



1957

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Recommended Citation

Boyd Leedom, *How Lawyers Can Help the Labor Board Do a Better Job*, 11 Sw L.J. 306 (1957)
<https://scholar.smu.edu/smulr/vol11/iss3/3>

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HOW LAWYERS CAN HELP THE LABOR BOARD DO A BETTER JOB†

by

*Boyd Leedom**

A really competent labor lawyer is something more than an astute representative of the company or union which retains him. While serving his client's interests honestly, he also tries to make the administration of justice simpler, cheaper and more prompt. He works in the intellectual and spiritual company of America's great legal scholars—Wigmore, Pound and others—who have deplored the theory of justice which regards a law suit as a game of skill by which lawyers use procedural devices or rules like a card player would play a trump or a jockey would hold back a good horse until the home stretch.

It has been fashionable from time to time for laymen to blame lawyers for their troubles. Many unions and companies are inclined to bar attorneys from negotiations for fear that lawyers complicate rather than facilitate the settlement of differences, that they engender suspicion on both sides of the table, and that in their zeal for protecting their clients' advantages or rights they widen the cleavage between management and labor.

There is one case in which a lawyer served as the main spokesman for a union in negotiations for a contract. The parties seemed to be reaching a stalemate, but there was still hope for settlement. In the course of discussion the management spokesman was trying to clarify and emphasize the company's position and said: "You may as well understand right now, that with respect to the seniority rule we won't retreat an inch; our minds are closed." At this point the union lawyer exclaimed: "Aha! I was hoping you'd say that. Now I can prove that you're not bargaining in good faith, and I'm filing an 8(a)(5) charge with the Labor Board." Many months later, while the Labor Board was painstakingly going over the record in an attempt to draw that shadowy line between good faith and bad faith in bargaining, the parties resumed negotiations without the lawyer and reached an agreement.

There have been other situations in which a lawyer was more of a hindrance than a help, but the legal profession should not be

† Based on remarks before the Sixth Labor Law Institute of the Southwestern Legal Foundation, Dallas, Texas, on April 25, 1957.

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condemned simply because some lawyers lack good common sense. On the contrary, the legal profession can and often does contribute substantially to the practice and procedure of collective bargaining. But to be effective a lawyer must safeguard his objectivity.

From the time he enters law school a lawyer is trained to look at both sides of a dispute. A lawyer who enters general practice usually gets experience in arguing both sides; this is inevitable when he represents a plaintiff one day and a defendant the next day in different cases which involve the same general problems. In the labor relations field, however, there are circumstances which make it more difficult for a lawyer to maintain an objective attitude. When lawyers begin to specialize on labor problems they tend to identify themselves permanently with one faction or another. It is a rare lawyer who can divide his time between union clients and employer clients; unions usually want an attorney who is always on their side, and management is equally suspicious of an attorney who represents unions even occasionally.

This circumstance sometimes requires such a great degree of identification with client *interests* that lawyers also adopt their client's *attitudes*. Laymen who find themselves in litigation often are so involved emotionally that they exercise poor judgment. They are so sure of their own righteousness that they fail to analyze the arguments on the other side. A good lawyer never makes this mistake, but lawyers in the labor relations field are more likely to become emotionally involved in controversy than lawyers in other fields.

Some lawyers appear to be acting out parts in a drama in which the client is playwright, producer, and director all at the same time. The client has a notion of what the lawyer is supposed to do, and the lawyer acts up to his client's expectations. For some clients the role requires the lawyer to be a blustering table pounder, who makes oratorical attacks on the adversary to obscure the facts. The adversary may be either a company, a union, or (too often) the National Labor Relations Board. For other clients the role requires the lawyer to be a fly-specking pettifogger, who stalls for time by raising spurious technicalities. For other clients the lawyer is expected to play the role of the artful fixer who knows his way around the Labor Board offices and pretends to obtain action (or inaction) simply by speaking to old friends somewhere in the NLRB hierarchy. A lawyer who lets a client cast him in any such role is not only a liability to his profession but also is doing the United States Government (and the NLRB in particular) a great disservice.

It should not be inferred that this writer is urging attorneys to spurn their clients or lose cases. As labor problems become more complicated with government regulations, clients need lawyers more and more. Lawyers in this field, however, must make an extra effort to set their clients an example in reasonableness, objectivity, and self-restraint. This writer suggests only what every good lawyer knows—that a victory on a point of law after months or years of litigation sometimes is like ashes in a client's mouth when he really needed an amicable adjustment of the controversy at the beginning. A lawyer's effectiveness cannot be fairly measured by his record of *winning* cases.

When the objective of winning the immediate case is paramount in a lawyer's mind, he is often forced to urge upon the Board arguments which in the long run can be used *against* his client as often as they can be used *for* his client. This condition can be observed most readily in representation cases, which make up the bulk of the Board's work load.

