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Hard Times for Labor

Abner J. Mikva*†

The National Labor Relations Act (NLRA) was passed in 1935 for the purpose of promoting stability in labor relationships. In this Article, Judge Mikva posits that the economic environment has changed so substantially over the past fifty years that the NLRA cannot fully address the needs of labor nor promote stability in labor relations. Judge Mikva suggests that the time has come to amend the NLRA to reflect the conditions of labor in the current environment.

Upon learning the secret behind the curtain, Dorothy accuses the Wizard of Oz of being “a very bad man.” The Wizard replies that he is not a bad man, just a very bad wizard. Like Dorothy, many of us blame the Wagner Act1 for failing to live up to our exaggerated expectations of a panacea for labor’s troubles. Despite our best hopes, the Act has not succeeded in transforming the American workplace into a democratic Emerald City. But the Act is not a bad law; it is just a bad wizard.

The Wagner Act was enacted in 1935 in the midst of labor upheaval and economic malaise.2 Employer opposition to unions and collective bargaining was seen as the cause of these evils; a broad declaration of the rights of workers to organize, bargain collectively, and seek higher wages was seen as the cure. This past half-century has been witness to a massive reduction in the kind of industrial warfare that gave rise to the Wagner Act. Workers in unionized industries today generally enjoy a higher standard of living and security than did their nonunionized counterparts of fifty years ago.3

Yet the Act has not brought satisfaction to the work force nor has it come close to achieving its stated goals. Believing that the Act is irrelevant,4 labor leaders today call for its abandonment,5 while workers in newly-emerging industries turn away from collective action.6 Unions have not become the stable partner in the growth of a healthy economy—unemployment is high; jobs are scarce.

Employer resistance to unions, while no longer manifested by the familiar gray of Pinkerton uniforms, is rampant.7 Businesses move with alarming regularity to nonunionized climates, leaving a trail of unem-

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* Judge, U.S. Court of Appeals for the District of Columbia Circuit. J.D., University of Chicago Law School, 1951.
† Numbered citations appear following this article. They cite only to authority and are not essential to comprehension of the text. See Mikva, Goodbye to Footnotes, U. COLO. L. REV. (forthcoming 1985).
ployed behind. And the National Labor Relations Board, considered by the drafters of the Wagner Act to be the crucial component in the protection of workers' rights, is less and less frequently involved in the action: filings at the Board are down, as is any evidence of Board understanding of or commitment to the goals of a stable labor policy. Indeed, one need only look to the cities of Youngstown, Ohio, or Ontario, California or Lackawanna, New York to recognize that the goals of the Wagner Act elude this country more than ever.

How is it that the Wagner Act has fallen so short of its stated goals? First, in establishing the basic contours of American trade unionism, the drafters of the Wagner Act looked to the world of 1935. During the past fifty years, a technological revolution has changed both the operation and structure of industry. Yet the Wagner Act's vision of the contours of the labor movement has remained intact. Rather than providing labor with the necessary tools to advance in society, the Wagner Act effectively prohibits labor from addressing the critical issues. Second, the Wagner Act enhanced labor's bargaining power so that labor and management could sit down to negotiate as equals. The duty to bargain prevents management from ignoring labor's demands, but it cannot create that which workers need most—jobs. Nor does the Act speak to the vast numbers of workers who by choice or legislation are not members of a labor union. In short, the Wagner Act has not provided a flexible charter that is adaptable to changing times and needs. The National Labor Relations Act, even as amended, has not shown the Constitution-like resiliency of a document for the ages. Its time came and went in short season.

The Wagner Act moved the industrial battleground from the factory gates to the bargaining table. Initially, as labor sought input into decisions concerning wages, hours of work and conditions in the shop, management embarked on a systematic and sometimes violent anti-union campaign. In the years following enactment of the Wagner Act, the number of strikes increased dramatically, as labor exercised its newly protected rights. However, once the Board and courts began to enforce the Act in earnest, collective bargaining agreements began to reflect labor's ability to achieve at the bargaining table.

Bargaining worked in the 1930's because management fully controlled and was required to bargain over labor's primary concerns. Hard bargaining could result in contracts that incorporated labor's needs and desires. Also, the Act addressed most of the relevant universe of wage earners. Management of the 1930's could not turn to other labor markets to achieve lower costs, and it was faced with competition primarily from businesses operating under identical constraints. Short of continued massive resistance to the Act, management had no choice but
to grant labor some of what it sought and to live with the resulting collective bargaining agreement.

