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## THE FAILURE OF U.S. LABOR LAW

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In October 1984, the House Subcommittee on Education and Labor published a report entitled "The Failure of Labor Law—A Betrayal of American Workers," which concluded as follows:

Since 1935, the policy of the United States has been to favor collective bargaining as the means of conducting labor-management relations. The objective of labor law is to promote and protect collective bargaining and to prohibit discrimination against employees because of their views regarding unionization.... The law is failing on all counts to meet these objectives. The law is being used as a weapon to obstruct collective bargaining, and the notion that the law protects workers against discrimination because of union views has become an illusion. We face the dangerous situation of a law articulating a clear policy and promising specific protections that it is failing to provide. Those who continue to rely on the law to achieve its stated policy and protections are being badly betrayed. Workers are routinely fired for advocating a union and the scope and effectiveness of collective bargaining has been seriously eroded. It is for these reasons that we state that labor-management relations are in crisis.

This article summarizes the arguments and evidence which led the Subcommittee to the above conclusion.

**The Increase in Employer Resistance to Collective Bargaining**—The past twenty years have witnessed an increase in both the intensity and sophistication of management's anti-union activities. The report presents evidence that "at least one in twenty workers who vote for a union today are illegally fired for their union support." (p. 5) The number of unfair labor practice charges filed against employers increased from 10,931 in 1965 to 31,281 in 1980, or a total increase of 20,350 charges. The preceding fifteen year period had a rise of only 6,459 charges, less than one third the increase from 1965 to 1980. The increasing sophistication of employer's anti-union activities is evidenced by the growth of the management consulting industry which, according to some estimates, has grown tenfold over the last decade and now registers sales of over a half-billion dollars annually. Testimony presented by the AFL-CIO indicates that management hires consultants in approximately 2/3 of all union organizing campaigns.

**Fundamental Weaknesses of the NLRA**—Among the weaknesses cited are "protracted delay in the implementation of the law and ineffectual remedies." (p. 7) The NLRA provides only for compensatory and not punitive damages. Thus the remedy for illegally firing a worker for union activity is reinstatement with back pay, and the posting of a notice by the employer on a public bulletin board saying that such behavior will not occur in the future. Such a remedy not only fails to compensate fully the illegally fired worker, but also fails to protect the right of workers to unionize.

Illegal discharges typically occur at the height of an organizing campaign and are directed at the most active leaders of the unionization effort. Reinstatement several years after an unlawful firing further impresses on the workforce that favoring a union is a risky proposition. The remedy is focused on protecting an individual rather than guaranteeing workers an uncoerced opportunity to organize a union. The practical effect is that it can often pay the company to break the law.

Other weaknesses in the law occur when a union has won the right to represent a bargaining unit, but the employer refuses to bargain in good faith. The usual remedy is an order to bargain in good faith. That

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this remedy is particularly inadequate can be seen in the fact that “only slightly more than 60% of the time does a majority vote for a union ultimately result in a collective bargaining agreement.” (p. 10) Moreover, the law deprives workers of bargaining strength by sanctioning the hiring of replacements for striking workers, and by prohibiting secondary boycotts.

**The Administrative Crisis at the Board**—The report charges that the NLRB now has the largest case backlog in its history, and that the average amount of time from the initial filing of a charge to a court-enforced remedy has now increased to three years. The administrative efficiency of the board was further hampered by the fact that between August 1983 and March 1985, President Reagan failed to appoint anyone to a vacancy on the board. This vacancy was the result of the President’s earlier failure to reappoint board member Howard Jenkins (R) who had served on the board for the past 20 years. Not only did the vacancy itself contribute to the backlog but it also resulted in the deadlocking of several decisions in 2-2 votes; the final decision on these awaited the appointment of the fifth board member. All of these delay factors have crippled the law severely.

**Politicization of the Board**—Finally, controversial appointments to the board under the present administration have made it a non-neutral body. [On this point, see also LCR 110, Jan. 1984.] Initially, President Reagan appointed John Van de Water chair of the board. However, Van de Water was not confirmed by the Senate because his long background as a management consultant was not perceived as being neutral. Nevertheless, he was given a recess appointment by which he was able to serve as chair for a year in spite of the Senate’s vote. John Dotson, a management attorney, succeeded Van de Water as chair. The Subcommittee report quotes Dotson’s philosophy as follows:

. . . in other words, collective bargaining frequently means labor monopoly, the destruction of individual freedom, and the destruction of the marketplace as the mechanism for determining the value of labor. (p. 15)

In 1982, President Reagan appointed Hugh Reilly as Solicitor of the Board. Mr. Reilly’s background included experience as a staff attorney for the Right to Work Foundation. The perception that the board is no longer a neutral body has been confirmed by two outstanding characteristics of the decisions of the Dotson Board: first, a large number of policy reversals have benefitted management; and second, management has won a “significantly larger number of cases before this Board than it won during previous Republican and Democratic Administrations.” (p. 15) The Subcommittee Report cites a number of cases to support its claim that the Dotson Board tends to favor management, reject legitimate claims of employees, and accept at face value asserted “business justification” for actions of employers ranging from the shut-down of unionized plants and other facilities to the discharge of employees who have been particularly outspoken in their assertion of statutory rights. (p. 19)

Finally, the Subcommittee report argues that the Dotson Board has undertaken to reinterpret the provisions of the NLRA in favor of management in its characterization of over a dozen decisions as “key decisions.” The report charges that restrictions have been placed on the collective bargaining process so that the scope of bargaining has been limited across the entire range of work related issues, from major changes (such as a decision to close a facility) to less crucial matters (such as Christmas bonuses). Employers have been allowed to inform the union at a later time of changes subject to bargaining, thus presenting the union with an accomplished fact. They have been allowed to end the bargaining process sooner by declaring impasse and unilaterally instituting changes. (p. 20)

The Subcommittee’s report presents sufficient evidence to support its conclusions that labor law has failed, and that labor-management relations are in crisis.

--Suzanne Meehan

*The report summarized above is entitled, “The Failure of Labor Law—A Betrayal of American Workers.” Report of the Subcommittee on Labor-Management Relations of the Committee on Education and Labor, U.S. House of Representatives, 98th Congress. Report H 98. Available from the Government Printing Office.*

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