

Overview of the NLRA and NLRB

OVERVIEW OF THE NLRA AND THE NLRB

I. HISTORY

A. National Labor Relations Act of 1935 (The Wagner Act).

In 1934 and 1935, Senator Wagner of New York introduced bills in the United States Senate to give federal support to employee organizations and collective bargaining. The National Labor Relations Act (“NLRA”) was passed by Congress, signed into law by President Roosevelt, and became effective on July 5, 1935. The NLRA is frequently referred to as the “Wagner Act” in recognition of the efforts, energy and legislative expertise of Senator Wagner in bringing to fruition the origin of modern American labor law.

The cornerstone of the NLRA was Section 7, which originally provided:

“Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.”

Unlike the earlier provisions of the National Industrial Relations Act (“NIRA”), 48 Stat. 198 (1933), the NLRA made the rights set forth in Section 7 legally enforceable. The NLRA also required employers to bargain collectively with employees through representatives [labor organizations] chosen by the employees.

In addition to the rights established in Section 7 — the right to organize, the right to bargain collectively, and the right to engage in strikes, picketing and concerted activities -- the Wagner Act established the National Labor Relations Board. The initial National Labor Relations Board (frequently referred to as the “Board” or the “NLRB”) consisted of three (3) members appointed by the President by and with the advice and consent of the Senate. The

Wagner Act defined certain acts and practices of employers as unfair labor practices in Section 8; and provided that the Board would decide in each case the appropriate unit for the purpose of collective bargaining, hold hearings, conduct secret elections, and resolve questions of representation.

Section 10 of the Wagner Act empowered the Board to prevent any person from engaging in any unfair labor practice (listed in Section 8), including the issuance of complaints and the holding of hearings, and the authority to issue an order requiring persons to cease and desist from unfair labor practices and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of the Act.

B. Labor Management Relations Act of 1947 (The Taft-Hartley Act).

The Labor Management Relations Act of 1947 (“LMRA”; “Taft-Hartley Act”, or “NLRA, as amended”) was enacted on June 23, 1947, and the amendments became effective 60 days thereafter, except that the authority of the President to appoint certain officers as set forth in Section 3 became effective immediately. The Taft-Hartley Act increased the membership of the Board from 3 to 5 Members, and authorized the Board to delegate to any group of three or more Members any or all of the powers it may itself exercise.

The Taft-Hartley Act established the position of General Counsel of the Board who, like the Board Members, is appointed by the President by and with the advice and consent of the Senate. The General Counsel of the Board exercises general supervision over all attorneys employed by the Board (other than Trial Examiners and legal assistants and other staff of Board Members) and over the officers and employees in the Regional Offices. The General Counsel has final authority, on behalf of the Board, with respect to the investigation of charges and issuance of complaints under Section 10, and with respect to the prosecution of such complaints

before the Board. The separation of the judiciary and prosecutorial functions in the LMRA was in response to criticism under the Wagner Act that the NLRB appeared to function as “judge, jury, and prosecutor”.

Section 7 (Rights Of Employees) was amended by the Taft-Hartley Act as follows:

“Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring members in a labor organization as a condition of employment as authorized in Section 8(a)(3).” (LMRA amendments in bold letters)

Section 8(b) was added and stated, among other provisions, that it was an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of the rights guaranteed in Section 7; to refuse to bargain collectively with an employer; and to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a refusal in the course of their employment, for certain prohibited objectives.

The LMRA added Section 8(c) which provided:

“The expression of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.”

The Taft-Hartley Act stated in Section 8(d) that “to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times, and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party . . . “

The Taft-Hartley Act made some changes in Section 9 including the filing of a decertification petition, and providing that the Board would conduct only one (1) election in a 12-month period. Section 10(b) was amended to provide that no complaint shall issue based upon any unfair labor practice occurring more than six (6) months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made. The Taft-Hartley Act added Sections 14(a) and (b), which provided as follows:

“(a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

(b) Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.”

