Buffalo Law Review

Volume 57
Number 3 *Symposium on James Atleson's Values and Assumptions in American Labor Law, A Twenty-Fifth Anniversary Retrospective*

Article 3

5-1-2009

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Thank you very much for the invitation to be here today. I'm really quite privileged to have been invited to participate in this twenty-fifth anniversary retrospective of James Atleson's *Values and Assumptions in American Labor Law*. And I am especially privileged to be in the company of such distinguished scholars, including my former colleague, [former Chairman of the National Labor Relations Board (NLRB)] Bill Gould.

This conference provides an opportunity to reexamine Professor Atleson's thesis through the lens of the Bush NLRB. Some days it feels as if I have been on the Board for a quarter of a century, so this event seems particularly fitting.

Professor Atleson wrote that pre-Wagner Act[1] values and assumptions, especially notions of private property, prerogatives of capital, and employee duties of loyalty and deference, helped to explain many court decisions, "[W]hich otherwise seemed odd, irrational or, at least, inconsistent with received wisdom."[2] I think it is fair to say that these same values and assumptions permeate the decisions of the Bush NLRB.

Certainly the output of the Bush NLRB reflects no shortage of decisions that are odd, irrational, or inconsistent with the received wisdom, and sometimes all three things at once. And these decisions reflect exactly the values and assumptions that Professor Atleson has identified, sometimes quite explicitly, suggesting, that the received wisdom, or the values, of the Wagner Act had little hold on the Bush NLRB

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† Member of the National Labor Relations Board. This is a transcript of remarks delivered on September 19, 2008, during the symposium marking the twenty-fifth anniversary of the publication of James B. Atleson's *Values and Assumptions in American Labor Law*, presented by the University at Buffalo Law School in conjunction with the Baldy Center for Law and Social Policy.

1. National Labor Relations Act, 29 U.S.C. § 151 (2006).

2. JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 10 (1983).

at all. In fact, the Board was not reluctant to turn back the clock.

At the same time, some of the cases of the Bush Board reveal a persistent conflict of values between the Wagner Act and other pieces of legislation. Early on, of course, we saw the Supreme Court deal with the conflict between labor law and maritime mutiny law, and, more recently, the 2002 *Hoffman Plastic* decision that dealt with the conflict between labor law and immigration law. But recent Board cases also highlight the tension between Wagner Act values and assumptions and those of post-Wagner Act legislation including the Taft-Hartley Act[3], and particularly its free choice and free speech provisions, and also with the individual rights legal regime that began in the 1960s.

The Board's recent cases also reveal a conflict between Wagner Act values and assumptions and the values and assumptions of so-called judicial conservatism. In short, I would say that labor law has been trumped by whatever happens to be in competition with it. This is what I call the first rule of statutory interpretation: the National Labor Relations Act always yields.

The immediate legacy of the Bush Board, of course, is that we are today a two-person board, and have been since January of this year [2008] when the Board went from five to two members. With all likelihood this will be the situation for the foreseeable future, until after a new president is elected and gets around to filling these vacancies. Had the Bush Board been more moderate in its decisions, had the dissenting opinions been less vocal, we likely would not be where we are today.

Critical to any understanding of the Board today is an appreciation of the controversy within the Board and about the Board during the Bush administration. The Board itself has been sharply split in virtually every one of its major decisions. The split has produced, in the form of dissenting opinions, a clearly articulated alternative view of what labor law should be, at least under the existing statute, and also a view of how the Bush Board has failed to uphold the values of the law. Surely fueled in part by the many dissenting opinions, the Bush Board became very controversial. This was demonstrated by a joint congressional hearing that was

3. 29 U.S.C. § 141 (2006).

held last December by the House and Senate labor committees, at which then-Chairman Battista and I were asked to testify. We were on the witness stand for two hours, and then a second panel of practitioners and one academic were also questioned about the Bush Board decisions, in particular focusing on what was called by organized labor "The September Massacre" or the group of cases at issue from September 2007. The controversy is also revealed in the Senate gridlock over filling vacancies at the Board, despite what is arguably a lack of a quorum.

The Bush Board has been very deeply divided, and the divisions have been wide-ranging: what the law is, what it should be, what policy choice should prevail. We've also disagreed about judicial philosophy and legal methodology.

We have differed on virtually everything: burden of proof, who has it, whether it's been met, what inferences are to be drawn from the facts, credibility resolutions. We have even differed over whether to grant extensions of time.

Let me start with the substantive differences, the competing views of the statute, and competing policy preferences. I think each of these divisions bears out Professor Atleson's theory. As I said, recent major cases, each with dissenting opinions, have marginalized statutory rights. Decisions of the Clinton Board that made moderate efforts to update the statute by dealing with statutory coverage and a variety of issues were overruled by the Bush Board. As I stated in testimony to Congress last December, virtually every policy choice of the Bush era impeded organizing, created obstacles to collective bargaining, or favored employer interests over worker rights.

