Federal Labor Laws

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Part One – Introductory Materials

I. Historical Development of Federal Labor Law

A. In the eyes of policy makers in the United States, organized labor has not fared well. The broad political and legal development of the law of labor-management relations in the United States can be summarized through a few generalizations:

1. For all but twelve years out of the 200-plus year history of this country, the prevailing position of the federal and state courts and legislatures has been decidedly anti-union. In the best of these times, the courts and legislatures maintained some degree of neutrality in labor-management relations, but for the most part a decidedly pro-employer posture was the norm. The encouragement of collective bargaining was the preeminent focus of public labor relations policy only during the period from 1935 until 1947.

2. The history of labor law is essentially a story of how workers have developed reasonably effective strategies for using collective power to improve and control wages, hours and working conditions, only to have the strategies restricted or declared unlawful by the courts, legislative bodies, or administrative agencies.

3. Management strategies to defeat collective action, to suppress workers and to break unions have often been sanctioned, or at best ignored, by the same judicial, legislative and administrative bodies.

B. The Common Law Era – Judicial Reaction to Unionization and Concerted Activity by Workers

1. The Criminal Conspiracy Doctrine

a. The earliest legal doctrine developed in the United States for the regulation of union activity was the criminal conspiracy doctrine, adopted from the tradition of the British common law. The first documented use of this doctrine in this country involved a case against cordwainers in the city of Philadelphia.

b. Consider Case I-A, based on the *Philadelphia Cordwainers' Case*.[1]

Case I-A: Criminal Conspiracy Doctrine

The year is 1806. A group of journeymen cordwainers get together to discuss their low wages and to form an association. They agreed that none of them will work at the shoemaking craft unless they are paid a wage greater than the current rate. They also agree to do whatever is necessary to keep other journeymen from working at lower wages. Finally, they agree that none of them will work for a master cordwainer who employs anyone who violates the by-laws of their association.

Questions:

1) May an individual worker refuse to work unless he or she is paid a certain wage?

2) What were the goals of the cordwainers' organization? Were those goals unlawful?

3) In determining the legality of the cordwainers' activities, is it relevant that they formed an organization?

4) Would the activities of the cordwainers be legal today?

1) Individual action by the cordwainers would have been lawful. The courts recognized that any journeyman had the right to cease working unless wage rates were acceptable (the right to quit).

   a) The right to quit did not extend to large numbers of workers in the 18th and early 19th centuries. The economic systems of indenture, apprenticeship and slavery denied this basic right to affected workers.

   b) This case also demonstrates how important the tradition of individual action, as compared to collective action, has been throughout American history. The tension between individualism and collective action has been a recurring theme through American labor history.

2) The state, acting in the interests of the masters, successfully charged that the cordwainers had

[1] *Philadelphia Cordwainers' Case (Commonwealth v. Pullis)*, (Philadelphia Mayor's Court, 1806), 3 Doc. Hist. of Amer. Ind. Soc. 59 (2d Edition, Commons 1910).

engaged in a criminal conspiracy, the jury being told that "a combination of workmen to raise their wages may be considered in a two-fold point of view: one is to benefit themselves . . . the other is to injure those who do not join their society. The rule of law condemns both."[2] The cordwainers were fined $8.00 each.

3) The basic tactics of the workers were to organize and to "turn-out" (strike) to obtain better working conditions. It was the simple acts of organizing and engaging in collective action that was held to be unlawful.

