Did the NLRB ever have a '*Golden Age'?*

H-LABOR Discussion, summer 1994.

This contribution resulted from a discussion initiated by Seth Wigderson, H-LABOR moderator, about the NLRB's effectiveness and political will. Eventually it came to include Mel Dubofsky, Roger Horowitz, Sandy Jacoby, and Chris Tomlins (and is archived by H-NET at this URL in April 1999). I jumped in because I was even then drafting the 1930s chapters of my ***Bloodless Victories*** book, and quite engaged with the subject.

H.J. Harris, April 1999.

I've just been working through NLRB case-files myself, and think that one of the many useful things coming out of this discussion is the need to keep the NLRB's impact/effectiveness in perspective-- Bob Zieger's work on the Pulp & Paper Workers in Covington, KY, Dan Nelson's work on the Rubber Workers in Gadsden, and Hodges' book on the Southern Cotton Textile Industry (just to name 3 that spring to mind, largely because the offprints or books are staring at me) should remind us that the ***utility*** even of a ***favorable*** NLRB ruling, even at the high point of its pro-CIO / pro-labor activism, and before the judicial/political "corrections" of 1938/9- that Mel and Chris emphasize, was often very limited.

Thus, too great attention to the ***declaration*** of law and public policy by the Board may be a bit misleading for simple barefoot labor historians. One of the problems, though, is that the Board files may be the fullest (and certainly most accessible) sources one has available. ***Especially*** in cases where delay and employer obstruction diluted or negated the impact of an NLRB ruling, there may be almost no other trace of a failed organizing drive. If the local press (general and labor) doesn't comment--or, in the latter case, maybe doesn't exist in a small town or low union density state--one may be stuck for other information, esp. about what happened ***after*** a ruling.

Here's a brief digest as an example: Jan. 1936 "my" Metal Manufacturers Association provokes 3 bitter strikes to destroy the union strongholds within its territory, the Phila. metal trades--c.50/60,000 workers and, through the end of 1935, just ***one*** union contract (at Philco, though, the biggest metal trades employer in the city, and biggest radio company in the US, so it's an important exception!!) There's a federal labor union with 100% membership at a mid-sized (c.200 workers) agricultural equipment firm, some informal closed shops (for molders only) at 7 small foundries, some informal union shops at 7 tool-and-die jobbers organized by James Matles's Machine, Tool & Foundry Workers. (Hence my earlier query). That, plus the much larger FLU at Westinghouse's South Philly works (c.3,000 employees) whose status at the time is unclear, represented the extent of post-NRA labor organization.

Anyway, my guys decide the time is ripe to get rid of the exceptions, make a few examples. The NIRA's gone, the Wagner Act isn't taken seriously, there's optimism about a Roosevelt defeat in '36, there's ample unemployment, it's winter, the MTFWU's merger talks with the IAM are getting nowhere, but if they get ***some***where it'll be more formidable...

What gets into the public record about this? (1) The tool & die shops: zero in NLRB--not in

interstate commerce. US Conciliation Service files, though, are a goldmine. (2) The ag. implement works--S.L. Allen & Co. becomes Case No. C-60, 1 NLRB 714-29. ***As soon as*** the local AFL organizer realizes there's going to be an attempt to break the strike (strikers had been sent individual dismissal letters, foremen had been attempting persuasion) he files a ULP charge-- refusal to bargain / coercion etc. This is even before active strikebreaking begins.

The NLRB, then, moves ***quickly***. Hearings are ordered within days of the company's response (which mostly consists of the "boilerplate brief"--formalistic constitutional argument--plus denials of the stated "facts"). They take place while the wounds are still fresh on witnesses' faces (the strikebreaking turned bloody, with imported NMTA thugs).
The result: TOTAL VICTORY-- the company's ordered to dismiss strikebreakers, reinstate strikers-- all who can't be placed ***immediately*** to be on a preferential list.

So the timetable is: mid-Jan. 1936 strike; early Feb. complaint AND strikebreaking begins; early March hearing; mid-May ruling. And, the last detail, mid-June the strike collapses and about a third of the strikers are taken back "as individuals."

Then, nothing--exc. fruitless attempts by the USCS to rescue something from a complete disaster. For obvious reasons that Jim Gross, Peter Irons have told us all about, neither the NLRB nor the AFL made any attempt to have the order enforced--the former because of its legal strategy of concentrating on a handful of picked, carefully-managed test cases; the latter because it would have been a waste of time and money until after ***Jones & Laughlin***, and in any case who's going to give a damn about a washed-up FLU?

