

1-1-1993

## Book Review [Which Side Are You On: Trying to Be for Labor When It's Flat on Its Back]

Santa Clara Law Review

Follow this and additional works at: <http://digitalcommons.law.scu.edu/lawreview>



Part of the [Law Commons](#)

### Recommended Citation

Santa Clara Law Review, Book Review, *Book Review [Which Side Are You On: Trying to Be for Labor When It's Flat on Its Back]*, 33 SANTA CLARA L. REV. 557 (1993).  
Available at: <http://digitalcommons.law.scu.edu/lawreview/vol33/iss2/8>

This Book Review is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact [sculawlibrarian@gmail.com](mailto:sculawlibrarian@gmail.com).

## BOOK REVIEW

WHICH SIDE ARE YOU ON: TRYING TO BE FOR LABOR WHEN IT'S FLAT ON ITS BACK. By Thomas Geoghegan, New York, Farrar, Strauss & Giroux, Inc. 1991. Pp. 320. Hardcover. \$19.95.

*Reviewed by Martin Eichner\**

*Which Side Are You On* makes important contributions to our understanding of the workplace. The author vividly describes his experiences as a labor law attorney representing local unions and rank-and-file members. In doing so, he presents a rare portrait of "blue collar" workers and their organizations. In the course of painting this picture, the book also draws important conclusions about the role played by our labor laws in fostering the economic decline of unions and their members.

Sympathetic, but accurate, portraits of American workers and their unions are rare in any of our media forms. Instead, books, movies, and print media uniformly depict workers as white, male, overweight, unlettered, and racist. Their unions are depicted as reactionary, selfish, and often criminal.

These images are not just amusing cartoons. Like other stereotypes, they play an important role in our society. Their very existence disempowers workers and their organizations, by casting them as undeserving. They justify hostile economic and political actions taken by other components of our society, particularly their economic enemies.

In this book, Geoghegan provides us with memorable images of the friends and adversaries he has encountered in the union movement. For example, he describes one client in a case seeking to retrieve lost pension benefits:

---

\* Martin Eichner, B.A., Columbia Univ., 1967, and J.D., Stanford Law School, 1970. Since graduating law school, Mr. Eichner has been in private labor law and employment law practice in Palo Alto. During his years of practice he has represented individual employees, rank and file union caucuses and alternative worker organizations, as well as some traditional AFL-CIO unions.

I had to tell Phil that his pension was half of what he thought it would be. He is one of these small, bent-over Teamsters who can barely see over the dashboard. For years, he has been driving, puffing cigarettes, getting smaller and smaller.

These people are presented as real people, with real strengths and weaknesses of character and intellect.

*Which Side Are You On* is not a scholarly work. There are no detailed statistical studies of plant closings or the number of lost union organizing campaigns, nor are there detailed sociological analyses of the lives of workers or working class families. Geoghegan does refer to scholarly works to support his conclusions.<sup>1</sup> However, the real strength of this book results from the author's anecdotal studies of his own personal experiences as an attorney representing unions and workers in legal and economic disputes.

Geoghegan emphasizes that he drifted into union labor law; he is not like those older generation union lawyers who tell stories about their fathers walking picket lines and who dreamed of someday representing unions. Geoghegan notes an always present alienation between himself and his clients. He does not live in their neighborhoods, eat at their restaurants by choice or socialize with them. Even those union attorneys who came from union backgrounds should recognize that their societal roles as attorneys create similar contradictions, but it is helpful that Geoghegan faces the issue directly.

Sadly, Geoghegan realizes that he feels the need to apologize to some of his friends for his career choice and at points, he appears to be apologizing to the reader as well. However, the author correctly keeps his personal story in the background. Instead, his primary focus rests on his portrait of his clients and the dominant role of labor law in their lives.

The first part of *Which Side Are You On* traces Geoghegan's early career from typical late '60's Harvard student through early

---

1. For example in Chapter 12, "Citizens," the author presents his theories concerning the decline of union power. At page 256 he addresses Michael Goldfarb's study of the causal connection between employer negative campaigns and the high union loss rate in NLRB elections in *The Decline of Organized Labor in the United States*. Geoghegan, citing Goldfarb, notes that unions now lose approximately 50% of NLRB elections, which is insufficient to replace concurrent losses from factors such as plant closing. Geoghegan does not even address the fact that success is often elusive when the union wins the election. Management attorneys can delay the certification process for years by appealing through the NLRB and the circuit courts. The union cannot begin bargaining during the interim. By the time the union finally "wins" a bargaining order years later, it has often lost its base of support in the bargaining unit due to employee turnover and discouragement.

positions in the '70's with the United Mine Workers headquarters, and later with the unsuccessful Ed Sadlowski challenge for the national presidency of the United Steelworkers.

The second and more important part of the book is based on the author's move to Chicago in the late '70's. In this section he describes his subsequent career representing both local unions and individual rank-and-file union members during the decade of the '80's. These experiences were shaped by the dramatic setbacks suffered by organized labor and highly paid workers in basic industry during this decade.

