Santa Clara University
School of Law

Santa Clara Law Review

Volume 34 | Number 1 Article 8

1-1-1993

Books Received

Santa Clara Law Review

BOOKS RECEIVED

Agenda for Reform: The Future of Employment Relationships and Law. By William B. Gould IV. Cambridge, Massachusetts: The MIT Press. 1993. Pp. 313. Hardcover.

American industries no longer exist *in vacuo*. The emergence of global economics, evidenced by the formation of the European Economic Council, the re-emergence of Japan and Germany as economic labor powers, and initiatives such as the North American Free Trade Agreement (NAFTA), poses a threat to the well-being of the American labor system, and more particularly, to the security of the American worker. In the face of these threats, American industries find themselves at a crossroads. Industries are realizing that new paths must be taken if they are to remain viable in global economics.

Given the current climate of the American labor system, it is most helpful to have a resource such as *Agenda for Reform: The Future of Employment Relationships and the Law*, by William B. Gould IV. *Agenda* explores the current weaknesses of the labor system, explaining how the system arrived at its current condition and offering options for labor law reform and new labor-management relationships that stop the erosion of worker protection while promoting industrial proficiency. Gould's goal in *Agenda* is to propose an agenda of reforms that would protect ideals he has espoused for over 25 years: job security for workers, employee participation in the economy and the political process, and the effectiveness of unions in protecting employee interests in the workplace. While overall pro-labor and pro-union in its outlook, *Agenda* effectively presents the perspectives of both labor and management, and it is quick to criticize both where necessary.

Throughout the book, Gould presents an in-depth look at the American labor law system. Close attention is given such definitive acts as the National Labor Relations Act and the Civil Rights Acts of 1964 and 1991. The relevance and impact of the Acts on the labor law area are examined in detail.

Agenda goes beyond historical analysis, however, and proposes reforms that aim at providing greater job security and a voice to workers while keeping in mind America's need to protect itself against foreign competition.

A pervasive theme in *Agenda* is the importance of the union as a representative and protector of workers' interests. The ability of unions to create and support collective bargaining activities is for Gould a strong factor in why American workers need union support. The book stresses that employees, both skilled and unskilled, are often in a position to do collectively what they cannot do individually. Gould points to such activities as promoting labor legislation designed to promote the workers' interest, and initiatives in arenas such as unemployment compensation, social security, and workers' compensation as areas unions address via collective bargaining that are not effectively addressed in individual employee discussions with management.

Gould laments the decline in power of American labor unions over the last thirty years, and he sets forth sound reasons for how this decline occurred. One large reason was the basic lethargy and lack of organization unions generally displayed during the last three decades. In the 1970's and 1980's, unions failed to attract and organize "fresh blood." There was no active organization of new workplaces where young employees were likely to be employed. The unions also failed (and continue to do so) in not pursuing unorganized sectors of workers. Gould cites Silicon Valley and the high-tech industry in general as niches the unions have not successfully attracted. *Agenda* also points out that unions have not addressed new types of employees that have emerged over the last two decades, including illegal immigrants and part-time workers. All of these failures acted to steadily deplete the number of union members in the country.

The author also points to the Supreme Court and its numerous decisions in the labor law area as a factor in the decline of unions. Gould cites numerous Supreme Court pro-employer/anti-collective-bargaining decisions from the Burger and Rehnquist Courts that hurt union status. The author shows how both Courts fashioned opinions promoting managerial prerogatives and the right of workers to resign from unions.

Gould makes it clear that a return to aggressive tactics is necessary if unions are to regain their strength. Strong attempts to unionize unorganized sects must be made, and the unions must attract young members. One effective method of attracting non-union employees that the book suggests is the provision, through union representation, of benefits such as legal services. Gould suggests linking such services with job security issues—such as legal representation for workers involved in wrongful discharge cases. Gould believes that the wrongful discharge area, as well as the employment discrimination area, are opportune areas for unions to become actively involved in as protectors of worker interests. First, such areas allow the unions to seize the high ground of public opinion. Second, unions are better positioned to intervene in the workplace where arbitration or some other type of legal mechanism is in play. Gould believes that through utilizing the collection of individual rights that have become a part of the employment relationship over the last twenty years, unions can both assist unorganized workers and foster their own growth.