8 May 1937, however, the former shop committee (none rehired) request that the company restore recognition / recommence bargaining, in line with the year-old order. (After ***J&L***, that is). They get the predictable dusty answer. They go to the Board. The Board petitions for enforcement in the IIId Circuit in September '37, i.e. when the economy's on the way down the tubes.

In its response, the company states: that of the 165 production workers it employed in Jan. 36,

"5 were night watchmen, non producers who did not strike; 7 have died; 65 have been reinstated; 48 ... have obtained regular and substantially equivalent employment elsewhere; 15 failed to reapply for work; 19 committed violence against persons and/or property in carrying on the strike; only 7 of these, however, have been refused re-employment solely on this ground; 15 are unemployable by reason of age and bad health, for which reason(s) their ability to work would not justify their employment or retention. Of this number, 4 are now pensioners. 4 are unemployed."

Finally, on 12 Jan. 1938 the issue's settled by a consent decree. The company's ordered to cease and desist from its ULPs, to bargain collectively, to post notices, and to offer re-employment ONLY to the 4 men to whom it had no objection. It's clear that the order to bargain is a bit of a formality; reemployment, promise to cease & desist, and posting notices are the heart of the decree. There's not actually a union left with which to bargain.

And that's almost the end of the story. The local labor press is unhelpful about implementation, if any. AFL records on FLUs don't seem to be much better. NLRB records end with the decree. All

that I've found elsewhere is a complaint to the USCS in 1940 by a guy who wasn't one of the lucky 4 but claimed to have committed no violence, etc.

So what do we make of this? Was "justice" finally done? Or, on a small, failed strike, and for a union gone cold in the ground, was the NLRB, even in early '38, realistically unprepared to waste much energy? Prepared to settle for formal compliance by the employer / reemployment of the 4 to whom it had no objections, to save administrative / legal resources? This is my reading, at any rate.

Don't get me wrong: I'm not trying to marginalize the NLRB. Availability of the NLRB was absolutely central to the AFL's self-defense strategy during the strike; the Wagner Act affected the employer's behavior (e.g. bargaining to an impasse, keeping verbatim notes of session after fruitless session, and provoking a walkout, thinking that'd protect vs. accusation of Refusal to Bargain); and, ***AFTER*** the La Follette Committee's investigation of the MMA in Dec. 36-Jan. 37 (a clear response to the unenforceable NLRB order) and ***J&L***, individual employer and employer association behavior DID change in the direction of compliance / legality.

But if what we're interested in is e.g the role of `the state' in legitimizing the labor movement, or helping it on its way, we have to look a lot further than the NLRB and the fed. courts. In the cases I'm interested in, I'd give almost as much weight to the La Follette Committee as to the NLRB, maybe more--it had the power to intervene decisively, which the NLRB lacked, and it exercized it at a time that mattered (in other words, Auerbach was right), at the peak of the self-organization / sitdown era.
I'd want to give a few cheers for federal and state mediation services, too, playing a valuable supporting role (esp. in the many everyday conflict situations to which the NLRB did not apply, before or after ***J&L***) in assisting ***both*** parties to bargaining relationships to learn the rules of a new game, and esp. in getting one side (reluctant employers) to the table in the first place.

I'd want to count in the `local state' too--e.g. a Phila. Mayor (maverick Republican, La Guardia-esque) who set up a Labor Board with tripartite representation, but only incl. "responsible"/"liberal" employers, to take the place of the defunct Regional Labor Board... who, in the Allen strike, intervened personally with the company to try to get them to stay their hand... who ordered the Health & Fire Depts. to prevent the quartering of strikebreakers within the plant... who ordered the police to stop convoying strikebreakers, and to permit peaceful mass picketing... who made the Hosiery Workers' attorney his City Solicitor (with a large role in mediation)... who passed a city ordnance withdrawing licences from `detective agencies' employing ex-cons... who sent in the police to evict such strikebreakers from factories... who collaborated with the La Follette committee to expose `unacceptable' practices by local employers... who required the police to do nothing in the 1937 Exide sit-down, 7 weeks long, finally settled by his Labor Board on terms which included that the final vote on acceptance of a permanent agreement must be taken by the workers ***at their place of work*** so that they could resume the sit-down if they wanted. That's a whole lot of interventions, very immediate, very direct, their effects very tangible. No fancy doctrines at stake, just good ol' democratic political responsiveness in the Popular Front period. (Not that one normally thinks of the Pop. Front as including many Republicans...)

