ORGANIZING and the law

THIRD EDITION

Stephen I. Schlossberg

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TO THE MEN AND WOMEN OF THE UAW

Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employer and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on equality with their employer.

Chief Justice Charles Evans Hughes, of the Supreme Court of the United States, in *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 at 33.

FOREWORD

This third edition of *Organizing and the Law* substantially updates and expands the book, originally revised in 1971 with Fred Sherman. It reflects recent developments in the labor-management community and in the law by adding chapters on organizing at hospitals and health care centers, organizing women workers, worker victories (alternative victories for workers, a chapter of particular value to organizers), and the phenomenon known as "union-busting." We have, however, endeavored to avoid major changes in the book with respect to its basic design and organization. Revisions have been made to show the considerable changes in the law since 1971 and to clarify and extend discussion in certain areas. We have substituted cases or added new ones where it seemed appropriate to do so, because either the principles had changed or the opinions were better written, more interesting, or more instructive. We have done the same with quoted material and other authority. Because the foreword to the original edition sets the tone of the book, we reprint it here. We apologize for the use of the male pronoun as a generic term; we have tried to avoid that error throughout this new edition.

STEPHEN I. SCHLOSSBERG
JUDITH A. SCOTT

October 1983

FOREWORD TO THE FIRST EDITION

Taft-Hartley may, indeed, be, as some have said, a "slave labor law," but you won't find proof either way in this publication. This book is about the law—not a debate as to its merits and demerits—but what it is, how it helps, and how it hurts. It represents a try at setting out in usable and readable form the major legal principles affecting union organization. It is not, however, written without a point of view. *This book is based on the simple premise that the unionization of workers is a social and economic necessity.* It is hoped that it will help to take some of the mystery and mumbo-jumbo out of the basic law in the field and, in so doing, permit the acceleration of organization. In the last analysis, that is why the book was written.

The task of organizing workers into unions has never been easy. It has always been, by definition, a "rugged" staff assignment. An ideal organizer combines essential talents of a variety of occupational specialties. He should be part missionary, part salesman, part politician, part counselor, part teacher, part psychologist and, most relevant here, part lawyer.

This book aims to help the organizer become more familiar with the law because the better the organizer understands the law, the more he will be able to make it work for him. This volume will *not* make lawyers out of organizers, but, if carefully followed, it may permit organizers to make intelligent choices under the law and to know when they need lawyers. Properly used, with an understanding of its character and limitations, and not treated as an authoritative word that must be followed in every single case, this handbook should prove extremely useful. No organizer should assume that this volume can substitute for legal advice.

The main source for the material in this volume is the Labor Management Relations Act, as amended (originally "The Wagner Act" and now called "The Taft-Hartley Act"), and the decisions of the Labor Board and the courts interpreting that law.

Where relevant, to the organizer, unions, or the workers, however, other matters will be mentioned.

Attention to detail, the avoidance of mistakes and violations of law, and the careful use of tools provided by the law can be tremendously important to the organizer and the workers he seeks to help.

It must be kept in mind that lawyers usually get a case after it has been made. That is, the facts are already determined. No matter how clever an attorney may be, he cannot change the facts he "inherits."

Forearmed with a basic knowledge of Board procedure and some of the more important rules of law announced by the NLRB and the courts, an alert organizer can make more meaningful decisions as to timing, can tailor situations to the law, and can keep the kind of detailed records that will enable lawyers, both partisan and government, to prove the best possible case.

Policy is inextricably bound up with advice for most effective performance under the law, so this book is bound to include some admonitions and suggestions of a policy nature, although the major thrust is toward understanding law and procedure. Policy is, of course, made by the union's organizing department and not its legal department, so, in the unlikely event of a policy conflict, the organizer should look to the union rather than to this book.

This book does not cover the law applicable to municipal, state, and federal employees; nor does it deal with state labor relations law or the Railway Labor Act. Organizers concerned with these laws will have to look elsewhere for guidance.

Finally, to state what is presumed to be already obvious, there is no legal trick or bag of tricks that will organize workers. While this book can, it is hoped, make the task somewhat easier, workers can be organized into unions only by their own efforts and the efforts of union leaders.

