

“The NLRB: Then and Now”

By James A. Gross

On July 5, 1935, President Franklin Roosevelt signed the Wagner Act into law. It was a law that promoted independent labor organization and collective bargaining and was intended to give workers the opportunity to secure their own rights and interests through participation in workplace decision-making. In the explicit language of the Act, Congress declared it to be the “policy of the United States” to eliminate obstructions to the free flow of commerce “by protecting the exercise of workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for purposes of negotiating the terms and conditions of their employment or other mutual aid or protection.”¹

As I have written elsewhere, the Wagner Act established the most democratic procedure in U.S. history for the participation of workers in the workplace decisions that directly affect their lives. Seventy-five years and several amendments later, labor has never come close to achieving this system of workplace democracy envisioned by Senator Wagner.² Although the reasons for that are wide-ranging and diverse as are the blame-bearers, this article focuses on watershed events in National Labor Relations Board (NLRB) history considered in a “then and now” context. Those events, wider and deeper than case doctrine, provide the basis for a new approach to the promotion and protection of workers’ rights.

The Regulatory Approach to Enforcement

The NLRB was not the first administrative agency in this country but it was part of a massive and pervasive development of administrative law and administrative agencies during the New Deal that constituted a new approach to law interpretation, application and enforcement. The NLRB was one manifestation of the Depression-inspired belief that economic behavior as well as social behavior needed to be regulated in the public interest. It was regulation that was intended to put government on the side of the powerless at workplaces in this country.

The NLRB's predecessors under the pre-Wagner Act National Industrial Recovery Act (the National Labor Board and the "old NLRB") had experimented with tri-partite (government, employer, and union) representation on these boards, agreements reached through mediation and compromise, hearings conducted as non-legalistic and informal discussions and reliance on voluntary cooperation. This approach was found wanting and was rejected. Consequently, the Wagner Act NLRB was a quasi-judicial body of neutrals, that decided cases by setting forth principles of law, conducting formal hearings, issuing rules and regulations, and requiring legalistic uniformity in its procedures.³

More significant historically, this regulatory approach shifted control of decision-making authority from the employers and unions in dispute to a national labor board that would issue decisions on the merits of individual cases. Henceforth, American labor policy would be developed by law and

litigation through legislative enactment, the growth of a body of NLRB case precedent, and the application of administrative law.

The Wagner Act was a fundamental change in public policy, particularly in the role of government in protecting workers in the exercise of their freedom of association. For Wagner, the right to organize and bargain collectively was at the core of social justice for workers. The Wagner Act sought to eliminate the vulnerability that leaves workers at the mercy of others or of supposedly impersonal economic forces—either of which can transform workers from being self-reliant participants in society into helpless victims. This law promised to give workers the opportunity to secure their own rights and interests through participation in workplace decision-making.

Beginning with the presidency of Democrat Jimmy Carter, however, Democratic as well as Republican administrations have waged an intense and unrelenting attack on government regulation. This “War Against Regulation”⁴ has been a two-front war involving not only the expected opposition of the regulated and their allies but also attacks launched from within the government with leadership from Presidents, their administrations and congress. Congresses both Democratic and Republican have made a key standard of performance in their governments the number of rules eliminated, public service positions cut, resources reduced, or functions contracted out.⁵

The discussion of regulation has been recast in terms of economic efficiency and the use of market mechanisms that would replace or reduce regulatory burdens on the economy and employers. That discussion now

emphasizes voluntary standards of self-regulation by industry groups. Politicians of all stripes now run against “big government” and against “Washington insiders.” The message that has resonated with the public is that deregulation is good and regulation is wrong and damaging to the nation’s economic growth.⁶

The conservative economic philosophy of unregulated markets that drives the deregulation movement is rooted in values contrary to the Wagner Act:

the each-versus-all individualism that drives the free market approach to life induces people not only to be preoccupied with their own personal self-interest, but also to accept even the harsh economic and social consequences of the market as the inevitable results of impersonal forces beyond anyone’s control. If the market is impersonal, moreover, it can be neither just nor unjust. It is absurd, the argument goes, to demand justice of such a process because there is no answer to the question of who has been unjust. When bad things happen to people they are misfortunes, not injustices. As one distinguished economist put it, “social justice is simply a quasi-religious superstition.”⁷

