UNIONS AND THE NATIONAL LABOR RELATIONS BOARD

Jack Getman

In "A Union Movement for the New Century," Ellen Dannin admirably tries to make a case for the continued relevance of the National Labor Relations Board (NLRB) to unions and workers. However, given the current circumstances of abject employer abuse of the intent of the law, the NLRB is, in fact, a tool for employers to break organizing drives and thwart collective bargaining.

Professor Dannin thinks that union leaders are overly critical of the National Labor Relations Board (NLRB) and the National Labor Relations Act (NLRA). She is probably right. But if the angry quotes from union leaders and supporters about the Act are too strong, their basic sense of being betrayed by the legal system and the NLRA is more accurate than Professor Dannin is willing to admit. From the point of view of unions seeking to organize, strike, or bargain, it matters little that the NLRA read separately from the cases, doctrines and procedures that constitute its meaning to organized labor is a "noble law." The fact is, that as currently applied, the law is an organizing trap, and that it sets the stage for employers to use collective bargaining as an instrument for destroying unions.[1]

The Gypsum City, Michigan case that Professor Dannin describes so powerfully does not support her argument. Indeed, it illustrates the weakness of the NLRA. The company involved, like many companies in the 1980s, shifted from a policy of cooperation to one of confrontation. As was also typical, the shift was most powerfully manifest during negotiations for a new agreement. She writes that, "The Company seemed to be pushing the workers to strike." This was a common management tactic during the 1980s used by such major companies as Hormel, Boise Cascade, and International Paper (IP). It was easily achieved by demanding concessions at the bargaining table, which the union could not grant without losing the support of its members. International Paper, for example, not only demanded lower salaries and a weaker seniority system, but it also asked for the right to outsource the jobs of almost half the bargaining unit. Despite the fact that IP was seeking concessions that it knew no honorable union could possibly accept, the union's charge that it was guilty of bad

WorkingUSA: The Journal of Labor and Society · 1089-7011 · Volume 8 · June 2005 · pp. 501–505

350 Main Street, Malden, MA 02148, USA, and 9600 Garsington Road, Oxford, OX4 2DQ.

faith bargaining was dismissed.[2] Professor Dannin does not suggest that a charge in the Gypsum case would have fared any better.

The employer in the Gyp case could have responded to the strike by hiring permanent replacement workers. Had it done so, the strikers would not have been entitled to their jobs at the end of the strike. This would have almost surely meant the decertification of the union. This employer did not use this tactic, but the possibility of its use and the fact that it was used in the highly publicized nearby Hormel strike must have been known to the union and its members. It helps to explain why "the strike ended under a contract that meant real losses for the union members."

The employer threatened to implement its "last best and final offer," a tactic that Professor Dannin notes has been approved by the courts of appeals. She correctly points out that this tactic "can be demoralizing to the union and even destroy it." Professor Dannin has, in her writings, properly pointed out the law need not, and should not, have been interpreted to give management this power. But the doctrine of unilateral implementation is well settled. And from a union's point of view, the fact that "the NLRA says nothing about how an impasse in bargaining is resolved" is small comfort. Given all these union-threatening, worker-harming doctrines, it is not surprising that the possibility of help from the NLRA does not arise in the story until Jim and Danny were "fired for violence." Both had done things that would justify a discharge under existing law. Professor Dannin, a Board attorney at the time, came up with several imaginative arguments to support the claim that the discharges were not for the stated reasons but were actually used first "to send a threat to the other workers as they went in to vote on the contract. Second, it was retaliating against the workers for their concerted activity in expressing solidarity." Her carefully developed theory of the case was sabotaged because "there was no cooperation, even from the two whose cases I would be presenting." Instead of cooperating with her, the strikers turned to two charlatans who wasted a lot of their money in an effort to show that "the NLRB and I (Professor Dannin)—as the NLRB representative—were incompetent."

What does the story reveal? First, that under current NLRA law, an employer can, if it chooses, bargain to weaken or even get rid of a union. The law will not intervene if it is done with any legal sophistication. Second, that the law only enters to help workers get their jobs back after a strike has been lost. If the strike had been won, the settlement would have included reinstating the discharged workers. What I would add is that even if the law were skillfully used as Professor Dannin planned, she would probably have lost.

Jim and Danny did things that would justify and explain their being discharged. This is typical. In almost any strike that lasts for weeks or more where the employer continues to operate, such conduct takes place usually at the picket line. To get the strikers reinstated, the General Counsel and the Board must be persuaded that the misconduct was pretext, and that the real reason for the discharge was to punish the worker. Pretext cases are hard to win before the Board and harder to win before the courts, which are particularly harsh on striker mis-

conduct.[3] Even if the striker is ordered reinstated, there is a fair likelihood that he will not actually return or that he will eventually be forced to resign.

Professor Dannin's analysis of the discharge cases is thoughtful, sophisticated, and understanding. Undoubtedly, it would have given the discharged workers their best chance before the Board. But the Board is dominated by pro-management Bush appointees, and even if it ruled for the strikers, its decision could be appealed to the Courts of Appeals that is, for the most part, neither sophisticated nor sympathetic. Finally, even if, counter to my prediction, everything went right and the discharges were overturned, the victory would have only slightly diminished the pain and unhappiness in the community. The real problem is that the strike was lost. The recriminations and lack of unity that Professor Dannin describes is typical. It is only a small manifestation of the general, long-lasting unhappiness that comes with losing a strike.