Another central concern of *Agenda* is the issue of employee participation programs in the workplace. Gould holds that for employees to function in a democratic society, they must have a voice in their workplace. In defining this voice, Gould indicates that it can include participating in decisions on hiring, scheduling of work, and hours, and can go as far as profit-sharing in the company. To an extent, this voice could only come about through a breakdown of the adversarial "them-us" labor-management mentality that pervades the American labor system. Cooperation is essential if key reforms such as those involving job classifications, work rules, and the enhancement of employer flexibility are to be made. Such cooperation is evidenced in the changes in the relationship between employee and employer at the shop floor level of many U.S. industries. The "team method" of work assignments and responsibilities that has become part of basic manufacturing industries displays the type of cooperation necessary for reform, and for Gould, it is a step in the right direction. While active reform is key, Gould indicates that there are factors at work that may push employers to initiate greater employee participation on their own. One factor is that foreign competition is intensifying, especially from Ja-

pan. To keep up with the competition, America needs to eliminate inefficient practices. Another factor is the expansion of the nonunion sector in the United States. Due to this expansion, employers will become more interested in finding some mechanism or institution through which employee interests can be represented. While employee participation programs are advocated by Gould, he is wary of such programs being used by employers to replace the need for union representation in the workplace. Ideal programs will combine involvement with managerial decision-making and union protection, since such employer-given benefits do not replace the job security unions can win for employees via collective bargaining.

Agenda for Reform is incredibly comprehensive in its coverage and ambitious in its objectives. Throughout the book, important legal acts and movements that have shaped American labor law are discussed and analyzed. William B. Gould has certainly shown himself to be an authoritative voice in labor law reform. *Agenda* is a valuable resource for those who wish to gain a deeper insight into the future of American labor law.

Federal Environmental Regulation of Real Estate. By Frank B. Cross. Boston, Massachusetts: Warren, Gorham, Lamont. 1993. Pp. 347 & Appendices. Hardcover.

The federal government's regulation of the environment is a recent development that is changing the scope of basic real property law. In the past, real estate lawyers who were engaged in land sales focused on lending laws and various federal laws as the guidelines for completing transactions. Today these guidelines still exist, but they are now supplemented by a new category of concerns to which every lawyer must pay close attention: federal environmental regulation of real estate. These laws are important for real estate lawyers and property owners in general, because they directly affect land ownership. The owner of property that poses an environmental hazard may become liable for literally millions of dollars in environmental protection expense or may face criminal penalties. Environmental laws also have a serious effect on land development. Virtually all construction may be prohibited by statute if a piece of property is in certain environmentally sensitive areas, such as wetland areas. For an attor-

ney who routinely handles real property transactions, a familiarity with the federal environmental statutes is essential to effective representation of clients. This is easier said than done, however, when one considers the complexity of such statutes as the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) or the Resource Conservation and Recovery Act (RCRA). Attorneys who deal with such statutes regularly find that they tend to be not only complex, but also vague as to what they permit and prohibit.

Federal Environmental Regulation of Real Estate is an attempt to present the practicing attorney with a practical manual for handling and complying with federal environmental statutes. Author Frank B. Cross compiled the manual in recognition of the significant and still-emerging effect of environmental law upon real estate transactions. Chapter 1 provides an overview of the manual and discusses the areas in which federal environmental regulation impacts real estate. The remaining chapters provide overviews of specific federal environmental acts that affect real estate transactions. In examining the acts, the chapters set forth the procedures necessary to comply with the laws or the factors influencing the risk of liability under the acts. Each chapter is accompanied by an appendix setting forth applicable sections of the environmental acts addressed in that chapter. Of special interest are Chapters 2 through 8.

Chapter 2 of the manual examines the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Cross begins the section with a historical overview of the statute, discussing the origins of the Act in 1980 and the establishment of Superfund, which enabled the government to clean up waste sites and sue responsible parties to recover cleanup costs. The manual then covers the procedures involved in triggering the Act and discusses how parties become liable under the Act. Section 2.02 discusses the "Government Response Trigger," or how and when the government's authority kicks in under the Act. The section defines what constitutes a "release" under the Act, and Cross points out, through citing numerous applicable cases, that the courts in general read the statutory definition of "release" broadly. Under the Act, a "release" of "hazardous substances" must occur for government authority to be triggered and for

liability to attach. Chapter 2 also defines what "hazardous substance" means and how the courts interpret the statutory definition. Section 2.03 addresses what parties are potentially liable under Section 107 of CERCLA. Overall, Section 107 creates four defined categories of potentially liable parties, including (1) the current owner and operator, (2) any person who at the time of disposal owned or operated the facility, (3) any person who by contract arranged for disposal, and (4) any person who accepts or accepted any hazardous substances for transport to disposal facilities. Cross points out that the statutory language regarding potentially liable parties is unclear and has resulted in some inconsistent court decisions on liability. The section addresses all forms of potential parties, including trustees who control assets that include hazardous wastes under CERCLA (section 2.03(g)), and construction contractors who work on a site and somehow disturb hazardous substances (section 2.03(h)). The manual makes it clear that the Act's definitions of release and responsible parties are very broad. Chapter 2 then discusses site cleanup procedures (section 2.08), the settlement of liability (section 2.11), and notification requirements that the parties must follow upon discovery of a release of hazardous substances (section 2.14). The chapter presents a fairly comprehensive look at the Act, and the manual offers an accompanying appendix setting forth relevant regulations of CERCLA.