More specifically for the NLRB, this movement has meant, among other things, extensive “counter-staffing,” that is, appointments to the agency of people who have values and commitments contrary not only to the regulatory policies of the agency but also to the concept of regulation itself.⁸ For example, President Reagan’s first choice for NLRB Chairman, John Van de Water, a professor-consultant whose career involved advising employers on how to resist unionization. When Van de Water failed to gain Senate confirmation after his recess appointment, Reagan nominated and the Senate confirmed Donald Dotson who considered collective bargaining “the destruction of individual freedom, and the destruction of the marketplace as the mechanism for

determining the value of labor” and criticized past NLRBs whose ignorance of the “laws of economics” had resulted in decisions rendering U.S. industry less able to withstand foreign competition.⁹ After his and other appointments, the agency began to wither under the weight of an unprecedented and ever-growing backlog of undecided cases. At the same time, the Reagan-appointed majority was delivering serious blows to unionization and collective bargaining in the cases it was deciding.

Constitutionality

On April 12, 1937 at the NLRB “it was just wild.” A “great joy” and a “whole feeling of victory...ran through the office...[it was] like a carnival almost for that day and days afterward.”¹⁰ There was cause for celebration. Almost four years after Senator Wagner first assembled the members of his National Labor Board in August, 1933, the Wagner Act had become the law of the land and the NLRB a permanent governmental authority with powers of adjudication.

It was a victory of substantial proportions but from the perspective of worker human rights it was a limited victory, to some tantamount to winning a battle in the short run but losing the war in the long run. During the congressional debates concerning Senator Wagner’s bill, he and others had spoken eloquently and forcefully, using human rights-based language, about freedom of association and collective bargaining being essential components of

an industrial democracy that would free workers from the tyranny of government and employers.

The arguments before the Supreme Court in support of the Act, however, were based on the commerce clause of the Constitution. The language of workers' rights and freedoms was subordinated to the language of economics and commerce. Strikes, for example, were not portrayed before the court as struggles for worker freedom but rather as interferences with interstate commerce. The Supreme Court found the Wagner Act constitutional not as a human rights measure but as an effort to eliminate strikes and disruptions to interstate commerce. In the context of those arguments the Wagner Act could have been entitled the "Wagner Anti-Strike Law."¹¹

Labor protests were characterized not as human rights or civil rights issues but merely as another form of self-interested economic activity. Consequently, labor law in the words of Supreme Court Justice Felix Frankfurter, "involved balancing 'the effort of the employer to carry on his business from the interference of others against the effort of labor to further its economic self-interest.'"¹² Workers' rights under that conception of labor law became matters of economic policy and power with commerce being the paramount concern. Still, the Supreme Court did recognize in Jones and Laughlin,¹³ one of the lead Wagner Act constitutionality cases, that workers' freedom to organize was "a fundamental right,"¹⁴ leaving open the slim possibility that human rights could prevail over commerce.

Post-Wagner Act Commitment to Social Justice: Lessons Learned the Hard Way

People came to work at the NLRB in the early Wagner Act years to participate in a great social movement by joining an idealistic group with a social justice mission: the protection and advancement of the civil and human rights of working men and women. All of the Board's employees were at least firm believers in the Wagner Act. Board attorneys and the trial examiners (now administrative law judges), and regional staff went to places and situations that one trial examiner characterized as "almost unbelievably foreign to the America of which we read in smug prints."¹⁵ The places ranged from Henry Ford's giant 80,000 man River Rouge plant in Dearborn, Michigan, the largest industrial unit in the world, to a mining company with operations scattered throughout such places as Joplin, Missouri, Salena, Kansas, and Picher, Oklahoma, to a family-dominated small town in Gaffney, South Carolina.

William Avrutis, who prosecuted the NLRB's case against the Eagle Picher mining company in Picher, Oklahoma, recalled gaunt men with lead poisoning and that he, "the sole lawyer present was the only man in the room who had ten fingers on his hands."¹⁶ Avrutis's response was a commonplace reaction at the NLRB in 1937:

We put our hearts and souls into this thing and felt sustained by a feeling that we were in a righteous cause, as indeed we were. I feel myself that this case was one of the highlights of my entire life. It was a privilege to be engaged in a matter involving such an avowal of social policy on the part of the nation to do something about bringing, in a real constructive sense, law and order to what was a wild area.¹⁷