I wouldn't want to leave the state (qua Pennsylvania) out either-- e.g. in the Allen strike, after it becomes clear that the Philly cops aren't going to do their usual fine job, a company executive who's a Maj. in the Pa. National Guard attempts to convoy strikebreakers behind the protection of his uniform. A phonecall to Harrisburg--the Earle admin. is Pa.'s first Democratic one in God knows how long--stops that.

While the Wagner Act's fate is undecided, Pa.'s "little New deal" is being enacted, incl. restrictions on employment agencies dealing in strikebreakers... on carrying of arms by industrial police... on issuance of injunctions by state courts... and there's the "little Wagner act" too, reaching the parts which no-one at the time expected a federal law to be able to reach. More tangibly, there's unemployment insurance and relief policies-- e.g. granting strikers unemployment benefits, after 2x the normal waiting period, but with no questions asked... and local employment service policy-- refusing to make referrals (or to require an unemployed person to take an available job at) any company that (a) requires workers to join a company union or refrain from joining a bona fide labor organization... (b) has a strike on... (c) doesn't pay prevailing wages [=union rates, by normal Davis-Bacon standards].

So what I'm impressed by, looking at the 30s, is (a) the extraordinary variety of `packages' of local and state responses to labor on offer, depending on the jurisdiction, and (b) the development, in at least some jurisdictions, of extraordinarily useful, practical, pro-labor commitments, not very durable (Pa.'s began to be scaled back after 1938 too) but complementing fed. policy in important ways.

If we're interested in `the law' as something which legitimizes & adds confidence to the labor movement, I don't think we can afford to ignore these sorts of undramatic public policy developments. If we're interested in it as something which affects behavior immediately and concretely, I think we've even less justification to concentrate as much as we have over the past dozen years or so on the NLRB alone. The sort of superb politico-administrative history (and, in Chris's case, doctrinal exegesis) that Chris and James Gross or Peter Irons have carried out has helped us understand the development of the Board as an institution, and its policies. But I don't think that any further concentration, critical or otherwise, on the Board alone will get us very far with explaining what happened, what changed, in and for the wider labor movement at the time.

Gone on too long, but a couple more examples:

--in the triumph of the UE at RCA in Camden (and if you want to appreciate the importance of the local state, cf. Philly and Camden, Pa. & NJ), the NLRB ruling in the '36 representation election mattered. [The Board certified the UE as excl. b.a. despite the fact that it only got 3,000 votes out of c.10,000 eligible-- because it got all but about 60 of the votes cast. Company & company union strategy had been to boycott the poll, thinking thereby to invalidate it]. That gave the UE cause confidence and legitimacy-- but to win recognition took months of "industrial guerrilla warfare" (Matles) and hammering away at the loyalty of company union members, often on a one-to-one basis.
And there's a great story in ***People's Press*** about a Democrat election rally in Phila. [which registered an enormous increase in electoral participation 1932-36, and a phenomenal REP > DEM swing] where the RCA company union contingent in the parade suddenly start ripping off their green badges in an apparently-spontaneous realisation that one can't be ***both*** a pro-New

Deal Democrat ***and*** a company union member at the same time. So our story about labor and politics in the New Deal has to include the mobilizing effects of democratic/Democratic electoral politics, too.

Finally, after ***J&L*** the company sees sense, recognizes UE, starts negotiating. How big a % of the behavioral change do we trace back to the NLRB ruling?

--the Westinghouse S. Phila. local wins official recognition in '37 in a consent election, but that merely formalizes a status that's well established on the ground. As people may know, Westinghouse held off from signing a contract, nationally or locally, until after a pathbreaking NLRB case in 1940 deciding that this was required to fulfil the duty to bargain. Does that mean there was no bargaining from '37 to '40? Like hell it does. There's everything except a written contract, and UE pulls frequent what it calls `disciplinary' actions when the company violates its conception of their unwritten agreement.

--the UE loses its first representation election in April '38 at the Phila. GE plant. No evidence of employer ULPs-- rather, a failed organizing attempt. Matles recognizes the errors afterwards: attempt to organize the plant from the outside, because there's actually a deal of loyalty to the ex-company union, insecurity about change during the recession, burgeoning suspicion about UE because of the Communist issue. So, lacking an organization inside the plant, and under pressure from the `independents' [who sprung the representation election on them], the UE attempts to use the election campaign to win members over. Fails. Matles recognizes: the purpose of a representation election is not to win support, it's to impress the employer with the support you've already got. If you're not established within the shop, you might as well not bother.