4) The basic act of organizing would be lawful today. However, the specific activities would still be illegal. Workers engaged in a strike to obtain illegal terms of employment are engaged in unprotected activity. In this case, the form of union security sought by the cordwainers would go beyond legal limits in protecting the interests of the union in the workplace.

c. The cordwainers case was much more than a labor law case. It represented a major Constitutional dispute between the Federalists and the Democratic-Republicans over the appropriate role of the British common law in the development of a body of American law. The Democratic-Republicans were aligned with the interests of workers, and the Federalists were aligned with the masters.

d. Other significant practices in use at the time were maximum wage laws, designed to curtail wages that holders of skills in short supply could command.[3]

2. Illegal Purposes Doctrine:

a. Beginning in Massachusetts in 1842, a judicial shift away from the criminal conspiracy doctrine began to emerge. Following the lead of the Massachusetts Supreme Court, many courts considered collective action as an illegal conspiracy only if either improper tactics or improper goals were involved. Courts which adopted the illegal purposes doctrine accepted the act of organization as legitimate. If the purpose for the union activity and the tactics used were both legal, there was no criminal conspiracy.

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[2] *Id., at* 233.

[3] Cox, A., Bok, D.C., Gorman, R.A. and Finkin, M.W. *Labor Law. Cases and Materials (12th Ed.).* Westbury, New York: The Foundation Press, Inc. (1996) at 3.

b. Case I-B, based on *Commonwealth v. Hunt*.[4]

Case I-B: Illegal Purposes

A Bootmakers' organization successfully establishes a scheduled rate of pay following a strike in the late 1830's. In an effort to enforce their schedule, seven of the members of the organization agree not to work in any shop in which non-members are working for less than the scheduled wage rate. As a result of the pressure brought by these seven, a non-union bootmaker is fired.

Questions:

1) What are the goals or objectives of the collective action by the union bootmakers?

2) Assume that one of the goals is to organize non-union workers. Under what circumstances would the collective action of the union be legal? Illegal? Remember, this is the 1830's!

3) Assume that another purpose of the activity is to drive non-union bootmakers into poverty. Would this be an illegal goal?

1) There were two basic goals of the collective action in this case, to enforce the pay schedule and to organize nonunion workers. These goals were regarded as legal in Massachusetts, with the court ruling that there was no criminal conspiracy unless improper tactics ("falsehood or force") were used to achieve the goals.

2) The organizing goal, even to the extent of driving nonunion workers to the point of poverty, was accepted as legitimate, and it could not be grounds for a criminal conspiracy as long as no improper tactics were used. Workers were not deprived of the right to earn a livelihood unless they refused to join the union. Because the option to join was available, workers voluntarily remained non-union at their own peril.

3) This doctrine closely parallels the treatment of union activity under the Taft-Hartley Act. Union activity may violate § 8(b) or be considered unprotected activity under § 7 if improper methods are used (violence, mass picketing, secondary pickets, etc.) or if improper goals are involved (closed shops, hot cargo clauses, "permissible" subjects, etc.).

[4] *Commonwealth v. Hunt*, 445 Mass. (4 Met.) 111, 38 Am. Dec. 346 (1842).

4) This is one of the few times in American labor history during which some courts took a "laissez faire" or hands off approach to regulating union activity.

3. Ex Parte Labor Injunctions:

a. The most aggressive legal weapon used against labor organizations is the injunction. An injunction is a court order compelling a person to do or to refrain from doing something. As used in labor disputes, injunctions against all effective forms of collective action were common from the late nineteenth century until the enactment of the federal Anti-Injunction Act of 1932 (Norris-LaGuardia Act).

b. Two of the most serious problems with the use of injunctions in labor disputes were that they were issued ex parte (without notice or an opportunity for a hearing) and that they were frequently enforced through the deputation of employer agents, with little regard for the enforcement costs as measured in human life.

Case I-C: Labor Injunctions

The time frame is the early 1890's. The workers at a factory go on strike to obtain higher wages and shorter hours. In an effort to prevent the employer from hiring strikebreakers, the union establishes a picket line, usually consisting of two people. Generally, the pickets attempt to keep nonunion workers out of the plant by using persuasion and social pressure. However, on a few occasions there have been vague threats of physical violence, although no violent incidents have resulted.

Questions:

1) Are the goals of the strike legal?

2) Are the tactics of using "persuasion and social pressure" improper methods for obtaining the goals of the union?

3) Do the threats of physical violence represent improper tactics?

4) Is the existence of a picket line illegal?