The Resource Conservation and Recovery Act (RCRA) is discussed in Chapter 3. Initially passed in 1976, prior to CERCLA, the Act was the result of a growing concern in the 1960's and 1970's over the safe disposal of wastes and recycling of raw materials. RCRA establishes a complex "cradle-to-grave" system for monitoring hazardous wastes. The Act is intended to be consistent with CERCLA, but the procedures are not identical. The first step under RCRA is the conducting of an RCRA facility assessment (RFA) that identifies actual or potential releases of hazardous wastes. The RFA includes visual site inspection and sampling. If the RFA indicates release, corrective action begins. The EPA will direct an RCRA facility investigation (RFI) that evaluates the nature and extent of the release. The RFI is generally conducted by the site owner. If the RFI finds minimal or no release, the EPA may not take any action. If substantial release exists, the RFI is followed by a study to identify appropriate cleanup

methods. The EPA decides which cleanup plan is best, and the corrective action is generally complete once this plan is effectuated. The RCRA authorizes the imposing of criminal penalties on parties who do not comply with certain Act provisions. Considering its complexity, Cross does a commendable job in giving an overview of RCRA and how it interacts with CERCLA.

Chapter 4 addresses the problem of underground storage tank leakage and how it is handled under CERCLA and RCRA. Subtitle I of RCRA, adopted in 1984, addresses the problem of UST systems. Subtitle I establishes a comprehensive system for dealing with the regulation of the design and installation of new USTs and the monitoring of existing USTs. The law requires the owners of USTs to respond to releases, and under CERCLA, financial responsibility requirements for owners and operators of USTs were established. Subtitle I also created a LUST (Leaking Underground Storage Tank) Trust Fund to pay for corrective action in the event of tank releases for which responsible parties cannot pay. Cross points out that the UST legislation is simpler than CERCLA and RCRA and has resulted in significantly less litigation.

The protection of wetland areas through Section 404 of the Clean Water Act is examined in chapter 5. Section 404 provides authority to regulate the discharge of dredged or fill material into the waters of the United States. At its inception, the section was held to apply generally to navigable waters; the Supreme Court, however, quickly held that section 404 includes wetland areas. Chapter 5 discusses the problems involved in defining what is a wetland, as well as what types of activities concerning wetlands the government may regulate. Cross also discusses regulatory enforcement of the law and what penalties are available (section 5.07).

Chapter 6 provides an examination of "Storm Water Runoff," or water resulting from heavy storms, snow melting, surface runoff, or drainage, that contains a variety of pollutants, including heavy metals, pesticides, and traditional pollutants (nutrients, etc.). The chapter addresses how industries can obtain permits from the EPA for regulated storm water discharges (section 6.03), as well as how permittees can comply with EPA imposed discharge monitoring requirements (section 6.04). How the EPA enforces the regulations,

and what penalties are available to the Agency, are also noted (section 6.06).

The Endangered Species Act (ESA) and its uncompromising protection of endangered animals is the subject of Chapter 7. Passed in 1973, the ESA contains broad prohibitions against any individual "taking" a species listed by the Department of the Interior as endangered. The law is directed at both the private and the public sectors, prohibiting private industries from harmful activity as well as placing restrictions on federal government actions that might adversely affect protected species. Cross stresses that the law is worded in absolute terms and backed by the Supreme Court, which has held that species protection is accorded the highest priority, far over pragmatic economic concerns. Chapter 7 includes how the protections of the ESA are triggered through the "listing" of a species as endangered and what criteria must be met for such a listing to occur, and it addresses the liabilities and responsibilities for private and government parties under the ESA (sections 7.03-7.04).

The closing chapter discusses the interplay between state-related legislation and the federal environmental legislation discussed in the earlier chapters. In addition to the detailed federal environmental regulations affecting real estate development, states often have their own requirements that regulate and impose penalties for contaminated sites. Cross points out that state legislation either "piggybacks" upon the terms of the federal regulations or, more frequently, goes beyond the federal rules, imposing additional and harsher regulations. State legislation generally provides additional penalties for environmental violations, and people are sometimes convicted for violation of state hazardous waste laws. After a brief discussion of the interplay between the applicable federal and state laws, Chapter 8 provides a state-by-state examination of CERCLA-related provisions, RCRA-related provisions, UST-related provisions, wetlands-related provisions, storm-water-related provisions and endangered species-related provisions.

Federal environmental regulation of real estate ownership, development, and acquisition is not a settled area. The federal environmental statutes themselves continue to be interpreted, amended, and redefined through litigation. A practicing attorney in the real estate area undoubtedly needs a

reference guide that can either provide answers or point the practitioner in the right direction. Frank B. Cross' *Federal Environmental Regulation of Real Estate* is a current attempt to provide a reference in this evolving field. The manual is a sound reference providing overviews of pertinent sections of federal environmental acts with which real estate attorneys would need to be familiar in the course of their everyday practice. Due to the ever-changing scope of the subject matter, the manual is not, nor could it be, a totally complete guide. Cross has, however, compiled a manual that covers most of the bases, while leaving room for supplements that will update the basic manual as the scope of the subject matter changes.