Trial Examiner Charles Whittemore was sent to a mill town in Gaffney, South Carolina and saw witnesses, “men, women, and young folks, who can neither read nor write...starved, starving people with tired land. Girls with yellow teeth who chew snuff to keep the lint from their lungs.”¹⁸ This was “heartrending” to Whittemore. He reported to Washington: “It’s fantastic at your distance, and hardly believable. Here it is tragic and revolting.” Although Whittemore realized that the Board could not protect witnesses after the NLRB left town, he hoped that their few minutes’ stay “under the protection of the U.S Government” would “permit them to dare vision a time when they can demand social justice for and by themselves.”¹⁹

Was this evidence of bias and prejudice against employers? I think not. It was justice but not a blind or impassive justice of mechanical scale balancing. It was a justice that looked straight into the faces of those who suffered and were vulnerable to the power of others. This was not an abstract bloodless justice that takes the eyes of the advocates and deciders away from the flesh and blood of real people in the streets who are wronged. They realized that law is more than rules; that it is a system of moral choices.

The Wagner Act Board enforced the Wagner Act vigorously after constitutionality. By the end of 1937, the NLRB had “tackled the Big Boys in every industry”: the Aluminum Company of America, Carnegie-Illinois, Wierton, Inland and Republic Steel, Swift, Standard Oil, Shell Oil, Western Union, Consolidated Edison, Montgomery Ward, Consolidated Aircraft, Douglas Aircraft, Goodyear, the Associated Press, Chevrolet, Ford, Remington Rand, the

growers' and shippers' associations in California, United Fruit, and the east, west, and gulf coast shipping associations. The Nation wrote that "the sharp hook of justice [was] sinking through the tough gullets" of some of the country's staunchest opponents of unionism and the Wagner Act.²⁰ A company attorney challenging an NLRB decision in a court of appeals began his oral argument by saying, "I feel like a traveler walking a familiar road and finding all the signposts reversed."²¹ The first Wagner Act NLRB had a record of vigorous enforcement of the Act unmatched in the history of administrative agencies. One expert considered the Board's administration of the Wagner Act during its first five years "the most high-powered and effective law enforcement in our history."²² No labor law ever passed in this country has come so near, even so briefly, to fulfilling what it was passed to accomplish.

A vigorous and literal enforcement of the expressed policies of the Wagner Act, however, would not be tolerated. The Wagner Act Board's uncompromising interpretation and enforcement of the Act was beaten back by a grouping of powerful forces that succeeded in pressuring the NLRB to backtrack and eventually succeeded in transforming much of the Wagner Act into Taft-Hartley.

These opponents included not only employers but also anti-New Deal politicians in the House and Senate who formed a powerful alliance of Republicans, Southern Democrats, and the American Federation of Labor (AFL) that eventually pummeled the Board publicly through the use of congressional

investigating committees. NLRB General Counsel Charles Fahey called it a “drumfire of attack” that “they keep up, and keep up, and keep up.”²³

Powerful conservative groups within industry, the labor movement, and politics attacked the Board because the NLRB was at the cutting edge of changes taking place in the balance of power in the American economy. The NLRB represented a new national power being exerted by the federal government in the economic affairs of the country, a new countervailing national power that threatened the virtually unchallenged hegemony in labor relations which industrial magnates had enjoyed for decades. Equally important, after the AFL-CIO split the Board had the power to shape the nature of the new labor movement—which is an abstract way of saying that the NLRB was able to exert a material influence upon the outcome of the AFL-CIO conflict. Consequently, almost every Board election policy or practice became a matter of great political controversy.

The NLRB, therefore was the focus of changes that threatened not only the power positions of American industry and its leaders, but also the power position of traditional AFL craft unions and their leaders. Southern Democratic Congressman Howard Smith’s special Committee to investigate the National Labor Relations Board was a major political effort to regain, maintain, and increase the power of American industry and business and the AFL. The Smith Committee was a watershed in the history of the NLRB and American labor policy.