5) What remedies are available to the employer?

6) In addition to the injunction, what economic and legal weapons were available to employers in the battle against unionization in the late 1800's and early 1900's?

c. Case I-C, based on *Vegalahn v. Gunther*.[5] *Vegalahn v. Gunther* is an excellent example of the breadth of labor injunctions, but the case is known primarily for the dissent of Justice Holmes, later of the U.S. Supreme Court.

1) In the case, the union struck for shorter hours and higher wages (clearly legitimate goals). However, the union was prevented from maintaining any picket, with the court claiming that any interference with the business of the employer could be enjoined.

2) The court in *Vegalahn* condemned forms of pressure, which it considered to be "moral intimidation," specifically condemning persuasion of strikebreakers to break "existing contracts" of employment.

3) Physical threats were the major issue in the Holmes dissent. Holmes acknowledged the ability of the court to enjoin acts of violence or actual threats of physical violence, but dissented on the grounds that the court should go no further by enjoining all picketing, whether peaceful or not.

4) In this case, the union was prohibited from maintaining any pickets, making all picketing illegal if there were any elements of intimidation or coercion (including "moral intimidation") of either the employer or strikebreakers.

5) The use of injunctions in labor disputes was specifically sanctioned by the U.S. Supreme Court in 1895.[6] However, abuse of the injunctive power of the courts was the subject of a major treatise written by a future Supreme Court Justice in 1930.[7]

6) See section immediately following – The Business Law Era.

C. The Business Law Era -- Judicial and Legislative Reaction to Unionization.

1. In addition to the injunction, a wide variety of legal and economic weapons were available to the employers of the late nineteenth and early twentieth centuries, including:

a. Judicially enforceable "iron clads" or "yellow dog" contracts, which were contracts under which workers agreed, as a

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[5] *Vegalahn v. Gunther*, 167 Mass. 92, 44 N.E. 1077 (1896).

[6] *In re Debs*, 158 U.S. 564, 15 S.Ct. 900 (1895).

[7] Frankfurter, Felix and Greene, Nathan. *The Labor Injunction*. New York: MacMillan Co. (1930).

condition of employment, not to join or assist labor organizations.[8]

b. Blacklisting, or the practice of circulating among employers in an industry the names of known union members or advocates.

c. Company towns, company unions, corporate welfare schemes, payment in scrip, and other forms of economic coercion which made all aspects of the worker's life dependent on the employer.

d. The concept of business or contract torts, such as restraint of trade, interference with business or contractual relations, and intentional infliction of economic harm.

2. These tactics were readily accepted as valid by the courts of the era. The business contracts and torts became devices to justify the use of the injunctive power of the courts against unions. For example, an employer could seek an injunction against a union that was attempting to get workers subject to yellow dog contracts to join the union.

3. Early state legislation attempted to prohibit or limit employer use of specific legal or economic weapons against unions. Indiana, for example, has state legislation from the late 1800's prohibiting blacklisting, recognizing the right of workers to organize, and restricting the importation of strikebreakers.[9] Most of these laws suffer from desuetude.

4. **Anti-Trust Laws**: In 1890, Congress enacted the Sherman Anti-Trust Act[10] in an effort to curb the monopolistic business practices of large corporations. The objective of the law was to prohibit any monopoly or other combination in restraint of interstate trade. Although the law was designed to regulate business practices, anti-union employers discovered that it was an effective weapon for attacking union economic activity. Federal anti-trust legislation still has some importance to union activity today.

   a. Consider Case I-D, based on *The Danbury Hatters' Case, (Loewe v. Lawlor)*.[11]

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[8] *See, e.g.*, *Adair v. United States*, 208 U.S. 161 (1908).

[9] *E.g.*, Acts (Indiana) 1893, c. 76, Acts (Indiana) 1889, c. 166, Acts (Indiana) 1885, c.51.

[10] 26 Stat. 209 (1890).

[11] *Loewe v. Lawlor*, 208 U.S. 274, 28 S.Ct. 301 (1908).