The conclusion that Professor Dannin draws from her story is that "when union leaders damn the NLRB and the NLRA as enemies of labor, they harm themselves and those they represent." She urges them to use instead their energy to support a program for making the original NLRA vision "more than a utopian dream." The best hope for doing this "is a litigation strategy that draws on that of the National Association for the Advancement of Colored People (NAACP) Legal 'Defense' Fund . . . to restore the original vision of the NLRA." How this strategy is to be implemented is set out very briefly in her conclusion. She urges that cases be tried by focusing on persuading conservative court of appeals judges who know nothing about labor law. The key to accomplishing this is to avoid "shorthand evidence and jargon" and to use instead social science evidence and expert witnesses to demonstrate.

I find Professor Dannin's approach admirable, even touching, in its hope that good lawyering can make so profound a difference in the enforcement of the law. I do not, however, share her hope. It is far too late in the day to fundamentally change the role of the Board or the interpretation of the NLRA. The worst features of current labor law—its favoring employer property rights over collective bargaining or the right to strike, its stringent limits on union access to employees while permitting employers to make captive audience speeches, its pitiful remedies against employer violations—are all cemented into the law. They are supported by generations of Supreme Court precedents and legislative acceptance. The system of unequal access based on traditional property rights has by now been reaffirmed in four Supreme Court opinions. The *Mackay* doctrine permitting employers to hire permanent replacements during a strike has survived despite constant efforts to change or limit it by litigation or by Congressional amendment. Indeed, the doctrine has constantly been expanded. The case against the *Mackay* doctrine—its unfairness to employees, its inconsistency with the statute—has been made in cases in eloquent testimony by victims before Congress, and in countless law review articles and books. And all to no avail.

The union and Board lawyers who have suffered fundamental defeats at the hand of the courts have been first-rate advocates. They have lost key cases

because the courts and the Board itself periodically have rejected the antimarket doctrines that both Professor Dannin and I recognize were implicit in the NLRA as it was originally passed. But I have no hope that good lawyers, even great lawyers, can convince courts not otherwise sympathetic to organized labor to reverse years of precedent interpreting the NLRA to do the least damage possible to the unregulated market. Remember, the judiciary that presided over the constant erosion of employee rights is currently being regularly infused with new Bush appointees.

Thus, in my view, organized labor is right to see the NLRA as offering little hope as an instrument of union resurgence. Not that any other technique offers an easy path to organizational success. Professor Dannin is right that unions will have to continue to use the Board in a variety of different situations, including representative elections. John Wilhelm, president of the Hotel Employees-Restaurant Employees Union (HERE), a union that seeks to avoid NLRB elections wherever possible, had his first major organizing triumph at Yale University in a Board-conducted election.

Nevertheless, there is reason to believe that the non-NLRB-based organizing techniques of unions such as HERE, Communication Workers of America (CWA) and Service Employees International Union (SEIU) offer organized labor the best possible chance for resurgence. The key to their tactics is what I call the "Inside Outside" approach. The outside element involves forming alliances with progressive groups outside of organized labor. The inside element is to involve the union's rank-and-file members in the organizing process, both to preach the advantages of unionization to their unorganized brothers and sisters, and to make neutrality agreements a key part of bargaining strategy in organized units. Involving the rank and file in organizing increases union activism across the Board. The participants understand that they are part of something bigger than a local effort. They are part of a movement.

The key successes of this approach have been the Justice for Janitors effort by the SEIU and the battle by HERE in Las Vegas, first to thwart a campaign by hotels to destroy the union, and when that was accomplished, to increase membership and bargaining power. The result of HERE's battle in Las Vegas has been to organize new hotels, increase membership, and create a decent life style for hotel workers. Las Vegas, where union buttons are a regular part of hotel employees' dress, is now a "union town" as it never was before these tactics were used.

The same tactics offer the best chance for winning strikes. Because it harnesses rank-and-file power and because it is based on alliances, the "Inside Outside" tactics would strengthen labor even if it did not lead to dramatic increases in membership. Organized labor faces many enemies. It is sad, ironic, outrageous even, that the law—including the NLRA—is one of them. But it is true.

Jack Getman is a labor law scholar and sometime activist, and teaches at the University of Texas School of Law. He has done empirical work on organizing

and strikes. He was national president of the American Association of University Professors (AAUP). He began his career at the NLRB.

Notes

1. For a discussion of the Act's transformation, see Julius Getman, "The National Labor Relations Act: What went wrong; Can we fix it?" *Boston College Law Review* 45 (2003): 125.
2. The story of the strike by the paper workers against International Paper is described in Julius Getman, *The Betrayal of Local 14* (Ithaca, New York: Cornell University Press, 1998).
3. This was common knowledge among Board enforcement attorneys back in the early 1960s when I worked there. In the four decades since, the courts' reluctance in this regard has grown even stronger.

References

Dannin, Ellen. 2004. From dictator game to ultimatum game . . . and back again: The judicial impasse amendments. *University of Pennsylvania Journal of Labor and Employment Law* 6:241.

Getman, J. 1998. *The betrayal of Local 14*. Ithaca, NY: Cornell University Press.

———. 2003. The National Relations Act: What went wrong? Can we fix it? *Boston College Law Review* 45:125.