The structure of the economy and business has hardly remained static in the years since the Wagner Act was enacted. New technology and forms of commerce are emerging. Instead of problems like the speed of the line, labor is now faced with the problems of mechanization, diversified holding companies, and foreign production and trade. The climate today permits an unprecedented movement of capital which can translate union success at the bargaining table into loss of jobs. The universe of manufacturing today has expanded well beyond the United States, well beyond the reach of an Act that is limited to regulating internal competition.

These changes in the business structure and the economy have produced no concomitant shift in the primary law governing labor. Management is not required to bargain about today's critical issues, nor are those issues even within management's control. Moreover, management has new options that eviscerate the Act's commitment to equality of bargaining power—it can leave, subcontract, or change its ownership structure to avoid the requirements of the Act and evade its collective bargaining commitments. If management is part of a diversified conglomerate, it can leave the industry altogether, frequently encouraged by tax and trade laws that seem antithetical to a stable labor environment. No amount of hard bargaining by the most powerful union can achieve a collective bargaining agreement that maintains jobs in the face of runaway shops and imports from price-competitive countries.

Where are the solutions? Most important, it is time to recognize the limited reach of the Wagner Act. The Act has been viewed by workers, unions, management, and government as labor's panacea. The Act's institution of free collective bargaining and the ordering of the day-to-day relationships in the shop are invaluable contributions. But the Act cannot today, nor could it ever, provide solutions to all of labor's woes. By recognizing which of labor's problems the Act can effectively address and which are beyond its ken, we can begin to devise contemporary solutions.

The realities of the eighties call for new approaches and different tools. Perhaps in the course of organizing service industries, units of government, and employers with flexible responses to unionization, labor needs more and different kinds of protection than the fifty year old Act presently accords. The present contours of the Act contemplate a smokestack industry universe—large, privately-owned factories where workers stand at assembly lines and produce things. The organizing problems of quasi-public hospitals and public sanitation workers fit awkwardly, at best, into this model. Size and structure requirements that
make sense in Bethlehem, Pennsylvania seem out of place in the Silicon Valley.

The tools we give to labor must rise to the level of the new tools developed by and for management. Employers today need not turn to Pinkertons or hired thugs to resist unionization. They can counter organizing efforts with far more sophisticated efforts. Frequently, management is the beneficiary of local government support and inducements from industrial development boards and state right-to-works laws. In the face of this government assistance, the union organizer appears almost “unpatriotic.”17 Inexplicably, the public interest today seems to be at odds with the concept of an employed and decently paid citizenry.

Highly refined public relations campaigns based on false information can be as devastating to organizing efforts today as the violence that surrounded organizing campaigns fifty years ago. Yet the recent trend in the Board and the courts has been to introduce an electoral free market into organizing campaigns, permitting misleading and inflammatory management speech to go unpunished.18 Dismissals of vocal employees asserting collective rights, no matter how cloaked, present an unequivocal message to employees: “Union organization is at the risk of your jobs.” Unless the mandate of the Act to encourage union organization is read to prohibit these modern day responses of employers, the goals of the Act can never be achieved.

The failures in organizing the unorganized are only part of labor’s tale of woe. The present labor policy makes it impossible for workers to maintain their current level of achievements.19 Congress rejected efforts to include in the Wagner Act a laundry list of required topics of bargaining. Instead, the Act requires bargaining over “wages, hours and other terms and conditions of employment.”20 This broad language was intended to provide the flexibility required for the Act to remain relevant over time. Unfortunately, flexibility gave way to rigidity as the Board and the courts filled in the Act’s open questions with values from other bodies of law. Property law trumped union interests in questions of union access to worksites, sitdown strikes, line slowdowns, and business decisions that impact directly upon workers.

The notion of management control over its property gave rise to the distinction between those subjects of bargaining that are mandatory and those that are permissive.21 Mandatory subjects, those deemed to fall within the language of “wages, hours and other terms and conditions of employment,” must be discussed to resolution or to impasse.22 Permissive subjects, which fall outside of the statutory mandate, may be the topic of bargaining, but neither side may bargain to impasse over such subjects, nor may they invoke economic weapons or call on the power of the state to compel bargaining.23 Moreover, employers are under no
duty to bargain over changes relating to permissive subjects effected during the term of an agreement, leaving management free to undercut whatever bargain the union was able to achieve.