*Which Side Are You On* details several different types of labor-management disputes. Some of these, such as the Mineworkers wild-cat strike campaign and the Sadlowski election campaign, were historically important. Other cases detailed by Geoghegan, such as a pension fraud case and local union election cases, are important because they describe experiences typical to many local union leaders and rank-and-file union members throughout this country.

This book is not a "my life in court . . . as a labor lawyer" type of memoir. The book does not recount courtroom battles in great legal detail or spend significant time discussing specific labor relations legal issues. The author largely underplays his own contribution to any of the contests in which he participated.

What this book does do is accurately portray the routine and daily encounters of the author's practice in Chicago. He illustrates the agony of choices faced by his practice. For example, he describes settling a pension fraud class action, which has worn him down over many years, for a financial package of equivocal results. He describes backing a dissident union faction which regularly loses rigged local elections, knowing as an attorney that the Department of Labor will never take effective remedial action. In every case we meet the clients and we learn the price they suffer in such defeats, the real cost in terms of lost jobs, homes and futures.

The central conclusion which Geoghegan draws from these experiences is that the current panoply of labor law in America dominates every aspect of the relationship between unions and management and between unions and their membership. Furthermore the result of this dominant role is to emasculate any effort by either unions or their members to exercise genuine power in the workplace.

The author details a variety of different episodes; efforts to win national or local strikes, efforts to fight back against plant closing and takeaway bargaining, efforts to reform local union leadership, and efforts to organize and obtain union recognition. In every in-

stance, the applicable labor statutes and the agencies which enforce those laws operate to guarantee defeat for Geoghegan's clients.

Like others in the labor movement, Geoghegan places the primary blame on the labor laws enacted after World War II, particularly the Labor Management Relations Act - "The Taft-Hartley Act."<sup>2</sup> The author indicates that these statutes, and accompanying Supreme Court decisions such as the "Steelworker Trilogy,"<sup>3</sup> reinstated the federal government as an active party in labor relations. These statutes and court decisions directed the government to prevent militant union economic activity such as secondary boycotts, and to foster "peaceful" resolution through debilitating processes such as arbitration. At the same time, this system of labor law provided unions with no effective legal recourse against the most powerful employer economic weapons such as permanent strike replacements and discharges of union activists.<sup>4</sup>

All of these criticisms are correct. However, *Which Side are You On*, fails to identify the root cause of this development. The fatal legal snare for workers and their unions did not start with Taft-Hartley. That statute was merely the logical extension of the basic conservative concepts already institutionalized in the earlier National Labor Relations Act, "The Wagner Act" of 1935.<sup>5</sup>

*Which Side Are You On* notes that the Wagner Act did not directly produce the dramatic successes of the CIO unions in auto, steel and other basic industries in the late 1930s. The author acknowledges that the legal remedies of the Wagner Act on behalf of

---

2. 29 U.S.C. §§ 151-68 (1986).

3. *United Steelworkers of America v. American Manuf.* 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navig. Co.* 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). Although these cases ostensibly removed the federal courts from substantive collective bargaining issues, they set the stage for mandatory arbitration, even when the union had not agreed to arbitrate. *Teamsters Local 174 vs. Lucas Flour*, 369 U.S. 95 (1962). They also restored the federal court role in issuing antistrike injunctions, as a means to enforce arbitration agreements. *Boys Markets vs. Retail Clerks*, 398 U.S. 235 (1970). *Which Side Are You On* accurately describes the destructive effects of wedding labor relations to arbitration remedies. Geoghegan describes how the reliance on arbitration delays resolution for months and years, allowing the employer freedom of action in the meanwhile. He also describes how the process forces union to turn their representatives into paralegals and to place the outcome of most disputes in the hands of their attorneys, leaving the union leaders and membership without an active role in the outcome.

4. The book presents a detailed explanation of why the labor laws encourage employers and their management attorneys to deliberately fire union activists. The author explains how the employers save significant financial benefits by crippling an organizing campaign, knowing that the backpay and reinstatement remedies come cheaply and come years too late.

5. The original Act was 49 Stat. 449 (1935).

unions were always ineffectual. The CIO successes were based on the exercise of economic and political power, not a reliance on National Labor Relations Board procedures.

However, Geoghegan fails to recognize that the Wagner Act established basic concepts in American labor law which would ultimately prove fatal to militant union activity. These concepts made subsequent developments, including Taft-Hartley, inevitable.

The Wagner Act, in its prefatory language, established the principle that the overall goal of future labor relations should be industrial peace.<sup>6</sup> Thereafter peace, not economic fairness or access to power in the workplace, became the principle for judging subsequent behavior. Action taken by unions seeking basic change in the workplace is unlikely to be consistent with industrial peace and therefore becomes unwelcome. Thus arbitration is favored, wildcat strikes during the life of the collective bargaining agreement are not. Secondary boycotts and organizational picketing, two crucial union weapons, are disfavored because they disturb the peace of "innocent" employers.