Now I recognize that even in the best of times, with a Board that is willing to give a dynamic interpretation to the law, there are significant constraints on the Board. We have an aging statute; we deal with years of precedent; we operate in a hostile economic, political and judicial climate. So to some extent, no matter who is serving on the Board, we may be operating only on the margins of this statute. During the Clinton Board years, in a journal that Professor Rabin edited, two union lawyers wrote that Board decisions revealed a lack of consensus about the fundamental tenets of labor policy, and the "increasingly confined (indeed,

relatively insignificant) doctrinal terrain on which the conflict over U.S. labor policy is enacted."[4]

So, even in the best of times, we operate somewhat on the margins. Nonetheless, the Bush Board has made things worse. While any one of its decisions alone may not be cataclysmic in impact, when viewed together they certainly show a pattern of weakening the protections of the Act.

Let me outline what I am talking about. First of all, fewer workers have been afforded fewer rights. The Board has made it harder for contingent workers to organize, refusing to look at the changes in the nature of the employment relationship which today emphasize flexibility over the stability that was assumed when the statute was written. The Board has put new groups of workers, such as university graduate teaching assistants, outside the coverage of the law altogether, even if they meet the common law definition of employee. In doing that, the Board has ignored the changing economic realities of universities that make collective bargaining appropriate. The Board has held fast to rigid legal categories, rather than consider the real dependency on employers of many so-called independent contractors, who can and should be treated as statutory employees.

A decision that probably best captures what the Bush Board did is the *Oakwood* decision, which dealt with the definition of a supervisor under the Act[5]. The Board adopted a much broader definition of the statutory supervisory exclusion than it had to, by looking to dictionary definitions, in fact three different definitions. When the dissent pointed out that the decision could potentially exclude millions of people from the coverage of the law, the majority said that looking at the potential consequences was result-oriented.

At the same time, the Board has narrowed the scope of what is considered protected, concerted activity for mutual aid and protection under Section 7 of the Act, and it has cut back on the remedies available for workers whose narrowed rights are violated. The decisions of the Bush Board signaled that the right to join together to improve working

4. Jonathan P. Hiatt & Craig Becker, *Drift and Division on the Clinton NLRB*, 16 LAB. LAW. 103 (2000).

5. Oakwood Healthcare, Inc., 348 N.L.R.B. 37 (2006).

conditions, particularly in a non-union setting, may be purely illusory.

In case after case, the Board has found that employees' statutory rights must yield to countervailing business interests of all sorts, including private property rights, such as an employer's abstract property interest in a piece of scrap paper which is used to post a union meeting notice. Employee rights must yield to various managerial prerogatives and business justifications, for example, business justifications that were not even asserted by the employer for engaging in partial lockouts. Employee rights have been held to yield to notions of workplace decorum, and to employer free speech rights. There's clearly been a more *laissez faire* approach to regulating employer campaign activity, so that intimidating statements against unionization are typically seen as lawful expressions of free speech, rather than unlawful threats or coercion of employees exercising their right to engage in union activities without interference. On the other hand, where employees make statements, or engage in conduct, that is considered to exceed the rules of civility or decorum, those employees have been held to lose the protections of the Act.

Notable, in this analysis, is the Board's decision in the *Register Guard* case.[6] There the Board decided that an employer's e-mail system is a piece of property, just like a telephone or a bulletin board, and thus employers may completely prohibit their employees from using the e-mail system to communicate with each other about working conditions, even if they use the e-mail system for communicating with each other about business matters. This case I sometimes subtitle "The Act is Surely Dead," if the majority could not find a way to accommodate employees' rights to communicate with each other at the workplace through this new technology.

The Bush Board decisions have also revealed a *laissez faire* approach to bargaining, giving employers free rein to operate and make operational changes without the duty to engage in any kind of meaningful bargaining.

For the first time—and this is perhaps one of the more dramatic things that the Bush Board did—the Board explicitly stated that the freedom of choice guaranteed in

6. Guard Publ'g Co., 351 N.L.R.B. 70 (2007).

Section 7 of the Act (which is to say, in this case, the right to refrain from union activities) prevails in the statutory scheme over the policy to promote collective bargaining. The majority reasoned that the right to refrain is explicit in Section 7, but the policy to promote collective bargaining is just a general policy statement. To my knowledge this is the first time the Board has ever said that. (The only other place I found it was in a dissenting opinion by Chairman Dotson in the mid 1980s.) In so doing, the Board has presented its own dramatic policy decision as a simple matter of statutory interpretation. The majority's take on the relative strength of these statutory policies represents a break with tradition from the Board's past expression of statutory values. Indeed, the Chairman justified these decisions by saying that Taft-Hartley, a subsequent enactment, mandated this interpretation; that after Taft-Hartley, collective bargaining is no longer the essential policy of the Act. Historically, however, the Board has balanced these competing policies: the general policy to promote collective bargaining and the right to refrain.