The Taft-Hartley Act established the Federal Mediation and Conciliation Service (“FMCS” or “Service”), and set forth the functions of the Service. LMRA also included a provision where, in the opinion of the President, a threatened or actual strike or lockout affecting an entire industry or substantial part thereof will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe.

C. The Labor-Management Reporting And Disclosure Act of 1959 (Landrum-Griffin Act).

The Labor-Management Reporting and Disclosure Act of 1959 (“LMRDA” or “Landrum-Griffin Act”) was signed into law on September 15, 1959 by President Eisenhower. The Landrum-Griffin Act consisted of two major parts: Titles I through VI pertain to a bill of rights for union members, reporting requirements, trusteeships, elections, and miscellaneous

provisions; and, Title VII, amendments to the Taft-Hartley Act. Some of the major amendments to the Taft-Hartley Act included the closing of alleged “loopholes” in the secondary boycott provisions; the addition of a publicity proviso to Section 8(b)(4)(D); the addition of Section 8(b)(7); prohibited so-called “hot cargo” agreements in Section 8(e), with the exception of the construction and garment industries; and added Section 8(f) which permitted prehire agreements in the construction industry and agreements in the construction industry which required membership in a labor organization after the 7th day following the beginning of employment.

D. Other Amendments To The National Labor Relations Act.

In addition to the 1947 and 1959 amendments to the National Labor Relations Act, there have been other Federal Statutes or laws which have amended certain provisions of the NLRA. Public Law 93-360, enacted July 26, 1974, added Section 8(g) which requires notification of intention to strike or picket at any health care institution; and Section 19 concerning employees with religious convictions. There have also been a number of changes over the years to Section 302, Restrictions On Payments To Employee Representatives.

II. GENERAL OVERVIEW OF THE NLRB AND THE NLRA, AS AMENDED.

A. Structure of the National Labor Relations Board.

1. The Board

- a. **Function** - The chief quasi-judicial body under the NLRA, as amended.
- b. **Size** - The Board consists of five (5) Members appointed by the President for five (5) years, with the advice and consent of the Senate. The terms of the Board are staggered. Usually the Board Members sit on panels of three (3) Members.
- c. **Executive Secretary** - The Chief administrative officer responsible for assigning and monitoring cases, receiving and docketing documents, and other administrative duties.

- d. **Information Division** - Responsible for press releases, public announcements, and the publication of a weekly summary of Board Decisions.
- e. **Solicitor** - Chief legal advisor to the Board.
- f. **Division of Judges** - The Administrative Law Judges (“ALJ”) function as the trier of fact in unfair labor practice proceedings; and render Decisions containing findings of fact, conclusions of law, and a recommendation(s) as to the disposition of the case. The case, after hearing and the issuance of the Decision, is then transferred to the Board.

2. **The General Counsel Of The NLRB**

- a. **Function** - The General Counsel exercises general supervision over all attorneys employed by the Board (except ALJs and legal assistants and staff of Board Members), and over the officers and employees in the Regional Offices; has final authority on behalf of Board to investigate charges, issue and prosecute complaints, handle appeals, seek 10(j) injunctions, the overall supervision of the investigation and processing of representation petitions; and other duties prescribed by the Board or provided by law.
- b. **Term** - The General Counsel is appointed by the President for four (4) years, with the advice and consent of the Senate.
- c. **Division of Advice** - Responsible for giving advice to Regional Offices concerning complex or new legal issues.
- d. **Division of Enforcement Litigation** - Responsible for litigation to enforce or defend orders of the NLRB.
- e. **Division of Operations Management** – Responsible for supervising the field operations.
- f. **Regional Offices** - The Regional Director supervises a staff consisting of a Regional Attorney, field attorneys, field examiners, and other personnel. Some of the Regional Offices have separate Resident Offices header by a Resident Officer.

B. **Coverage Under The NLRA, As Amended.**

- 1. **Person** - Section 2(1) defines the term “person” to include one or more individuals, labor organizations, partnerships, associations, corporations,

legal representatives, trustees, trustees in cases under Title 11 of the United States Code, or receivers.