Laws cannot substitute for hard work. The job of an organizer—professional or amateur—will always be tough, and there is no quick and easy gimmick available to change that.

STEPHEN I. SCHLOSSBERG

January 1967

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The first edition of *Organizing and the Law* was a solo effort which was, however, enriched by the contributions of friends in the UAW, particularly the UAW legal department.

The second edition would not have been possible without the hard work of co-author, attorney Frederick E. Sherman, and Phyllis J. Oster of the School for Workers, University of Wisconsin.

This edition owes a debt to the committed, diligent, and competent secretaries who worked so hard on many production aspects of the book, Ingrid Coney of Washington, D.C., and Susanne Mitchell of Detroit, Michigan. Of course, all of Judy Scott's former colleagues at the UAW and Steve Schlossberg's law partners deserve special thanks.

Finally, the third edition, which began during Judy Scott's maternity leave, was completed only because of the many hours of child care provided by her husband, Don Stillman, for their infant son, Scott Stillman. For their perseverance, the two of them have earned her biggest thanks.

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CHAPTER I

AN OVERVIEW OF THE LAW

Labor relations are not matters of mere local or private concern.

Mr. Justice Murphy in
Thornhill v. Alabama,
310 US 88, 103 (1940)

Introduction

Most of the basic law affecting union organization is set out here in Chapter I. But these bare bones of the law are only the framework upon which the legal principles are built.

Labor law, and specifically the law that governs union organizing, is state and federal law, statutory and case law. By far the most significant statutory law is the federal National Labor Relations Act. Likewise, the most important labor case law is made by the National Labor Relations Board (NLRB), which administers the Act, and by the federal courts. The federal law plays the paramount role it does because of a doctrine known as preemption: generally, if the Federal Government acts in a particular area where it has the authority to act, the states are precluded from acting in that same area. In the labor field this has meant that by and large the states have been limited to acting in those areas where the federal law has not gone (either because of statutory or Board-created exclusion) or in those areas where specific allowances are made for state regulation (as with right-to-work laws). Because of the preeminence of the federal law and the impossibility of treating briefly the varying regulatory schemes of some 50-odd jurisdictions, this text will concern itself almost exclusively with the national law. But organizers should be aware that in some situations state law will govern entirely or in some detail, and in those situations the organizer

would do well to inform himself or herself of the local legal pattern.

The "charter" of organization is the federal labor act—originally the Wagner Act, now the Taft-Hartley Act and officially the Labor Management Relations Act, as amended. It is also referred to as the National Labor Relations Act. In this chapter you will find relevant portions of that Act printed along with a brief summary analysis or illustrative examples for each relevant section. The analysis is followed by a brief summary of the Labor Board's jurisdictional standards and a quick digest of the Board's unfair-labor-practice procedure.

While the Act is certainly the core of most of the law in the field, other materials of possible relevance have been condensed and included so that, in proper cases, organizers may call upon union "law" or reporting-and-disclosure law for a needed assist.

One word of caution. The material in this chapter is only the skeleton. Until subsequent chapters supply the flesh, the creature is unfinished. The sole purpose of this part of the book is to give the reader the benefit of an overview of the main law. After the more pertinent parts of the law, such as organizing ground rules and election rules, have been covered in some depth, however, occasional reference to the definitions and other original language of the statute may help keep the whole picture in perspective.

It is important to remember that some of the seemingly simple words written by Congress back in 1935, as well as the later amendments, are still being interpreted by the United States Supreme Court. Read those words carefully, know them, and relate them directly to the material in later chapters. These legislative words, these laws, are the tools of your trade.

Analysis of Selected Portions of the Taft-Hartley Act

Findings and Public Policy of the Act [Section 1]

The law aims at removing obstructions to interstate commerce result-

"The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other

ing from strife caused by the refusal of employers to accept collective bargaining and the *denial of the right to organize.*

forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

Inequality of bargaining power between unorganized workers and powerful employers tends to cause depressions and low wages.

"The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of 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.

We have learned that it is necessary to protect by law the right to organize and bargain collectively.

"Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.