The majority of the Smith Committee looked only for convenient weapons and vulnerable points against which to use those weapons to force the NLRB to back off from its vigorous enforcement of the Wagner Act. The Committee focused on extreme cases, carefully manipulated its public “revelations” for maximum publicity effect that created a public distrust of the NLRB that lasted over the years, and succeeded in pressuring President Roosevelt to appoint a politically safe majority on the Board.²⁴

Even though Smith’s anti-Wagner Act bill, which passed the House by a two-to-one margin never left the Senate Labor Committee, his investigation had a serious and far-reaching impact on the history of the NLRB and U.S. labor policy. In particular, Smith’s investigation succeeded without legislative changes in bringing into existence a different NLRB. Long before Taft-Hartley in 1947, fundamental changes were made in the NLRB’s administrative set-up, its doctrines, its personnel, and its overall mode of operations. Long before Taft-Hartley the NLRB had been “softened up” and pulled to the conservative right, had become “cautious,” and had been transformed “into a conservative, insecure, politically sensitive agency preoccupied with its own survival.”²⁵

The Smith Committee’s work and proposed amendments, moreover, had another long-lasting effect on NLRB and labor law history. The Taft-Hartley bill (particularly the Hartley bill) was rooted in Howard Smith’s proposed amendments to the Wagner Act including changes in the definition of collective bargaining, the “restoration” of freedom of speech for employers, permission for employers to petition for representation elections, more stringent application of

the rules of evidence in NLRB hearings, protection of craft unions from “the overwhelming weight of numbers” that forced them into industrial unions, and separation of the NLRB’s judicial and prosecutory functions. The final Taft-Hartley Act contains most of the more severe provisions of the Hartley bill.²⁶

The Taft-Hartley Act²⁷

Although many aspects of Taft-Hartley influenced NLRB and labor law history, the focus here is on three aspects of the Act’s effect on employees’ freedom of association: the purpose of the Act, employer speech, and the scope of bargaining.

Legislative Intent

Proponents of Taft-Hartley did fail to prevent the incorporation of the Wagner Act declaration that it was the policy of the U.S. to encourage collective bargaining and the exercise by workers of their full freedom of association. They succeeded, however, in adding provisions that undermined the Wagner Act’s intent and the effectiveness of the NLRB in effecting that intent: Section 8(b) on union unfair labor practices; Section 8(c) asserting employers’ right of “free speech;” a new Declaration of Policy Section that does not mention collective bargaining but only the protection of the rights of individual employees; and Section 7 that affirms workers’ rights to refrain from engaging in collective bargaining.

Taft-Hartley’s protection of the right to refrain from joining a union as equal to protection of the right to join a union to engage in collective bargaining

has resulted in a U.S. labor policy at cross-purposes with itself. Although there is no necessary conflict between the encouragement of collective bargaining and the protection of individual rights, experts at the time Taft-Hartley became law predicted correctly that the written affirmation of the protection of individual rights, particularly the right to refrain from engaging in collective bargaining, would be read as statutory justification for both the promotion of a policy of individual bargaining and employer resistance to unionization and collective bargaining. Given that many of the most important employment decisions cannot be individually negotiated, the choice is not simply between individual and collective bargaining but rather between participation in and exclusion from that decision-making process.²⁸ The concept added to Taft-Hartley, that is, of the federal government as a *neutral guarantor* of employee free choice between individual and collective bargaining, and indifferent to the choice made, is clearly inconsistent with the Wagner Act's concept, retained in Taft-Hartley, of the federal government as a promoter of collective bargaining. The Taft-Hartley Act contains both conceptions of the government's role.

NLRBs applying quite different policies, therefore, can choose between these contradictory statutory purposes and still claim that they are conforming to congressional intent. For that reason, there have been not merely revisions in NLRB case law (as would be expected and even necessary over the years) but radical changes that swing labor policy from one purpose to its direct opposite. These swings directly affect the ability of unions to organize and of employers

to resist organization as well as the relative bargaining power of the parties. As a consequence, after more than 63 years of Taft-Hartley (and 75 years since the Wagner Act) the United States has no coherent or consistent national labor policy. The same law, therefore, has been read as promoting collective bargaining and as promoting resistance to it.

Any reconstruction of national labor policy must begin with a resolution of this fundamental disagreement about what the purpose of the law should be. The national labor policy is in a shambles in part because its meaning depends primarily on which political party won the last election.