2. **Employer** - Section 2(2) defines the term “employer” to include any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.
3. **Employee** - Section 2(3) defines the term “employee” to include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, or by any other person who is not an employer as herein defined.
4. **Representative** - Section 2(4) defines the term “representative” to include any individual or labor organization.
5. **Labor Organization** - Section 2(5) defines the term “labor organization” to mean any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, in dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.
6. **Commerce** - Section 2(6) defines “Commerce” to mean trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.
7. **Affective Commerce** - Section 2(7) defines the term “Affecting Commerce” to mean in commerce, or burdening or obstructing commerce

or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

8. **Supervisor** - Section 2(11) defines the term “supervisor” to mean any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

C. Current Jurisdictional Standards Of The NLRB¹.

1. **Nonretail Enterprises** - gross outflow or inflow of revenue of at least \$50,000, whether such outflow or inflow is regarded as direct or indirect.
2. **Retail Establishments** - gross business volume of at least \$500,000 per year and substantial purchases from or sales to other states on a direct or indirect basis. When an employer’s operations are both retail and nonretail, the nonretail jurisdictional standards are applied unless the nonretail portion is de minimis.
3. **Office Buildings and Shopping Centers** - gross revenue of at least \$100,000 per year, of which at least \$25,000 is derived from organizations whose operations meet any of the Board’s jurisdictional standards other than the nonretail standard.
4. **Public Utilities** - gross business volume of at least \$250,000 per year or an interstate outflow or inflow of goods, materials, or services of \$50,000 or more per year, whether directly or indirectly.
5. **Newspapers** - gross business volume of at least \$200,000 per year.
6. **Radio and Television Stations; Telephone and Telegraph Systems** - gross business volume of at least \$100,000 per year.
7. **Hotels, Motels, Apartments, and Condominiums** - gross revenues of \$500,000 or more per year.
8. **National Defense Enterprise** - substantial impact on the national defense, irrespective of whether the operations satisfy any other jurisdictional standard.

¹ The Developing Labor Law, Third Edition, Volume II, Chapter 28, published by the Bureau of National Affairs.

9. **Employer Associations** - any member meets any jurisdictional standard, or the combined operations of all members meet any such standard.
10. **Secondary Employers** - in cases involving union conduct with respect to secondary employers, if the primary employer meets any of the jurisdictional standards or if the combined operations of the primary employer and the business of any secondary employers at the location affected by the conduct meet such standards.
11. **Single Employer Engaged In Multiple Enterprises** - the employer's overall operations meets any jurisdictional standard.
12. **Instrumentalities, Links, and Channels of Interstate Commerce** - gross revenue of at least \$50,000 per year derived from furnishing interstate transportation services or functioning as essential links in such transportation of passengers or commodities.
13. **Other Transit Systems** - gross volume of at least \$250,000 per year.
14. **Restaurants and Country Clubs** - gross annual volume of at least \$500,000.
15. **Hospitals** - at least \$250,000 gross annual revenue.
16. **Nursing Homes, Visiting Nursing Associations, and Related Facilities** - at least \$100,000 gross annual revenue
17. **Gambling Casinos** - where gross annual revenues exceed \$500,000.
18. **Symphony Orchestras** - gross annual revenue from all sources of at least \$1,000,000.
19. **Law Firms and Legal Assistance Programs** - jurisdiction is asserted where gross annual revenues are \$250,000 per year.

The NLRB has other jurisdictional standards besides the above list of jurisdictional standards covering such entities or organizations as professional sports, horse and dog racing, nonprofit, private educational, and religious institutions, architects, museums, accounting firms, real estate firms and associations, etc. Jurisdictional standards are within the discretion of the Board and not statutorily prescribed.

1. For more information on procedure before the NLRB, see *How to Take a Case Before the NLRB, Seventh Edition, and 2005 Supplement*, published by the Bureau of National Affairs. See also *The Developing Labor Law, Fourth Edition*, published by the Bureau of National Affairs.