WOLFE & GOODWIN

Attorneys at Law

Memorandum

Re: Welcome

To: Alex Associate

From: Kinsey Millhone

Welcome to the labor department at Wolfe & Goodwin. I hope that you will enjoy your four month rotation through the department.

To ease your transition into the department, we have prepared a background memo. There is no reason to study it, but reading it will make some of your initial assignments easier to understand.

Memorandum

To: Alex Associate

From: Labor Department

The statutory framework

Pre-1935 labor law

For practicing lawyers, modern labor law—by which we mean the legal rules affecting the interaction of unions, firms and employees—almost, but not quite, begins in 1935. Prior to that year, regulation of unions occurred primarily through federal antitrust laws and state tort and property laws. Both state and federal laws were typically hostile to unions.

Antitrust and Norris La-Guardia

Federal laws prior to 1935 have some modern impact. The Sherman Antitrust Act, passed in 1890, had been used by federal courts to curtail union power. Prior to 1935, Congress twice undertook to restrict the involvement of federal courts in the regulation of union activity. In the Clayton Act of 1914, Congress tried to reduce union antitrust liability when it amended the antitrust laws to declare that labor was not an article of commerce, and that certain labor disputes were not antitrust violations. The Supreme Court, however, gave narrow readings to

Page 1 of 11

the provisions. In the Norris-LaGuardia Act of 1932, Congress restricted the power of federal courts to issue injunctions in cases involving labor disputes. Norris-LaGuardia continues to control labor disputes in a few areas, notably union strikes in breach of a bargaining agreement can be enjoined. Neither the Clayton nor the Norris-LaGuardia Acts tried to regulate labor-management relations in any pervasive sense, however.

Wagner/NLRA

In 1935, the Wagner Act was passed. It was named for Senator Robert Wagner, its author and principle proponent. Its official name is the National Labor Relations Act. It is a bit of a puzzle why it was passed. President Roosevelt was not particularly in favor of it and it was not part of his New Deal legislation until it was obvious that it would be passed. Unions were not in favor of it fearing that their power might be diminished at the hands of federal bureaucrats. Managers opposed it strenuously. Left wing groups wanted more than the Act offered; but in any event, the left had very little power.

§ 7

The main theme of the statute is contained in its § 7. That section declares that employees shall have the right to organize for common protection free from the threat of retaliation or reprisal. Only a few changes have been made to the original language—namely, that employees also have the right not to organize.

§ 8

Section 7 is not self enforcing—that is, it declares rights without itself specifying a remedy. The remainder of the statute implemented those rights. Section 8 lists how managers may violate the statute.

Representation Elections

The Wagner Act set up a federal procedure whereby employees could select a union to represent them. These procedures are found in § 9 of the statute. Primarily, the procedure consists of a secret ballot election conducted by the government, after an election campaign by the union and by managers, in an appropriate bargaining unit.

NLRB created

Machinery had to be set up to administer the statute. The statute creates the National Labor Relations Board, a federal administrative agency. Under the Wagner Act, but no longer, the agency conducted representation elections, and both prosecuted and adjudicated unfair labor practices. Judicial review by the federal courts of appeals was established.

Pro-union

Note that we have mentioned what the statute does *for* unions, but not what it does *to* unions. The answer is that the 1935 statute was entirely pro-union. It contained no sections restricting union power.

1947 Taft-Hartley/LMRA

Under the imprimatur of the Wagner Act and the influence of World War II, union membership grew greatly in the late 1930s and the 1940s. Some unions, notably the United Mine Workers, called unpopular work stoppages during the war and just thereafter. In any event, by 1947 the Congress was in a mood to make the statute more balanced. In 1947, Congress passed the Taft-Hartley Act. Taft was a senator, Hartley a member of the House. The official name is the Labor-Management Relations Act. Part of this statute amends the NLRA. Part of it is contains new provisions. Statute compilations often print up the LMRA as if it were part of the NLRA. Nothing turns on whether you treat the statutes as two or as one.

§ 8 The Taft-Hartley Act restricted the power of unions by adding to § 8 a list of union "unfair labor practices." The practices were added as § 8(b) of the act and its subdivisions. For example, § 8(b)(4) declares that union secondary boycotts are an unfair labor practice.

General Counsel

> The administration of the agency was altered. In addition to the members of the NLRB (Board) and their staff, the office of General Counsel of the NLRB was added. The purpose was to split the prosecutorial and adjudicative functions of the agency.