Case I-D: Anti-Trust Laws

In the early 1900's, the United Hatters of America, AFL, attempt to organize the entire fur hat manufacturing industry in the United States. When the union is about 85% successful, it targets a Connecticut hat company. In its effort to organize this company, the union strikes the Connecticut plant, and with the support of the AFL, calls a reasonably successful national boycott of the company's hats. The company sues the officers of the union, claiming that the strike and boycott constitute an illegal attempt to interfere with the interstate transportation of hats.

Questions:

1) What remedies will the company seek?

2) Who wins? Why? What?

3) How would the case be decided today? Why?

1) In the *Danbury Hatters' Case*, the company sought treble damages, (ultimately amounting to $240,000) under the Sherman Anti-Trust Act of 1890. The Sherman Act prohibited any monopoly or combination in restraint of trade. The interpretation of the Court was that the Sherman Act applied to all combinations, including unions.

2) The company won this case, and other companies won many more. In fact, there were more anti-trust actions brought against union activities than business combinations until the Clayton Act of 1914[12] attempted to exclude union activity ("the labor of human beings is not a commodity"[13]).

3) After the Clayton Act, courts applied this exemption only to primary activity of unions, so that secondary strikes and boycotts were still subject to anti-trust regulation.[14]

b. There were (and are) three distinct remedies possible under anti-trust law. Depending upon the nature of the case there may be treble damages in civil actions, injunctive relief, and criminal prosecution.

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[12] 38 Stat. 730 (1914).

[13] 38 Stat. 731 (1914), 15 USCA § 17.

[14] *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 41 S.Ct. 172 (1921).

c. The *Danbury Hatters' Case* is important for other reasons. At this point in history, unions as unincorporated associations could not be sued. The $240,000 judgment was against the individual officers of the Hatters' Union. The judgment was paid by the voluntary contributions of union members across the country in a solicitation drive organized by the AFL.

d. The interpretation of the Norris-LaGuardia Act and its relationship to the anti-trust laws[15] in 1941 eliminated many of the early problems. In addition, Taft-Hartley substituted other strong restrictions on secondary activity which accomplished the same goals for employers. Today, anti-trust laws are still relevant, but primarily in cases involving combinations between unions and unionized employers to restrict market access by non-union employers.

5. The Railway Labor Acts (primarily RLA of 1926, as amended).[16] The first federal attempts to develop a comprehensive legal structure for the regulation of collective bargaining involved the railroad industry. Railway labor legislation evolved as a result of major strikes and looked to collective bargaining with mediation and voluntary arbitration as the selected method for resolving disputes. As amended, the Railway Labor Act now applies to air carriers as well as railroads.

D. New Deal Labor Legislation

1. **Anti-Injunction Act of 1932 (Norris-LaGuardia)**:[17] Federal regulation of private sector labor relations (beyond the railroads) began before the Roosevelt administration of the 1930's. The first step toward federal regulation was the Anti-Injunction Act of 1932, commonly referred to as the Norris-LaGuardia Act. Norris-LaGuardia was enacted in the waning days of the Herbert Hoover administration.

a. Norris-LaGuardia did not create any new rights for workers or unions but instead focused on the role of federal courts in labor disputes. The goal of the act was to significantly restrict judicial use of the injunction during labor disputes and to prohibit judicial enforcement of "yellow dog" contracts.

b. Nearly all states enacted "little Norris-LaGuardia Acts"[18] to similarly restrict the involvement of state courts in labor disputes.

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[15] 29 USCA § 101 *et seq*., *United States v. Hutcheson*, 312 U.S. 219 (1941).

[16] 44 Stat. 577 (1926), 45 USCA § 151 *et seq*.

[17] 47 Stat. 70 (1932), 29 USCA § 101 *et seq*.

[18] *See, e.g.,* The Indiana Anti-Injunction Act, Acts (Indiana) 1933, c. 12, IC 22-6-1-1 *et seq*.