Employer Speech

Senator Wagner, too ill to attend the debates on the Senate floor in 1947, warned that “talk of restoring free speech to the employer is a polite way of reintroducing employer interference, economic retaliation and other insidious means of discouraging union membership and union activity” thereby discouraging the freedom of association and, ironically, “greatly diminishing and restructuring the exercise of free speech and free choice by the working men and women of America.” Wagner added, “No constitutional principle can support this, nor would a just labor-relations policy result from it.”²⁹

As Wagner warned, Section 8(c) has become “the primary instrument used by employers to discourage unionization and collective bargaining.”³⁰ Following passage of the Wagner Act, the Board had reasoned that, because the employment relationship involved a complete economic dependence of the employee upon the employer, any antiunion speech or literature from the

employer was inherently coercive and violative of the employee's statutorily guaranteed freedom of association. The first Chairman of the NLRB J. Warren Madden told a Congressional committee eight years before Taft-Hartley, that "upon this fundamental principle—that an employer shall keep his hands off the self-organizing of employees—the entire structure of the Act rests."³¹ The statutorily permitted exercise of employer speech pursuant to Section 8(c) strikes at the law's promotion and protection of the freedom of association.

Scope of Bargaining

The significance of the freedom of association and collective bargaining, moreover, depends in great part on what subjects are negotiable. In a 1960s case, Fibreboard,³² which raised the issue of whether an employer had a statutory obligation to bargain about its decision to contract out all bargaining unit work for economic reasons, the NLRB's brief to the Supreme Court maintained that the Act did "not undertake to assign prerogatives to management or labor nor does it specify a list of subjects or joint concern."³³

The Board's brief defined a broad scope for collective bargaining:

It may be objected that the literal reading [of the statute] would give labor unions a statutory right to bargain about a host of subjects heretofore regarded as "management prerogatives," including prices, types of product, volume of production, and even methods of financing. Such is doubtless the logical, theoretical consequence of giving effect to the literal sweep of words, although the board has never gone so far. As a practical matter, however, the scope of collective bargaining is defined by the range of *employees' vital interests*.³⁴

Instead, in its decision the Supreme Court excluded from an employer's statutory obligation to bargain "managerial decisions which lie at the core of entrepreneurial control."³⁵ This shift from a focus on employee vital interest to

a focus on employer core interests has become the controlling definition of labor policy, leaving it to the value judgments of individual courts and NLRBs to deem what subjects are too important to bargain with a union.

Again, in First National Maintenance,³⁶ the Supreme Court fashioned a cost-benefit test, not a rights test, in determining whether there was an obligation to bargain given “an employer’s need for unencumbered decision-making.”³⁷ As one commentator put it, this test “turns the explicit purposes of the Wagner Act on its head” given that the Act’s purpose (carried over into Taft-Hartley) was to encourage industrial democracy through collective bargaining even when management decision-making might be “encumbered.”³⁸ Another expert summed up the impact of First National Maintenance on working people this way:

The maintenance workers of a Brooklyn nursing home voted to be represented by a union. As a consequence, within four months they were on the streets. They had no union, no jobs, and no right to bump or transfer into another job. From this sad story, the United States Supreme Court would, four years later, fashion a narrative of rights and freedom. Not the rights and freedom of the workers, whose very names have been lost to history. Rather the maintenance contractor turned out to be free, to have the right, not to meet at all with their union, nor any substantive obligation to them, and the same was true of the nursing home itself.³⁹

The Reagan-appointed NLRB majority not only adopted but extended the Supreme Court’s decision in First National Maintenance. A law that at its inception encouraged and promoted the replacement of industrial autocracy with a democratic system of power-sharing was turned into governmental protection of employers’ unilateral decision-making authority over matters that

directly affect not only wages, hours, and working conditions but also whether jobs would continue to exist. More specifically, it demonstrates how the statute and court and NLRB case law have come to legitimize employer opposition to the organization of employees and collective bargaining—in other words, to the exercise by employees of their right to freedom of association.

Concluding Observations on the Future of the Act and the NLRB

The NLRB that was created as part of a great upheaval in American institutions that embraced an administrative law and administrative agency approach to worker-employer disputes is now confronting a pervasive 35 year long anti-regulatory movement backed by the highest levels of government. An NLRB, at its beginning staffed by people with a commitment to social justice too often has been placed in the hands of people who are ideologically hostile to regulation and who understand freedom of association only as an impediment to market competitiveness. The decision to base the constitutionality of the Wagner Act on the commerce clause could be the law's undoing, if by undoing is meant that the fundamental rights of freedom of association and collective bargaining are subordinated continually to market considerations.