The Supreme Court rested this seemingly small, but truly fundamental distinction on a theory of management prerogatives, believing that subjecting "managerial decisions . . . which lie at the core of entrepreneurial control" would threaten the freedoms that the Wagner Act seeks to ensure. Certainly the drafters of the Wagner Act were concerned about making unwarranted incursions into management's right to control the operation and growth of its business. The Wagner Act was intended to apply a marketplace model to labor-management relations, not to displace capitalism. However, even the duty to bargain over mandatory subjects was a significant incursion on management prerogatives, one that Congress was willing to make because it was seen as vital to protecting labor in the 1930's. But, as technology and forms of business changed, the tools used to aid labor did not. Justice Stewart recognized this dilemma:

[D]ecisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment . . . [T]hose management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly on employment security should be excluded from [mandatory bargaining].

I am fully aware that in this era of automation and onrushing technological change, no problems in the domestic economy are of greater concern than those involving job security and employment stability. Because of the potentially cruel impact upon the lives and fortunes of the working men and women of the Nation, these problems have understandably engaged the solicitous attention of government, of responsible private business, and particularly of organized labor. It is possible that in meeting these problems Congress may eventually decide to give organized labor or government a far heavier hand in controlling what until now have been considered the prerogatives of private business management.

That hoped for eventuality has not occurred. The mandatory/permissive distinction embraces such topics as partial plant closings, automation and changes in technology. The massive changes wrought during the past fifty years make these vital issues to working people. But the Wagner Act provides no recourse for unions seeking input into these issues. Management can walk away from the bargaining table when unions attempt to negotiate over these issues, and the Act prohibits unions from responding with economic weapons. The theory of the Act, rendering management and labor equals at the bargaining table, does not mandate tying labor's hands. The language of the Act, imposing a duty to bargain over "terms and conditions of employment," is
sufficiently broad to permit labor input on the issues of greatest import. Indeed, the imposition of this duty constitutes strong precedent for worker input into business decisions that affect them; it is a recognition by the government that business owes a duty to parties other than its stockholders.

To make the Act work again, "terms and conditions" and the nature of an enterprise's duty to its workers must be examined in light of the realities of the eighties. The relocation of a shop, the use of robots in automobile factories or automatic elevators in lieu of manually-operated ones are today's critical "conditions of employment." These may not have been in labor's mind in 1935, but in 1985 they are issues that labor desperately needs to broach at the bargaining table. These issues determine whether union members will have jobs to go to when they wake up each morning, whether they will have paychecks to bring home to their families at the end of the week.

Admittedly, wholesale examination of the balance struck in the Wagner Act is a massive task. The Act has been amended only twice before; each amendment retained the essential structure of American trade unionism. The Taft-Hartley amendments were motivated by a belief that the Act weighed unfairly on the side of labor. The amendments sought to reestablish equilibrium. That need has arisen again, but it is not clear that Congress will make the move. Since the Landrum-Griffin Act, the second and last set of amendments to the Wagner Act, there appears to be an unwritten, unspoken agreement between management and labor to leave well enough alone. But well enough is no longer good enough. Increasing unemployment and the flight of jobs to non-unionized parts of the country and overseas mean that it is time to end trepidation and to adjust the Wagner Act vision of trade unionism.

The Act has been a false wizard because, while professing to be the answer to all the evils confronting labor, it speaks only to the organized. At no time, for a variety of reasons both historical and personal, has the unionized percentage of the work force exceeded thirty-five percent. The Act addresses only a limited category of problems that can be resolved in negotiations between private parties, intentionally omitting substantive requirements and circumscribing government's role in the collective bargaining process. In spite of these clear limitations, we cling to the myth that not only is the Act a good wizard, it is the only wizard. We must explicitly recognize that the Wagner Act is not the magna carta for the majority of working people in this country.

In the past fifty years, while maintaining the myth that the Wagner Act is the single tool necessary for protecting workers, Congress has enacted a host of legislation that addresses workers, nonorganized and organized alike. The Fair Labor Standards Act, the Occupational Safety
and Health Act,\textsuperscript{31} and the Employee Retirement and Income Security Act,\textsuperscript{32} are but a few of the statutes that operate wholly outside of the Wagner Act and its collective bargaining framework to provide protections for workers. These statutes, unlike the Act, set forth not only goals and procedures, but also specific substantive outcomes to be achieved. The subjects of this category of legislation, which includes minimum wage, safety, and pensions, are all topics susceptible to resolution through collective bargaining. Indeed, many of these statutes address issues that fall within the scope of mandatory subjects of bargaining. Still, Congress found specific legislation necessary, recognizing that the Wagner Act's structure was not designed to answer all of the issues confronting labor.