2. The National Industrial Recovery Act of 1933 (NIRA)[19] was the centerpiece of the first New Deal of the Roosevelt administration. Section 7a of the NIRA addressed collective bargaining rights and recognized the right of workers to organize and bargain collectively.

   a. Under the broad Presidential powers of the NIRA to implement and enforce "codes of fair competition," Roosevelt created the National Labor Board and, subsequently, the first National Labor Relations Board. Both Boards were given authority to conduct representation elections and to issue advisory recommendations in labor disputes.

   b. In many ways, the effect of the NIRA for unionization was to protect the status quo. In industries with a tradition of strong unionization, the act was a valuable tool for expanding the economic power of established unions. For industries with weak or no unionization, employers could and did use the law as a means for legitimizing company unionism.

   c. The NIRA was ruled unconstitutional in 1935 in the so-called "sick chicken" case.[20] However, many of the decisions of the (first) NLRB contributed to the development of contemporary labor law.

3. The original sections of modern federal labor law were enacted as the National Labor Relations Act of 1935,[21] also known as the Wagner Act after its primary sponsor.

   a. The goals of the Wagner Act were to reinforce the powers of the original NLRB, and to promote industrial peace through recognition of the rights of workers to organize, to engage in collective bargaining and to engage in certain forms of collective action.

   b. The structure of the Wagner Act included recognition of the basic rights of workers and unions under § 7, which were to be enforced by the NLRB through bringing action against employer unfair labor practices. The three-member NLRB was also given the power to conduct representation elections.

   c. The Wagner Act withstood Constitutional challenges in 1937 in *NLRB v. Jones & Laughlin Steel Corp.*,[22] with the Roosevelt Supreme Court stating:

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[19] 48 Stat. 195 (1933).

[20] *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

[21] 49 Stat. 449 (1935), 29 USCA § 151 *et seq*.

Employees have as clear a right to organize and select their representatives for lawful purposes as the company has to organize its business and select its own officers and agents.[23]

d. The Wagner Act was designed to promote industrial peace through collective bargaining. It is considered to be "pro-labor," although the regulatory structure invited revisions that later shifted the balance of legal power to the business community. It is also significant that many of the early CIO organizing successes occurred between 1935 and 1937, a period in which the Constitutionality of the law was seriously questioned. Many of the tactics which were successful in organizing were later to be deemed unprotected under the Wagner Act (such as the sit-down strike).

E. Modern Labor Law

1. The eleven year period from 1935-1946, immediately following enactment of the National Labor Relations Act, was a period of wide spread growth in size and influence for the American labor movement. The political reaction to this growth is symbolized by the enactment of the Labor Management Relations Act of 1947 (Taft-Hartley).[24]

a. Taft-Hartley came during a period of tremendous growth in the labor movement, wide-spread strike activity following World War II, and a significant conservative shift in Congress. The Act was passed over a Truman veto, although he, too, supported major revisions of the original Wagner Act.

b. Taft-Hartley attempted to neutralize the power obtained by organized labor through the 1930's and 1940's. Government policy shifted from the encouragement of collective bargaining to the active regulation of labor relations.

c. Specific changes in the NLRA included:

1) Addition of union unfair labor practices.

2) Prohibition of closed shop agreements and granting to states the right to enact so-called "right to work" laws.

3) Restriction of the use of secondary pressure by unions.

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[22] 301 U.S. 1, 7 S.Ct. 615 (1937).

[23] *Id*., 301 U.S. at 33.

[24] 61 Stat. 136 (1947), 29 USCA § 141 *et seq*.

4) Creation of the Federal Mediation and Conciliation Service.

5) Expansion of the NLRB from three to five members and creation of the office of the General Counsel to split "judicial" and "prosecutorial" functions of the Board.

6) Granting to the President the power to intervene in "National Emergency" disputes.

7) Creation for unions of the right to sue and be sued.

8) Recognition of the so-called "free speech" rights under the Act.