Consider for a moment one of the most tedious issues which arises in case after case—where to draw the line between supervisor and employee.

Theoretically Congress settled this issue for the Labor Board when, in the Taft-Hartley Act, it defined the term "employee" to exclude supervisors and supplied a definition of the term "supervisor." Yet it is a rare day when the Labor Board is not called upon to make rulings as to just how this precise statutory definition applies to various job classifications and to individuals whose status is in dispute.

Fortunately, the bulk of such controversies is settled by stipulation among the parties. The Labor Board would be hopelessly swamped if forced to take testimony regarding the duties and authority of all the fringe categories. Yet one sometimes has the uneasy feeling that minor supervisors are like pawns in a chess game. It may be assumed that there are situations in which a union agrees to exclude employees whom the employer claims are supervisors only to get a quick election by consent. In the process of compromise it is inevitable that each party abandons its position on some issues in exchange for the other party's retreat on other issues, and in labor relations it is desirable that unions and employers adjust their differences as much as possible without intervention by the Government. The trouble, however, is that when employers and unions compromise on issues regarding exclusion of employees from bargaining units, the rights of affected employees are in danger of being ignored. The excluded

employees themselves are never parties to the stipulations. It would be impractical for the Labor Board to consult such employees in each case, to find out how they feel about the stipulation, and to determine if the stipulation is consistent with the law.

Here is where lawyers can play an important part. When consulted on questions of this sort, it is the lawyer's moral duty to urge his clients to look conscientiously at the facts and to apply the statutory definition carefully. The Labor Board approves stipulations of the parties mainly on faith. The Board members like to think that if they took all the evidence on job content their ruling in each case would be approximately the same as the stipulation. It is hoped that this faith is not misplaced.

Another troublesome issue is jurisdiction. For many years the Board operated without any precise standards. There was a vast assortment of *ad hoc* decisions as to how much impact upon interstate commerce must be shown before the Board would exercise its statutory jurisdiction. Not only were the unions and employers bewildered, but the Board found considerable difficulty in being consistent, even more so than it does now.

In 1950 the Board promulgated a set of standards which made it possible to determine in advance of decision, in most cases, whether or not the Board would take jurisdiction. The Board's 1954 revision of these standards, reducing the areas in which the Board would function, precipitated a tremendous controversy. Most unions berated the Board's new standards, and most employers approved them. It is not intended to discuss the merits of this problem at this time, but rather to urge lawyers to persuade their clients to do some long-range thinking about this problem. The Labor Board is both a sword and a shield. When unions commit unfair labor practices, employers come running to the Board for relief; and it is not uncommon for a union to answer a complaint by challenging the Board's jurisdiction, although most of the jurisdictional defenses are still being raised by employers. In the wake of the Supreme Court decisions in the preemption cases, it appears that the Labor Board's role will be more difficult than ever. Lawyers and their clients may disagree with the Board's standards and with the Board's application of standards to particular cases. But it is hoped that in their approach to this problem the lawyers will look beyond the first case that comes to them. Jurisdiction is not much of a *legal* problem nowadays. It is more of a problem in political science. It is influenced by budgetary considerations and the merits and weaknesses of the administrative

processes of the Federal Government. It presents philosophical considerations regarding the role of the Federal Government and its relations to state government. There is more at stake than winning or losing a case. And one more way in which an ingenious lawyer can assist the Labor Board is to suggest an adequate and yet simple set of jurisdictional standards.

Freedom of speech also could profit from long-range thinking. Congress has provided that the expression of any views, argument, or opinion, or the dissemination thereof, shall not constitute or be evidence of an unfair labor practice if such expression contains no threat of reprisal or force or promise of benefit. There are still many difficult cases in which it is necessary to determine how this proviso applies. The proviso cuts two ways. When one reads some of the statements of union officials engaged in organizing drives or the conduct of strikes and some of the statements of employer spokesmen in combating unions, one finds abuses of the right of freedom of speech on both sides. It is assumed that employers ask for legal help in the drafting of anti-union speeches and letters to employees. It is also assumed that unions ask their lawyers to look over the language on their picket signs and other communications to keep them out of trouble with the Labor Board in the event the union is charged with unfair labor practices. It would be pleasing to believe that when called upon for advice on such items lawyers advocate compliance with the spirit of the law as well as the letter of the law. It would be unpleasant to think that a lawyer edits a document with the idea of helping a client "get away with something" if the client seems to be trying to commit an unfair labor practice without getting caught. Freedom of speech is such a valuable right that we cannot afford to jeopardize it by misuse.