CBA enforceable

> The statute made collective bargaining agreements enforceable in federal district courts. By so doing, it took contract enforcement out of the hands of state court judges and gave it to federal judges.

1959 Landrum-Griffin/LMRDA

Congress left the labor statutes alone for another dozen years. In the mid-1950s a congressional committee headed by Senator McClellan held hearings inquiring into the internal affairs of a few unions, most notoriously the Teamsters. The committee found corruption and abuse of power. In 1959, Congress passed the Landrum-Griffin Act (again, named after a senator and a member of the House). Its official name is the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA).

Internal union affairs

> Mainly, the LMRDA regulates the internal affairs of labor unions. Title I adopts a bill of rights for union members—free speech, freedom to assemble, freedom from arbitrary discipline. Title II forces unions to file financial reports. Title III restricts the power of national unions to put local unions into trusteeships and thereby exercise complete control over them. Title IV regulates union election of officers. Title V declares that union officers owe a fiduciary duty to the union and give remedies for breach.

NLRA amendment

While Congress was protecting the rights of union members vis-a-vis their union, it also amended the NLRA at the request of management groups. Most important were sections broadening the coverage of the secondary boycott provisions, and a new restrain on the rights of unions to picket a firm's premises demanding that the firm recognize the union as the representative of its employees.

Post-1959

There have been no amendments to the labor statutes since 1959 that are worth mentioning. But the granting of federal protection against discrimination in employment and in favor of pension protection and workplace safety, for example, have supplanted much of what unions used to do for workers.

Unions

General comments

A mistake that too many people make is to have one stereotype of how a union is structured. Even among local unions, the differences may be major. A Teamsters local union in Detroit has thousands of members, and many full-time union officers. Perhaps it is democratically run, or it may be dominated by entrenched local union officers. By contrast, the Paperhandlers union in Washington has a membership numbering in the hundreds. Most of its members are black. The chief union officer moonlights as a taxicab driver because the union cannot afford to pay him a full wage. This union is democratic.

AFL-CIO

The AFL-CIO may be the most misunderstood of America's labor organizations. The AFL-CIO represents no employees and negotiates no bargaining agreements (save perhaps as an employer vis-a-vis its own workers).

The AFL-CIO is the public relations representative of the International unions that are part of the federation. It is a major national lobbyist and writes amicus briefs to courts, primarily the Supreme Court.

It is supported by per-capita dues from its member International unions.

Local unions

A typical American local union is structured as follows. First, the members may have their employer in common. Thus a Steelworkers local union may represent all the workers at a particular

U.S. Steel plant, and no other employees. Workers with very different jobs at U.S. Steel will be members of the local. A carpenters local union, by contrast, is likely to have in it only skilled carpenters in a particular city. Those carpenters will be employed by many different firms.

Business agent

The day-to-day affairs of the local union will be conducted by an elected officer. In many unions this officer is called the "business agent." In some unions he or she will have a different title, such as secretary-treasurer. In a poor or a small union, this officer will not be full time. In a large or a particularly prosperous union, this officer may have one or more full time assistants.

Local officers

The number and titles of the union's officers will be dictated by the local union's constitution and bylaws. Typically, such officers will include a business agent, president, secretary, treasurer, and an executive council.

Assistant business agents are found only in big unions, and is likely to be a paid position. The assistant business agent owes his or her position to the business agent.

A local union President often has no power, no pay, and runs local union meetings.

Committees

A local union executive committee may not be powerful, yielding to the wishes of the business agent.

Local unions have negotiating committees, ad hoc as needed, which makes recommendations to the membership.

Local union meetings are regular, but attendance is abysmal unless there is a big issue.

International unions

A local union may not be affiliated with an International union, but most are. The relationship between the local and the International union is formally dictated by the International union's constitution and bylaws.

Negotiating with employers.

Some International unions negotiate bargaining agreements with firms, the agreement then bind local unions. The United Auto Workers negotiates with the Ford Motor Company for an agreement that applies to workers throughout the country. Only issues relating to local conditions are left to local unions. More typically, perhaps, a local union will negotiate with the employers in its area, with little or no participation by the International union.