It is deceitful to articulate a statutory commitment to a national labor policy of encouraging collective bargaining and then, in the same statute, allow employers to block implementation of that policy. The appointment process does not resolve this contradiction inherent in Taft-Hartley. The law itself needs serious reconsideration and redirection. Wilma Liebman suggested that

new direction in a press release following her appointment as Chairman of the NLRB:

The Board's work matters, just as it did when the NLRB was passed in 1935. Democracy in the workplace is still basic to a democratic society, and collective bargaining is still basic to a fair economy. The statute we administer is the foundation of America's commitment to human rights recognized around the world.⁴⁰

Our labor law, particularly the Taft-Hartley Act, needs to be brought into conformity with international human rights standards such as the right to form and join trade unions for the promotion and protection of workers' interests. Freedom of Association to protect and promote workers' interest is uniformly recognized as a fundamental right under the Universal Declaration of Human Rights;⁴¹ the International Covenant on Civil and Political Rights;⁴² the International Covenant on Economic, Social and Cultural Rights;⁴³—and the right to collective bargaining as set forth in the International Labour Organization's (ILO) Declaration of Philadelphia;⁴⁴ Declaration on Fundamental Principles and Rights at Work;⁴⁵ and Conventions Nos. 87⁴⁶ and 98.⁴⁷ Clearly, it will be a momentous task to achieve that conformity. The U.S. Council for International Business, for example, has urged the U.S. Government not to ratify ILO Conventions 87 (dealing with freedom of association) because "Article 11 [of that Convention] has been interpreted as foreclosing any interference in [union] organizing rights, such as employer 'free speech' under Section 8(c) and other acts of interference permitted under the NLRA would be illegal under Convention 87."⁴⁸

The United States has acknowledged that it “respects, promotes and realizes” the fundamental principles and rights at work and claims that it is in “full compliance with any obligations it may have by virtue of membership in the ILO.”⁴⁹ Because of the importance of the freedom of association, the ILO has established special machinery, the Committee on Freedom of Association (CFA) to address complaints of violations of labor rights and the CFA has reached a different conclusion. The CFA found the U.S. Supreme Court’s decision in *Lechmere* (holding that nonemployee union organizers would almost never have the right to enter employer property to communicate with unorganized employees) contrary the principles set forth in ILO Conventions nos. 87 and 98. The CFA called on the U.S. government “to guarantee access of trade union representatives to workplaces, with due respect for the rights of property and management, so that unions can communicate with workers, in order to apprise them of the potential advantages of unionization.”⁵⁰

The CFA has also (1) expressed concern about the long-standing problem of delay in the U.S. labor law system and urged speedy handling of complaints;⁵¹ (2) found that the NLRA did not treat workers and employers on a fully equal basis because it mandates the NLRB to seek an injunction against certain union unfair labor practices but not any employer unfair labor practices;⁵² and (3) ruled that the permanent replacement of economic strikers meant that the essential right to strike was not fully guaranteed.⁵³ The CFA has also urged the U.S. government to bring its labor legislation for federal-

sector employees into conformity with ILO conventions, particularly nos. 87 and 98. In addition, the CFA requested the government:

To draw the attention of the authorities concerned, and in particular in those jurisdictions where public service workers other than those engaged in the administration of the state should enjoy such rights, and that priority should be given to collective bargaining as the means to settle disputes arising in connection with the determination of terms and conditions of employment in the public service.⁵⁴

Most recently, the CFA concluded that the Supreme Court's denial to undocumented workers of the NLRB's back-pay remedy for violations of the NLRA left the Board with remedial measures that provide little protection to undocumented workers "who can be indiscriminately dismissed for exercising freedom of association rights without any direct penalty aimed at dissuading such action."⁵⁵ The Committee also found that U.S. states that ban public-sector collective bargaining are in violation of ILO Conventions nos. 87 and 98 and, in regard to one of those states, North Carolina, requested that state to establish collective bargaining in the public sector.⁵⁶ In 2006 the Committee requested the U.S. government to engage in collective bargaining with workers' organizations over the terms and conditions of employment for the approximately 56,000 federal airport screeners in the Transportation Security Administration—except for matters "directly" related to national security issues.⁵⁷ In 2008, the committee responded to the charge that the expansion of the definition of "supervisor" was depriving workers who are not supervisors of their collective bargaining rights. The Committee found that certain NLRB interpretations gave rise "to an overly wide definition of supervisory staff that would go beyond freedom of association principles."⁵⁸ Finally, in response to a

complaint that a decision of the NLRB denying graduate teaching and research assistants at private universities the right to engage in collective bargaining, the Committee concluded that in so far as they were workers, these teaching and research assistants were entitled to the full protection of their right to bargain collectively over the terms and conditions of their employment—excluding academic requirements and policies.⁵⁹