Another great right of American citizenship which should not be abused is the right of due process. In civil procedure due process only requires a fair hearing before a competent tribunal; but by provisions of the Taft-Hartley Act, the Administrative Procedure Act, and Rules and Regulations of the Board, there have been created additional procedural rights for the parties involved in official proceedings. Properly used, they constitute an excellent safeguard against high-handed action by the Board and its agents. When wrongly used, however, they constitute a kind of red tape which makes it exceedingly difficult for the Board to do the job for which it was created. Since Congress has provided orderly and peaceful procedures for the resolution of representation disputes and unfair

labor practices, those who rely upon the Board have the right to expect prompt action. Yet the age of some of the Board's cases is appalling. Of course, the delay is not always the fault of one of the parties. Much of the slowness can be blamed upon the human shortcomings of the Board and its personnel who are usually struggling to move too large a load of cases. The wheels of government grind slowly at best; but recalcitrant litigants who deliberately throw sand into the machinery by making dilatory moves in the hope of postponing or evading a clear statutory obligation evoke little sympathy.

Lawyers can help the Labor Board do a better job—and possibly save money for the taxpayers—by cooperating with the General Counsel's people in the regional offices. Complaint cases as well as representation cases provide ample opportunity for pre-trial explorations which can aid substantially in effecting settlements and narrowing the issues. The Board members, of course, can do practically nothing along those lines. Obligated to consider cases upon formal records, they are not available for informal discussion of pending cases with any of the parties. The overwhelming majority of attorneys engaged in practice before the Board understand the judicial function of the Board members and do not attempt to contact them for off-the-record conferences. Most lawyers are apparently aware of the NLRB's policy of not granting *ex parte* audiences to any party to a proceeding or to the agent of such party. This problem—which occasionally has plagued quasi-judicial agencies of the Government—causes no trouble at the Labor Board. Lawyers may be assured that they are not neglecting clients' interests when they refrain from taking a trip to Washington to try to see a Board member about a pending case or when they restrain a client from so doing.

In one respect, however, the judicial role of the Board is not fully appreciated. Some employers and unions engage in a subtle type of indirect pressure which is disconcerting, although the Board recognizes that it is not always deliberate. In one case a trial examiner made rulings adverse to the respondent. The respondent filed a motion to disqualify the trial examiner on alleged bias and prejudice, sending a copy of his motion to the Senate and House Labor Committees and to the Senators from his state. Under the rules and regulations, the respondent had a right to file such a motion, and trial examiners may on occasion be biased, although in this case the Board found later that there was no good basis for it. Was the respondent,

by distributing copies of the motion to the various Members of Congress, and letting the trial examiner know of such distribution, trying to intimidate the trial examiner? There is a proper procedure for getting review of claims of bias, and there is ample provision for judicial review of rulings on such claims. It does not seem proper for motions of that kind, phrased in the strongest terms conceivable, to be widely circulated to people who do not have access to the whole story. It is especially bad when done before there is a ruling on the motion in the hope that somebody will grant the motion rather than explain it to the legislative branch of the Government.

In another case, a trial examiner issued an Intermediate Report. Even before the Board members had a chance to consider the case, they were subjected to a barrage of statements to the press and a speech by a member of Congress denouncing the proceeding and the Agency. In still another case, a counsel who lost before the Board took his troubles to Capitol Hill. His presentation there not only placed the Board in a position of error on the merits of his case but quite literally purported to make scoundrels of most of the members of the Board—scoundrels engaged in absurd misinterpretation and distortion of the law. But in that case the court of appeals affirmed the Board's decision and the Supreme Court denied certiorari.

Without suggesting any limitation on the freedom of speech of members of Congress, this writer believes that if lawyers practicing before the Board want a truly judicial processing of their cases they will have to restrain their clients from trying to intimidate those other agencies of government engaged in judicial or quasi-judicial functions. It is not appropriate for parties to subject the Labor Board to all the publicity and propaganda techniques that they use in gaining their position on other issues which are resolved without resort to judicial proceedings. Congress in the Labor Management Relations Act and the Administrative Procedure Act has carefully prescribed due process and ample opportunity for judicial review of a case after a complaint is issued. The Board is doing its best to do its work within the spirit as well as the letter of those laws, and it expects the lawyers who appear before it to cooperate toward that end.

Certainly a good lawyer should fight hard for his client's cause. But in the field of labor relations he should be bound by the same ethical conduct that guides lawyers in other fields. And if he is to become generally recognized as really one of the best, if he is to make any real contribution in this great field in which we are all engaged,

he must retain an essentially objective viewpoint. Perhaps lawyers can do more than any other professional or semi-professional group to close the unpleasant and disturbing gap that divides labor and management in America. One big way a lawyer can help the Labor Board do a better job is to decide now that he wants to be one of the really good lawyers operating in the field of labor-management relations, and then so conduct himself in proceedings handled in the Regional offices, before the trial examiners, and before the Board.