Negotiations ends with ratification at either the local or the national level, depending on the kind of union that it is

An International union will serve important functions even if it does not negotiate with employers. There may be a national pension fund (useful to smaller locals that cannot finance a fund for its members), and a national apprenticeship school. The International may lobby on issues affecting its members. It is likely to mediate disputes among its locals, and between its locals and those of another International.

Typically locals pay a per capita tax to Internationals

Elected International officers

The chief office of the International union, the International president, is an elected position. The LMRDA requires an election at least every five years. The International is likely to have several other elected positions, and a large support group that may include accountants, economists, and lawyers.

The president of the International is very powerful. He or she often selects a successor. Contested elections for International president occur, but they are rare.

The Vice President of the International carries various titles, such as assistant general president Presumably this person is next in line to be International president, but it is a weak presumption.

The International will have an executive committee, which will include people from local unions (elected).

Appointed International representatives

Appointed employees of the International union are the principal contacts between the International and its local unions. These employees are commonly called International representatives. In at least one union (Machinists) they are called Grand Lodge Representatives.

Industrial and craft unions

Historically, there has been a distinction between industrial unions and craft unions. Craft unions are organized around a particular group of skills. Carpentry, pipefitting, tool and die work are examples. In many parts of the country it is difficult to become a member of these unions. They seek to control jobs in their area and to parcel the work out among a restricted membership.

An industrial union is formed around a particular product or company. In chemical manufacturing, for instance, a union representing workers is likely to include people performing very different tasks and having different levels of skill. The industrial unions ordinarily have an open membership policy. As one would expect, the stereotypes of craft and industrial unions are not accurate in many cases.

Political responsiveness of union officers

Who runs a local union? How responsive are local union officers to the wishes of their member-

ship? How do unions decide things—such as what to seek in collective bargaining? Almost nothing is known about these critical questions. The best study of the responsiveness of local union leaders to local memberships is, unfortunately, out of date. It showed that union leaders to be quite concerned about their prospects for reelection.

The Agency

NLRB organization

The agency consists of the Board members and their staff, the General Counsel and his or her staff, the Regional Directors and their staffs, and Administrative Law Judges.

The Board

The Board is an appellate entity. It decides cases on the basis of records sent to it from the Regions. It offices are located at 1717 Pennsylvania Ave., Washington, DC.

Board members are appointed by the President, with the advice and consent of the Senate. The term is 5 years, and reappointments are possible.

Each Board member has a large staff. The case load is so heavy that many cases cannot be brought to the attention of the individual Board members and are decided by staff according to standing instructions from the members.

General Counsel

The General Counsel has a variety of responsibilities, and a large staff to assist him or her. The General Counsel's offices also are located at 1717 Pennsylvania Ave.

> A General Counsel is appointed by the President, with the advice and consent of the Senate, for a five year term, and possible reappointments.

The General Counsel oversees the Regional Offices that are spread throughout the country. The Regional Offices prosecute unfair labor practices against employers and unions. They also administers the representation election machinery.

General Counsel's staff (Washington D.C.)

Appellate (may demand experience for young attorneys): litigates National Labor Relations Board cases in the courts of appeal.

Advice: tells Regional Directors whether to prosecute particular unfair labor practice cases.

Contempt (very small): litigates in federal district court against recalcitrant employers and unions.

Appeals: decides whether a regional director was incorrect in refusing to prosecute and unfair labor practice charge, but percent of refusals overturned is very, very low.

Miscellaneous litigation (very small): litigates when unusual litigation is brought against the Board or its individual members.

Supreme Court branch–one or two lawyers who brief and argue Board cases before the Supreme Court. Often this responsibility is carried by the Justice Department.

Regional Offices

This is part of General Counsel's office. There are Regional Offices throughout the country, in all major cities.

Lawyers and others in the Regional Offices investigate, select, and prosecute unfair labor practice cases. They also conduct elections to determine whether employees will be represented by a union.

Administrative Law Judges

Administrative Law Judges were formerly called Trial Examiners, and will be described as such in older cases.

Administrative Law Judges are not technically a part of the National Labor Relations Board; rather they are Civil Service appointments, having gone through a burdensome application process.

Administrative Law Judges travel throughout the country hearing unfair labor practice cases.

They then return to their home base (Washington, D.C., or San Francisco) and write opinions.

The opinions are long. They recite, and find, facts, discuss the law, and recommend to the Board an outcome and remedy.