These and other fundamental changes in law and case doctrine would be required to conform U.S. labor relations law to international human rights standards.⁶⁰ The use of human rights principles as standards for judgment could initiate change by changing the argument—by redefining policy issues thereby creating new perspectives on old issues. Change could begin simply as Clyde Summers advocated years ago, by judicial, and agency, and arbitral decision-makers obtaining and using their knowledge of foreign law systems “as a source for discovering and testing alternative ways to resolve perceived deficiencies in American labor law.”⁶¹ In Summers’ words:

Most of us are bound by our unconscious premises and have difficulty envisioning what we have not seen. When we have known only one labor law system, we are captives of its purported premises and their claimed consequences. We cannot easily imagine that essential parts might be otherwise; we do not see many of the questions most worth asking.⁶²

More recently, Supreme Court Justice Ginsberg has called it “a decent respect for the opinions of human kind” where judicial and quasi-judicial decision-makers can learn from international legal sources, particularly on matters concerning human rights. In her words:

Foreign opinions are not authoritative. They set no binding precedent for the U.S. judge. But they can add to the store of knowledge relevant to the solution of trying questions. As to our ignorance of foreign legal systems, just as lawyers can learn from each other in multinational transactions and bar associations, judges, too, can profit from exchanges and associations with jurists everywhere.⁶³

Despite some breakthroughs, “legal isolationism”⁶⁴ still characterizes the resistance of U.S. judges, agencies, arbitrators and advocates to the use of internationally recognized human rights precedents.

The purpose of human rights is to eliminate or minimize the vulnerability that leaves people at the mercy of others who have the power to harm them. The Wagner Act had the same purpose. If after 75 years the overwhelming number of U.S. workers can still ask, in the words of an anonymously authored auto worker poem—What is it that instantaneously makes a powerless child of a man or a woman after he or she enters the workplace?—then U.S. labor relations law has been turned inside out protecting the powerful rather than the powerless. By that core standard, U.S. national labor policy must be judged a failure.

¹ Pub. L. No. 74-198, 49 Stat. 449-50 (1935).

² James A. Gross, “Worker Rights as Human Rights: Wagner Act Values and Moral Choices,” 4 University of Pennsylvania Journal of Labor and Employment Law 480-482 (2002).

³ James A. Gross, The Making of the National Labor Relations Board: A Study in Economics Politics, and the Law (Albany: State University of New York Press, 1974), 2-3.

⁴ Phillip J. Cooper, The War Against Regulation: From Jimmy Carter to George W. Bush (Lawrence, Kansas: University Press of Kansas, 2009).

⁵ Ibid., 8.

⁶ Ibid., 28, 46 & 217.

⁷ Gross, “Worker Rights As Human Rights: Wagner Act Values and Moral Choices,” 489.

⁸ Cooper, The War Against Regulation, 18.

⁹ James A. Gross, Broken Promise: The Subversion of U.S. Labor Relations Policy, 1947-1994 (Philadelphia, Temple University Press, 1995), 249-253.

¹⁰ Gross, The Making of the National Labor Relations Board, 231.