Perhaps the clearest example of this kind of legislation is the Fair Labor Standards Act.\textsuperscript{33} Passed in 1938, the FLSA established minimum wage and maximum hours for most workers. In drafting the FLSA, Congress acknowledged that not only were nonunionized employees unlikely to achieve the minimum income and maximum hours of work necessary to sustain an acceptable quality of life,\textsuperscript{34} but also that organized workers required protections beyond those provided through collective bargaining to achieve an acceptable quality of life. Just three years after the enactment of the Wagner Act, Congress acknowledged that its radical format did not have unlimited utility, that there were some subjects that necessitated government regulation of and interference into substance.

Safety and health legislation, pension legislation, employment opportunity, and antidiscrimination legislation—all these protect all workers and all embody a recognition that collective bargaining cannot necessarily produce a socially acceptable result. These statutes raise concerns so fundamental that they must be extended to nonorganized as well as organized workers and are so vital that Congress will not leave them to the vagaries of collective bargaining. Moreover, some of labor's concerns require national solutions, either because they are problems that cannot be resolved by a single employer or because there is a strong public interest that cannot be accounted for in the collective bargaining context. The collective bargaining agreement is between certain workers and their employers. The Act did not allocate a voice in this process to the public interest.

Similarly, collective bargaining cannot provide a solution to foreign competition nor to technological innovations that eliminate the need for human workers. Jobs and job security, like safety and health and minimum wage, require national commitment to produce real solutions. Some unions in declining industries have negotiated collective bargaining agreements that provide job security, while other unions have success-
fully lobbied Congress for job protection in the face of technological obsolescence. But these efforts simply pit worker against worker, the employed against the unemployed, the old against the young. Instead of solutions that carve out protected groups, we need a national commitment to providing jobs at a living wage and under safe conditions to all Americans. In declaring that labor is not a commodity in the Clayton Act, Congress expressed such a commitment. It is time to revisit and breathe life into that promise.

Full employment is not a pipe dream. In Japan, for example, the government starts from the view that investment in humans is certainly as critical as capital investment. Japan builds on the notion that workers are critical members of their enterprise and that a gain to the worker is a gain to the enterprise. Japan has instituted a system of lifetime employment. Cultural differences between Japan and the United States are not insurmountable obstacles to importing lifetime employment to this country. Americans have long demonstrated a unique ability to translate foreign institutions into truly American ones, retaining the best of the foreign origins while altering the basic structure to reflect American values and needs. Trade unionism itself is one such example. Through the Wagner Act, Congress transformed European radical, syndicalist and massively political union concepts into a uniquely American brand of trade unionism.

In Japan, employers and workers alike consider that employment by the same firm should begin at the time one leaves school and last until the age-limit is reached. This system of lifetime employment is related to the role Japanese society expects industrial enterprises to play: besides a productive function, they must also fulfill a social one. American workers in most large U.S. companies remain with those companies for most of their working lives, unless layoffs or plant closings intervene. This practice stems from both cultural roots and from the practice of seniority. Rather than maintaining the notion that such long-term employees are merely hourly-workers, a commitment to preserving employment can positively alter the workplace—companies that are loyal to their employees generally enjoy the benefit of loyal employees. And, the notion of workplace as social universe prevails in American, as well as Japanese factories.

An American version of lifetime employment would serve not only unions and their workers but also society. The costs of job loss to this country are immense: “For every one percentage point rise in unemployment, 4.3% more men and 2.3% more women enter mental hospitals, 4.1% more people commit suicide; 5.7% more are murdered; 4% more wind up in state prisons; and over a six-year period, 1.9% more people die from heart disease, cirrhosis of the liver, and other stress-related ail-
ments." The 1970 recession, which caused a 1.4% rise in joblessness, has been linked, at least by one expert, to 51,570 deaths between 1970 and 1975. The needs of working people are denigrated by categorizing them as simply a "special interest group" or the "powerful labor union." The interests of workers are the interests of America. And in a country where less than twenty-five percent of the workforce is unionized, labor unions cannot give adequate voice to all of America's workers.