In a sense, the NLRB is involved in all three cases, all important ones too-- RCA with up to 12K employees... Westinghouse 3-4... GE 2-3, and the failure to win recognition there was a big obstacle to UE's claim for corp.-wide bargaining. But in "telling stories" about them, and explaining what's going on on the ground, I think it's a bit marginal as compared with the other things I mentioned. (i.e. Too much legal history makes me start coming over all grass-roots and rank-and-file).

Just one more thought before closing. There's a GREAT case sitting for someone to anatomize (and, as I'm 4,000 miles away and moving on from this area I offer it for free). Heintz Mfg. Co., C-1316, decided 26 June 1940. There's a huge informal file, massive hearing transcipt. Very messy story-- an FLU at this c.700 employee metal press shop from Aug. 33... informal relationship, but quite good [tho few bargaining gains]... '37 in comes the UAW-CIO... consent election to resolve representation Q, which UAW wins 389:380... followed by a demand that FLU officers be sacked... followed by a sit-down and a long, violent strike, where the company (and its employees) seem to be caught in the inter-organizational crossfire... the strike fails [level of violence tests pro-labor commitments of city authorities past breaking point]... the CIO presence collapses... the FLU withers... then '39 there's the threat of another CIO push, and an independent organization is quickly established by straw bosses and disillusioned former CIO officers.
The NLRB officials started out ***certain*** that this was a clear ULP case, where the "Heintz

Employees Protective Association" was in effect a company union. They changed their minds through the proceedings, and the company won.

What interested me about the story was:

(1) the insights into factionalism & organizational rivalry within the labor movement, and its destructive effects in late 30s in this one small illustrative case;

(2) the demonstration (a la Hobsbawm) of how parties learned the "rules of the game." The VERY SAME attorneys who, fighting the '36-8 Allen case, had been dismissive toward the Board's processes and doctrines... insulting in their questioning of labor witnesses... Rush Limbaugh-like in dealing with Trial Examiner-- in '39 are courteous to everybody, well prepared, know the case law, know the ground on which they're fighting, are keen on establishing lawyer-to-lawyer relations with NLRB personnel.
The kind of detailed work Irons, Tomlins et al. have done on the Board has explained the situation and mind-set of the rule-makers. But an administrative / judicial process is affected by the behavior of the parties as well as the adjudicators. It struck me that it'd be interesting to look at the rapid progress of "Old Deal" lawyers up the learning-curve-- I've a gut feeling that a part of the increasing employer success-rate before the Board has to do with this, as well as with the manifold pressures upon the Board with which we're now all familiar.

(3) A question of language and culture. The legal point at issue concerned how far down the managerial hierarchy could one go and still assume that employees were acting as the company's agents. i.e. Was a straw boss a worker or a supervisor? Reading the transcript, I was ***convinced*** that what decided the matter in this case wasn't law or `facts,' it was the impression particular witnesses made on the Board's counsel and Trial Examiner. They just couldn't, in their tight-a****d educated way, conceive that a semi-literate Italian immigrant straw boss who "f****d" into the record (much Ivy Leaguey clearing of throats, polite laughter) actually could be a ***leader*** of his work group, associated in his own mind with the management of the company and its interests. The union case more or less collapsed when it became clear they were asking the lawyers to take this guy seriously as an agent for a company ploy-- they wrote the Employees' Protective Ass'n off as a ***genuine*** independent.

Anyway, there's more to it than that, but the Heintz case gave me one of my happiest days in Suitland and I recommend it to any grad. student on the Net looking for an interesting paper topic. Intersects with all kinds of questions, notably of course Nelson Lichtenstein's work on the sociology of auto and other industries' supervision.

On which point, how about the SWOC case at Baldwin Loco, C-491, also 1940? Any of you think, from reading all that stuff about SM (Scientific Management), that the ***inside contractor*** system was a quaint bit of c.19th primitivism on its way out even before Frederick W. Taylor did (or did not do) his first experiment? Well, think again. 91 days of hearings, lots of stuff about contractors, assistant contractors, working leaders... Which (maybe) gets us back to ***Yeshiva*** and when is an employee not an employee?
Early NLRB files, in other words, as other contributors have said, can make FANTASTICALLY good reading for the modern social historian.

Well, this is certainly a lot easier than trying to write for publication, and perhaps more useful

because of the way the Net can encourage swift debate. So, if you have read this far, I look forward to hearing from you.