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- ¹¹ James Gray Pope, "The Thirteenth Amendment Versus The Commerce Clause: Labor And The Shaping Of American Constitutional Law, 1921-1957" 102 Columbia Law Review 5, 79 & 82 (2002).
- ¹² Ibid., 104.
- ¹³ 301 U.S. 1 (1937).
- ¹⁴ Pope, "The Thirteenth Amendment Versus the Commerce Clause," 98.
- ¹⁵ James A. Gross, The Reshaping of the National Labor Relations Board: National Labor Policy in Transition, 1937-1947 (Albany: State University of New York Press, 1981), 13.
- ¹⁶ Ibid., 14.
- ¹⁷ Ibid.
- ¹⁸ Ibid., 16.
- ¹⁹ Ibid.
- ²⁰ Ibid., 17.
- ²¹ Ibid., 22.
- ²² Ibid., 23.
- ²³ Ibid., 107.
- ²⁴ Ibid., 150, 162, 171, 211 & 254.
- ²⁵ Ibid., 228, 232, 250 & 267.
- ²⁶ Ibid., 253 & 255.
- ²⁷ 29 U.S.C. Sec. 141-197.
- ²⁸ Roy J. Adams, "The Right to Participate," 5 Employee Responsibilities and Rights Journal 97 (1992).
- ²⁹ James A. Gross, A Shameful Business: The Case for Human Rights in the American Workplace (Ithaca: Cornell University Press, 2010), 73.
- ³⁰ Ibid., 74. Quoting Clyde Summers.
- ³¹ Ibid., 75.
- ³² 379 U.S. 203 (1964).
- ³³ Gross, Broken Promise, 174.
- ³⁴ Ibid. (Emphasis added).
- ³⁵ Gross, A Shameful Business, 96-97.
- ³⁶ 42 U.S. 666 (1981).
- ³⁷ Gross, A Shameful Business, 99.
- ³⁸ Ibid.
- ³⁹ Alan Hyde, "The Story of First National Maintenance Corp. v. NLRB: Eliminating Bargaining for Low-Wage Service Workers" in Laura J. Cooper and Catherine L. Fisk, Labor Law Stories (New York: Foundation Press, 2005), 281.
- ⁴⁰ Washington Labor & Employment Wire, "President Obama Designates Wilma Liebman as NLRB Chairwoman," January 26, 2009. <http://washlaborwire.com/2009/01/26/president-designates-wilma-liebman-as-nlrb-chairwoman/> Accessed 5/6/2010.
- ⁴¹ G.A. Res. 217A, UNGAOR, 3d. sess., Pt. I, Resolutions, at 71, UN Doc. A/810.
- ⁴² 999 U.N.T.S. 171.
- ⁴³ 993 U.N.T.S. 3.
- ⁴⁴ <http://www.ilo.org/ilolex/english/iloconst.htm>.
- ⁴⁵ <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang-en/index.htm>.
- ⁴⁶ <http://www.ilo.org/ilolex/English>
- ⁴⁷ http://actrav.ilo.org/actrav-english/to_learn/global/ilo/law/con98.htm.
- ⁴⁸ Edward Potter, Freedom of Association, the Right to Organize and Collective Bargaining: The Impact on U.S. Law and Practice of Ratification of ILO Conventions No. 87 & No. 98 (Washington, D.C.: Labor Policy Association, 1984) 44. (Emphasis in the original.)
- ⁴⁹ Gross, A Shameful Business, 207-208.
- ⁵⁰ Case No. 1523, Complaint against the Government of the United States presented by the United Food and Commercial Workers International Union, et.al. Report No. 284 (1992).
- ⁵¹ Case No. 1467, Complaint against the Government of the United States presented by the United Mine Workers of America, et.al., Report No. 262 (1989).

⁵² Case No. 1523, Report No. 284.

⁵³ Case No. 1543, Complaint against the Government of the United States presented by the AFL-CIO, 74 (Series B) ILO Bull. No. 2 (1991): 15.

⁵⁴ Case No. 1557, Complaints against the Government of the United States presented by the AFL-CIO, et.al. 76 (Series B) ILO Official Bull., No. 3 (1992): 110-112.

⁵⁵ Case No. 2227, Complaints against the Government of the United States presented by the AFL-CIO and the Confederation of Mexican Workers, Report No. 332 (2003).

⁵⁶ Case No. 2460, Complaint against the Government of the United States presented by the Electrical Radio and Machine Workers of America, et.al. Report No. 344 (2007).

⁵⁷ Case No. 2292, Complaint against the Government of the United States presented by the American Federation of Government Employees, et.al. Report No. 343 (2006).

⁵⁸ Case No. 2524, Complaint against the Government of the United States presented by the AFL-CIO, Report No. 349 (2008).

⁵⁹ Case No. 2547, Complaint against the Government of the United States presented by the United Automobile, Aerospace and Agricultural Implement Workers Union, et.al. Report No. 350 (2008).

⁶⁰ For a full discussion see: Gross, A Shameful Business.

⁶¹ Janice R. Bellace, "Dedication: Clyde W. Summers," 138 University of Pennsylvania Law Review (1990) 617.

⁶² Ibid., 618.

⁶³ Ruth Bader Ginsburg, " 'A Decent Respect to the Opinions of [Human]kind': The Value of a Comparative Perspective in Constitutional Adjudication," The American Society of International Law, April 1, 2005.

⁶⁴ Gross, A Shameful Business, 211.