bargaining for any sustained period of time.

Even the advocates of organization and collective bargaining, however, prevented the realization of industrial democracy in some ways. Organized labor, for example, often pursued unwise legislative objectives and strategies and was too willing to accept, and even espouse, a limited role in management decision

making, thereby voluntarily restricting the scope of collective bargaining far short of the potential that Senator Wagner had envisioned.

The research for this volume was based on records at the NLRB and the National Archives in Washington, D.C.; records at the Truman, Eisenhower, Kennedy, and Johnson presidential libraries; the personal papers of former NLRB chairmen and members and of other influential people inside and outside the Board; records in the National Association of Manufacturers Archives at the Hagley Museum and Library; papers from the George Meany Memorial Archives; and oral history interviews of approximately seventy-five people prominent in the making of post–Taft-Hartley Act labor policy. The interviews with people who influenced the making and reshaping of national labor policy afforded an invaluable and otherwise unattainable sense of the climate of the times, disclosing historical connections that often could not be discerned from documents alone.

This study of post–Taft-Hartley Act NLRBs and U.S. labor policy provides the historical perspective and empirical basis necessary for the reevaluation of national labor policy, which is currently being conducted by the Clinton administration. In 1993 President Clinton asked the secretaries of labor and commerce to form the Commission on the Future of Worker-Management Relations to investigate and respond to the following three questions:

> What (if any) new methods or institutions should be encouraged or required to enhance work-place productivity through labor-management cooperation and employee participation?
>
> What (if any) changes should be made in the present legal framework and practice of collective bargaining to enhance cooperative behavior, improve productivity, and reduce conflict and delay?
>
> What (if anything) should be done to increase the extent to which work-place problems are directly resolved by the parties themselves, rather than through recourse to state and federal courts and government regulatory bodies?[1]

The commission, chaired by former Secretary of Labor John Dunlop, issued a fact-finding report in June 1994 and its final *Report and Recommendations* in January 1995.[2] The commission unanimously endorsed "employee participation" and "labor-management partnerships" as "good for workers, firms, and the national economy" and encouraged their expansion and growth.[3] The report favors workers' having "a say," having "a voice," and "being heard" at the workplace, but it does not define precisely what those ideas mean in terms of management prerogatives and power sharing.

The commission concluded that "the current labor law is not achieving its

stated intent of encouraging collective bargaining," but a majority of its members recommended legislative changes and interpretations that would "promote expansion of employee participation in a *variety of forms*" and provide workers with the opportunity "to choose, or not to choose, union representation and to engage in collective bargaining."[4] In order to promote a "variety of forms" of worker participation, the commission proposed "clarifying" Section 8(a)(2) of the National Labor Relations Act and its interpretation by the NLRB so that "nonunion employee participation programs should not be unlawful simply because they involve discussion of terms and conditions of work or compensation where such discussion is incidental to the broad purposes of these programs." At the same time, the commission, "concerned that in encouraging employee participation in nonunion settings, it does not adversely affect employees' ability to select union representation, if they so desire," reaffirmed "the basic principle that employer-sponsored programs should not substitute for independent unions."[5]

Commission member Douglas Fraser, former president of the United Automobile Workers, argued that a statutorily created exception to Section 8(a)(2) "would be an invitation to abuse." "The kind of participation and cooperation that should be encouraged," Fraser maintained, "is *democratic* participation and cooperation *between equals*."[6]

The commission recommended steps to improve the representation election process, to improve employee access to employer and union views on independent representation, to increase the use of injunctions to remedy violations of the Taft-Hartley Act, and to facilitate contractual agreement once a majority of workers choose union representation for collective bargaining.[7] There is nothing in the commission's report, however, recommending that the federal government encourage collective bargaining and unionization or stating that unions and collective bargaining are necessary for legitimate, mutual labor-management decision making—that is, industrial democracy.

The issues of labor law reform and the future of U.S. collective bargaining have become subjects of national concern and discussion. The Taft-Hartley Act and its overall administration have been ineffective in encouraging the practice and procedure of collective bargaining and in protecting workers' rights to choose unionism and collective bargaining.

This book is not intended as a detailed blueprint for legislative changes, an in-depth analysis of the current political scene, or an assessment of the political prospects for any current labor reform proposals.[8] The study aims to provide the historical perspective necessary for the reevaluation of national labor policy, highlighting the underlying principles of democracy that constitute the most appropriate standard for assessing not only the current state of labor policy but

also proposed changes. It offers a practical and useful basis for policy makers, showing them where we are, how we got here, and what fundamental questions must be addressed if changes are to be made.

At its core any national labor policy involves questions more moral and ethical than legal, economic, or political. In that sense, this book is about an even more important issue: how to reconcile the theory of democracy with practice.

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Taft-Hartley

A Fundamental Change in Labor Policy or Merely Adjustments to Eliminate Abuses?

Legislative Compromise Creates Statutory Confusion

In 1935 the Wagner Act established the most democratic procedure in U.S. labor history for the participation of workers in the determination of their wages, hours, and working conditions. The act was not neutral as between individual and collective bargaining; it intentionally favored collective bargaining.

For Senator Robert Wagner, collective bargaining was actually more than a method of negotiating wages, hours, and working conditions or a system of checks and balances based on countervailing power. Wagner believed that "the struggle for a voice in industry through the process of collective bargaining is at the heart of the struggle for the preservation of political as well as economic democracy in America" and that if people "know the dignity of freedom and self-expression in their daily lives . . . they will never bow to tyranny in any quarter of their national life."[1] He wanted management and labor to resolve their mutual problems through a system of self-government. He best expressed his beliefs in a speech delivered in 1937 shortly after the Supreme Court ruled that the Wagner Act was constitutional:

> The development of a partnership between industry and labor in the solution of national problems is the indispensable complement of political democracy. And that leads us to this all-important truth: there can be no more democratic self-government in industry without workers participating therein, than there could be democratic government in politics without workers having the right to vote. . . . That is why the right to bargain collectively is at the bottom of social justice for the worker, as well as the sensible conduct of business affairs. The denial or observance of this right means the difference between despotism and democracy.[2]

When Congress passed the Labor-Management Relations Act in 1947 (the Taft-Hartley Act), it was not immediately clear precisely how, if at all, lawmakers had changed the collective bargaining core of the Wagner Act national labor policy. Congressional intent, as expressed in the language of the new labor law, was ambiguous: some provisions of the new law were carried over intact from the Wagner Act, some new statutory language amended that act, and many new provisions were the result of legislative compromise and bargaining between the House and Senate.

The Taft-Hartley Act, for example, actually has two policy statements. First, Congress retained but added to the Findings and Policy section of the Wagner Act. It left intact the Wagner Act declaration that it was the policy of the United States to encourage the practice of collective bargaining:

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred 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 of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

But Congress added a paragraph to this section asserting that some practices engaged in by unions were obstructing commerce:

> Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce . . . through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

That insertion, as well as the addition of several union unfair labor practices (Section 8b) and a provision asserting employers' right of "free speech" (Section 8c), could be interpreted as reflecting a congressional intention to treat employers and labor alike; that is, the amended act (according to this construction) was meant to be a neutral guarantor of equal rights or, at least, of reasonably balanced rights—"reasonably balanced" to be defined by the National Labor Relations Board (NLRB).

Second, Congress placed a new Declaration of Policy immediately before the Findings and Policies section described above. Whereas the Findings and Policies section reaffirms that it is the policy of the United States to encourage