Processing cases and elections

Stages in ULP ("C") cases

Charge

A “charge” is claim that an employer or a union has committed an unfair labor practice. A charge can be filed by anyone, but a charge filed by someone unconnected to controversy will not get much attention.

A charge is filed with a Regional Office, on a form provided by the Office. Notice is given to the charged party, which may participate in its processing.

In principle, all charges are investigated by Region staff, but many Regions insist that the charging party provide information.

Complaint

If a Regional Director decides that the charge ought to be pursued, the Director will file a "complaint" against the charged party. This means the unfair labor practice case will be prosecuted by employees of the Regional Office. There is no court review of decisions to "go to complaint" or not.

Novel cases may be referred to Washington, at Washington's direction or at the instance of the Regional Director. This is the province of the General Counsel's Office of Advice.

The person bringing the charge can appeal the denial of a complaint to the General Counsel in Washington, but forget it except for publicity or delay.

A few unfair labor practice cases go to federal district court for preliminary injunction.

Most charges are "withdrawn" or settled before a complaint is issued or denied. It is routine practice for a Regional Office to give the charging party the opportunity to withdraw the charge before the charge is dismissed.

Hearings in unfair labor practice cases

Unfair labor practice cases are litigated on behalf of the charging party by lawyers on the staff of the Regional Office. The charging party may participate and has some procedural rights.

The cases are heard by an Administrative Law Judge. The proceedings are only slightly less formal than is civil litigation before a trial judge. The only discovery occurs in the context of settlement discussions.

Following the hearing, the Regional Office staff and the parties file briefs with the Administrative Law Judge.

The Administrative Law Judge's "recommended" decision and remedy follows the briefs, often by several months.

Board decision

After the Administrative Law Judge issues his or her opinion, the hearing record and the Administrative Law Judge opinion are sent to the Board in Washington.

The parties, including the Regional Office, file briefs, but there is no oral argument (except in rare cases where Board is considering changing an important rule).

Panel of three, or full Board decision

The entire Board may rule on a case, or it may be decided by a panel of three Board members.

The decision may a relatively full treatment of the controversy, or it may be a statement adopting the opinion and recommended remedy of the Administrative Law Judge. The latter is call a "short form." Many decisions are hybrids of the two.

A Board decision is not self-enforcing: the losing party files for review or the General Counsel files for enforcement in court of appeals if there is no voluntary compliance.

Stages in Representation ("R") cases

Petition

A representation case is ordinarily initiated when a union files a petition to represent employees.

The Board requires a minimum showing of employee support before it will process the petition.

A rival union may intervene.

Hearing

If the employer does not "consent" to the election, the Regional Office will conduct a hearing.

This hearing may resolve a number of issues, such as whether the bargaining unit (the group of employees the union seeks to represent) is an appropriate unit; eligibility issues—e.g., who is a supervisor—; and whether there is some bar—e.g., an existing, valid collective bargaining agreement—to having an election.

Campaign

The employer and the union then campaign to win the vote.

Balloting

Balloting is conducted by the Regional Office.

Ballots are secret, written, and give employees the choice of voting for union A or union B, if there are two contenders, or "no union."

Tie votes go to the employer

Appeal to Board

A vote in favor of either side may be challenged by the loser on a variety of grounds, such as election misconduct, bargaining unit issues, and so forth. The Regional Director, with or without a hearing, will decide if the objections have merit. The remedy for the employer is to set the union election victory aside, for the union it is the ordering of a rerun election.

From the Regional Director’s decision, there is discretionary review by the Board. If review is granted, there will be briefs, but no oral argument

§ 8(a)(5) case

If employer refuses to comply with an election result in favor of the union, the Regional Director will issue § 8(a)(5) complaint against the employer.

The case will not relitigate representation issues.

The case will be processed as an unfair labor practice case, but the process will be abbreviated.

As with any unfair labor practice, the case can be appealed to a court of appeals. A union that loses the election has no route to a court of appeals if the Board denies its election objections and refuses to go to complaint against the employer.

When a court decides representation issues (unit, misconduct, etc.) on appeal, deference to the Board is espoused.

Collective bargaining and bargaining agreements

The rules governing the process of collective bargaining are governed by the NLRA. The rules cover when the parties must bargain, over what issues, and the remedies for failing to bargain. This is the work of the Board.

Claims of breach of a collective bargaining agreements are within the jurisdiction of federal and state courts, with the former having preemptive jurisdiction.