But now, it seems, collective bargaining has receded as a national policy goal, and the right to refrain has assumed center stage. In turn, employee free choice has increasingly been construed to minimize the choice of employees who have selected union representation, and employers have been given greater freedom to vindicate their employees' choice by withdrawing recognition from unions. At the same time, the Board has erected obstacles for employers and unions who wish to enter into voluntary recognition agreements. In short, labor law has been turned inside out, limiting principles have been made the central focus of the Act, and the central policies have been turned aside.

The statutory goal of encouraging collective bargaining is now superseded by competing legal norms. To some extent, the Board is now following what the courts have done, leaning more heavily toward an individual rights focus, the norms of individual rights legislation, and giving greater precedence to the individual right to refrain.

Some might argue that what the Board has done is simply part of a larger legal trend. I think, however, that, taken together, what all these decisions suggest is an underlying discomfort with the concept of government regulation of business, particularly in the labor law arena, and a discomfort with the notion of collective action and the zeal that may accompany those efforts. These are, however,

the fundamental premises of this statute and so, in revealing this discomfort, it appears that the Board is uncomfortable with the role that it is supposed to play.

Besides our substantive differences, the Board has also been deeply divided over questions of judicial philosophy and legal methodology, how to approach the law and our cases. The Bush Board majority has invoked the doctrine of judicial conservatism to apply the statute strictly, to be unwilling to consider legislative history and other sources and instead looking to the dictionary. By engaging in a sterile debate over the meaning of words, they are surely guaranteeing the ossification of this statute. Their philosophy parallels what Justice Scalia said in the *Kentucky River* decision a few years ago, where he was examining the Board's interpretation of the supervisory exclusion.[7] Justice Scalia said the Board's policy goals were fine: to include as many people under the coverage of the Act as possible. But, he said, the problem is you can't get there through this statutory text.

The Board has also adopted a static approach to the law. It has been unwilling to adapt the law's doctrines to vastly changing social and economic conditions: the changing nature of the employment relationship, the changing nature of work, and the organization of work, shifting firm boundaries, vertical dis-integration of firms, and the general volatility of the business world. The decisions are formalistic without any real-world bearing. The Board during this period has moved backward, not forward, and not just by reversing Clinton era decisions. It has moved backward by failing to keep pace with the rapid changes in the nature of work and in the workplace. It has missed chance after chance to reinvigorate labor law for the twenty-first century.

I have argued that this philosophy of judicial conservatism, at an administrative agency in particular, is an abdication of responsibility. Administrative agencies are supposed to adapt their rules and doctrines in light of changed circumstance and in light of experience. What judicial conservatism does is to shift the focus from practical and policy considerations—what's going on in the workplace and

7. NLRB v. Ky. River Cmty. Care, Inc., 532 U.S. 706 (2001).

the economy, how do people really behave and why—to abstract legal reasoning, parsing doctrines, poring over the dictionary. Judicial conservatism in this context is really a form of agency radicalism. Judicial conservatism, therefore, becomes another value that is at odds with received wisdom.

I think the best way to interpret this law, as a matter of judicial philosophy, was well stated by Louis Brandeis, who in 1916 gave a speech titled "The Living Law." He lamented the failure of the law at that time, at the beginning of the twentieth century, to evolve with the economy and the society. He said that legal science was static and what courts needed to recognize was that "no law, written or unwritten, can be understood without a full knowledge of the facts out of which it arises and to which it is to be applied."[8] That principle, he said, applied, in particular, to the law of the workplace, and he cited the inequality of position between employer and employee. He pointed out that "the group relation of employee to employer with collective bargaining . . . was essential to the workers' protection."[9] The struggle, in his view, was for "a living law."

Brandeis' critique of stasis and formalism in the law remains current as it applies to labor law, certainly over the last few years. The record of the Bush Board compounds the fact that this Act is more than seventy years old, a product of the industrial era, and it has not been significantly amended in sixty years, since the end of the Second World War. Labor law scholars talk about the law in terms of death or dying. Probably the kindest expression is "ossification." And the result of this has been a profound loss of confidence in the law, the Board itself, and in its decision making—not simply in terms of the results that have been reached, but in the way those results have been reached. It is more than just a change in law or discontent with the outcome of a particular case. The evidence is that our caseload is in steep decline, particularly in the representation case area. Organized labor is avoiding the Board at any cost. There has been a sharp move to negotiate recognition, rather than use the Board's election machinery. And in an historic twist, organized labor is looking more

8. Louis D. Brandeis, *The Living Law*, 10 ILL. L. REV. 461, 467 (1916).

9. *Id.* at 463.

and more to the states as a guarantor of important rights, rather than to the federal government.

At this point, I think that I should stop and let Virginia [Seitz] proceed with her comments. In short, what I would say in conclusion is that the Wagner Act was a twentieth century law. What we need is a twenty-first century law. What we got was really a nineteenth century law.

I thank you.