Coupled closely with the concept of industrial peace was the Wagner Act concept of union activities such as picketing and organizing as free speech rather than exercises of economic power. It follows that large numbers of picketing union members are unnecessary to express union free speech and they constitute a threat to industrial peace. Unfortunately, two lone picketers at the plant gate are also unlikely to stop the busloads of strike replacements. Furthermore, it was inevitable that the public would agree that employers should have the same free speech rights, such as the right to hold captive audience meetings in the plant to defeat union organizing campaigns.

Union activists and attorneys like Geoghegan should remember that the effective economic tactics used in the CIO victories, such as sit-down strikes, had been ruled illegal under the Wagner Act, prior to the enactment of Taft-Hartley.<sup>7</sup>

---

6. Section 1 of the Wagner Act states, "The denial by employers of the right of employees to organize . . . lead(s) to strikes and other forms of industrial strike and unrest, which have the intent or the necessary effect of burdening or obstructing commerce . . ." Thus from the beginning, the purpose of the law is to end industrial strife and eliminate the need for union economic actions such as strikes. This principle of industrial peace was echoed immediately when the Supreme Court upheld the Wagner Act in *NLRB v. Jones & McLaughlin Steel*, 301 U.S. 1 (1937).

7. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939). In *Fansteel*, the Supreme Court again emphasized the need for industrial peace. It determined that the Wagner Act did not protect all strike or other "concerted activity," only "legal" activity. It defined a

Another lethal concept created by the Wagner Act was to establish the government as the arbiter of a union's right to represent the employees of any particular company. Prior to 1938, a union had to fight for the right to bargain with an employer in the economic battlefield. The Wagner Act replaced that battlefield with a complex election system conducted under governmental auspices. If successful within that electoral system, the union looked to the government to protect its right to act on behalf of the employees rather than looking to its own economic power.<sup>8</sup>

The process for establishing the bargaining agent is not a test of economic power but a free speech election process through the National Labor Relations Board.<sup>9</sup> Once established, the procedures virtually guarantee that the union cannot be replaced by another union, although the ability to decertify the union and return to a non-union shop is significantly easier.

A union safely established as the bargaining agent can expect to peacefully continue in that status, as long as it does not provoke the employer into closing the plant or conducting a non-union campaign. This is a disincentive to militant activity especially since employers can usually win a strike. Because of the difficulty in changing unions through the NLRB process, the union has far less incentive to make its own members happy. With an agency shop agreement, it also has a guaranteed source of dues income. In the meanwhile, the employees can only seek resolution of their workplace disputes through that union as the exclusive agent. No other union, or outside attorney, or any other agent can compete with the exclusive agent in the workplace.

Since the government, not worker support, guarantees the bargaining agent status, employees within the unit often see their union as merely another component of the overall bureaucratic apparatus hanging over their heads. Individual clients should be excused when

---

sit-down strike as not just illegal but an act of violence. This decision also defined a legal strike as a means of expressing grievances, a free speech activity, rather than a means of economic coercion. Once down this path, the NLRB and the courts continued to redefine legal strike activity in ever narrower terms, rapidly moving to exclude highly effective tactics as slow-downs or sick-outs. Cf. *NLRB v. Montgomery Ward*, 157 F.2d 486 (8th cir. 1946); *Elk Lumber Co.*, 91 NLRB 333, 26 LRRM 1493 (1950).

8. It is true that union organizing victories prior to 1938 were often short-lived. The guarantee of long-term bargaining rights after an initial victory must have seemed attractive in light of that history.

9. However, the governmental authority only protects the union's right to bargain, it does not require the employer to reach an equitable agreement or any agreement at all. Thus as noted above, a union can spend years in the NLRB appeals procedures only to find itself at the bargaining table with no economic muscle left to force a fair contract from the employer.

they cannot remember if they spoke with a union representative or an employee relations representative about their problem, or if they didn't notice any particular difference between the two.

At the same time, the union movement has little incentive to invest in organizing campaigns in new workplaces because of the delays and handicaps in the certification-election process. In the conclusion of *Which Side Are You On*, the author proposes changes in the current labor laws to restore some equity to the union side. For example, his proposals would remove the incentive to fire union organizers without fear of the legal repercussions. He proposes an expedited recognition process to eliminate the delays inherent in the current NLRB procedures.<sup>10</sup>

All of these reforms should be welcome by those seeking greater fairness in the workplace. However, such reforms would not address the basic conservative concepts dominating our system of labor law. Rather than deal with this reformist approach, some unions have begun to take their disputes outside the current labor law confines. For example, they are making recognition demands without resorting to NLRB election procedures. They are backing those demands with non-legal tactics such as corporate or public image campaigns. *Which Side Are You On* does not address these potential solutions for the current abuses. It is possible that Geoghegan's focus as an attorney limited his ability to see possibilities outside the current labor law system.

Regardless of these analytical limitations, *Which Side Are You On* should be required reading for any person honestly seeking to understand the human cost of the numbing union defeats of the last decade and the role of labor law in the bleak landscape now confronting honest union leaders and their memberships.

---

10. See generally pp. 231-85.