Institutionalizing lifetime security is a major move, but perhaps no greater than the implementation of Social Security, a program that reflects many of the same concerns that give rise to the lifetime system in Japan. There are lesser steps that may be taken, but these will only mitigate, not solve, the job problems confronting this country today. Some countries, notably Canada in recent years, respond to plant closings by implementing a voluntary program under government auspices that seeks to find new jobs for laid off workers, as well as to provide retraining. The Canadian emphasis is on helping workers find new jobs as expeditiously as possible, and is seen as an alternative to subsidizing extended unemployment. But Canada's approach does not address the hard question. The significant problem for workers confronted with permanent layoffs is not a lack of information about available jobs, but simply a lack of jobs. Job creation, not glorified want ads, are necessary. The Canadian commitment to retraining is also important, and can and has been implemented in this country. But this too is only a partial solution. Retraining is appropriate for some workers, but what kind of retraining is appropriate for a furloughed fifty-two year old steelworker who has spent his entire life in one mill?

Pay equity is another controversy that collective bargaining cannot effectively reach. The jobs traditionally filled by women provide salaries far lower than jobs that historically are ascribed to men. Traditional women's jobs are generally not highly unionized. Even as union strength increases, management resistance to a restructuring of wage rates is unlikely to be overcome; individual employers do not want to put themselves at a competitive disadvantage by raising pay scales in these jobs. The employer response has been to threaten mass layoffs if pay equity efforts are successful at the bargaining table. This issue bears all the attributes of one requiring a national solution.

There are other areas that need to be addressed. The tax laws ought to be harmonious with a sound labor policy, rather than short-circuiting it. We need an effective vocational education policy for the most tragic and expensive piece of America's unemployment problem—the young who have never been employed. We need an early retirement policy in the private sector whereby social security laws, pensions laws and tax
laws take account of the fifty and sixty-year olds who have become supernumeraries in the workforce.

Mostly, the policymakers need to realize that in a country that proclaims the work ethic as one of its mores, a national labor policy must provide a true right to work by guaranteeing jobs. That is not a utopian fancy; it is essential to a stable economy. The Wagner Act is old and moribund. We need a new wizard and soon.

5. Note the testimony of union president William Wynn of the United Food and Commercial Workers, before the House Labor Subcommittee on Labor-Management Relations, reported in Daily Lab. Rep. (BNA), at A-1 (June 26, 1984). Wynn stated that because his union cannot rely on the NLRB for justice, we'll get it ourselves . . . in the streets if necessary.” He charged, “Labor-management relations is back in the jungle.”
6. N. Y. Times, supra note 4, § 1, at 8, col. 2.
8. Guzick, supra note 7, at 424-25. See also Rones, Moving to the Sun: Regional Job Growth, 1968-1978, MONTHLY LAB. REV. 12, 14 (Mar. 1980). Rones found that between 1968 and 1978 manufacturing employment fell by 800,000 in the Northeast, while increasing by 900,000 in the South and 300,000 in the West. He suggests, however, that not all of the Southern job increase is due to the relocation of Northern firms. Much of the increase can also be attributed to the creation or expansion of Southern firms.
9. N. Y. Times, supra note 4, § 1, at 8, col. 5.
11. R. Gorman, supra note 2, at 1-5.
12. Id. at 5.
14. N. Y. Times, supra note 4, § 1, at 8, col. 4-5.
16. N. Y. Times, supra note 4, 2, at 8, col. 1.
22. R. Gorman, supra note 2, at 445-47.
23. Id. at 496-97.
33. See 81 Cong. Rec. 4960-61. (1937)
35. Permanent employment, or shushin koyo, guarantees employment until around age fifty-five to sixty. The system is a matter of custom, not law, and is generally adhered to by the larger companies. (Japan’s Labor Standard Law provides a worker with thirty days notice.) Women, now approximately 40 percent of the Japanese labor force, are generally not included in the permanent employment system. See Gould, Labor Law in Japan and the United States; A comparative Perspective, 6 Indus. Rel. L.J. 1, 12-13 (1984).
37. Id. at 7-8.
39. Id.
40. This figure reflects 1980 data, the most recent available. See Handbook of Labor Statistics, supra note 29, at 12.
41. Batt, supra note 38, at 607.
42. In 1939, the median annual income of full-time women workers was 58 percent of the median annual income of full-time male workers. In 1981, the latest year for which figures are available, the comparative salaries of women had only increased by one percent, or to 59 percent of the median male income. C. Norwood, The Female-Male Earnings Issues, Bureau of Labor Statistics, U.S. Dept. of Labor Report No. 673, at 2 (Sept. 1982).