9) Recognition of the individual right to refrain from union activity.

10) Restriction of the power of a union to control pension and other negotiated funds.

2. In the 1950's, a major concern of Congress was the involvement of organized crime in the activities of a few labor organizations. This problem was also a major factor in the 1955 merger of the American Federation of Labor and the Congress of Industrial Organizations that led to the creation of the AFL-CIO. The result of the Congressional concerns was the enactment of the Labor Management Reporting and Disclosure Act of 1959 (Landrum-Griffin).[25]

a. Landrum-Griffin was an outgrowth of the investigations of the McClellan Corruption Committee (technically, the Senate Select Committee on Improper Activities in the Labor or Management Field). The Act represents the first widespread involvement of the federal government in the regulation of internal operations of unions.

b. While Landrum-Griffin made some changes in Taft-Hartley, particularly in the restrictions of union use of secondary pressure, it is most significant for its regulation of internal union activities.

1) The Act created the "Bill of Rights" for union members that specified minimum standards for the rights of individuals to participate in their unions.

2) The law also created reporting requirements for union officers and defined the fiduciary responsibilities of those officers.

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[25] 73 Stat. 519 (1959), 29 USCA § 401 *et seq*.

3) Other provisions restricted the imposition of trusteeships on subordinate bodies and regulated union election procedures.

4) The law also attempted to prevent Communist Party members and individuals convicted of certain crimes from holding union office.

3. While there has been no major revision in federal collective bargaining law for the general private sector since 1959, there are a number of federal laws with significant implications for collective bargaining for distinct classifications of workers.

   a. The Postal Reorganization Act of 1970[26] brought the U.S. Postal Service under the jurisdiction of the NLRB for enforcement purposes. This law was enacted after a major strike by postal workers in 1969.

   b. The Health Care Amendments of 1974[27] expanded coverage of Taft-Hartley to include non-profit, private health care facilities.

   c. The Civil Service Reform Act of 1978[28] created a regulatory structure for collective bargaining for federal employees. Prior to the enactment of this law, federal employee collective bargaining was regulated by a series of Executive Orders, the first of which was issued by President Kennedy in 1961.

4. Other federal laws have been enacted since 1959 that have a significant impact on the collective bargaining process, even though these laws are not technically labor relations laws.

   a. Title VII of the Civil Rights Act of 1964[29] and the Equal Employment Opportunities Act of 1972[30] are an important body of federal law regulating discriminatory practices of employers and unions.

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[26] 84 Stat. 719 (1970).

[27] 88 Stat. 395 (1974).

[28] 92 Stat. 1111 (1978).

[29] 78 Stat. 241 (1964). Title VII, as amended, is found at 42 USCA § 2000.

[30] 86 Stat. 103 (1972).

b. The Occupational Safety and Health Act of 1970 (OSHA)[31] and other health and safety legislation affect negotiation of conditions of work.

c. The Employee Retirement Income Security Act of 1972 (ERISA)[32] is the basic federal law regulating private pension benefit plans.

5. Public sector employers and employees at the state and local level are excluded from the coverage of federal collective bargaining laws. In addition, there are several other categories of employers or employees, most notably the agricultural industry, which are not covered by the Taft-Hartley Act. To the extent that the federal government does not exert jurisdiction over these industries, states are permitted to enact and enforce laws regulating the collective bargaining process, consistent with federal Constitutional standards.

   a. Most states provide some degree of regulation of state and local employment relations through the use of a state collective bargaining law similar in structure and enforcement to the National Labor Relations Act. However, the variety of limitations on the rights of public sector workers is substantial. For example, in some states, there is no recognition of the basic right to organize while in other states there is a structure for comprehensive collective bargaining including at least a limited right to strike.

   b. A few states have exerted jurisdiction over the labor relations of employers excluded from federal law. For example, Wisconsin has a state employment relations act covering small employers and California has an agricultural labor relations act.

[31] 84 Stat. 1590 (1970).

[32] 88 Stat. 829 (1974).