

# OHIO STATE LAW JOURNAL

Volume 41, Number 2, 1980

## Current Issues in Labor Law

### Foreword

#### Which Side Are You On?

LEE MODJESKA\*

*They say in Harlan County  
There are no neutrals there,  
You'll either be a union man  
Or a thug for J. H. Blair.  
Which side are you on?  
Which side are you on?*

*Florence Reece\*\**

Labor law is one of the most complex of the legal specialties, and its study and practice is tremendously challenging and demanding. The rigors are not confined to matters of substantive and procedural law. Today's private labor law practitioner is inevitably confronted with various difficult and fundamental ethical, moral, and ideological questions.<sup>1</sup>

Ethical, moral, and ideological questions are of course not unique to labor law practice, but the labor relations milieu does present idiosyncratic problems. The very history and intensity of labor-management conflict, with its concomitant passion and prejudice, have a virtually inescapable impact upon the lawyer who represents the parties to the conflict. Personal and professional integrity and identity are repeatedly challenged by strong and sometimes irresistible allurements or demands for compromise.

From law school to senior partnership, the private labor law practitioner is required to choose between the representation of either labor or management. Most labor law firms exclusively represent either unions or employers in labor relations matters. A variety of reasons, rational and irrational, contribute to this exclusivity phenomenon in labor law.

A startling number of lawyers profess a personal inability or unwillingness to represent a particular side. It is common to hear lawyers

---

\* Professor of Law, The Ohio State University College of Law. On leave, 1980-81, Visiting Professor, Duke University School of Law.

\*\* Florence Reece, *Which Side Are You On?* (1932). This old labor song was written by the wife of a leader of the National Miners Union in Harlan County, Kentucky, during the bitter organizational struggles of the coal miners.

1. For better or worse, the observations here are based upon personal experience. For many years the writer was engaged in the practice of labor law—as a partner and associate in major law firms, as a sole practitioner, and as government counsel.

state, "I could never bring myself to represent a union" or "I could never represent an employer." The position appears to be an amalgam of emotionalism, morality, and ideology. The rejected side seems to be viewed as the embodiment of greed, evil, and corruption. The favored side seems to be viewed as the last bastion of the human spirit and the free enterprise system.

Most labor lawyers appear to perceive a conflict of interest per se in the dual representation of labor and management interests, whether or not a direct conflict exists in the particular matter. Some consider dual representation inappropriate in various, particularized situations—such as when the parties share a common trade, industry, or geographic area.

Considerations of client acquisition and retention may be predominate in a firm's decision to exclusively restrict its labor law clientele and practice to either labor or management. Many, if not most, employers would absolutely reject legal representation by a firm which also represents unions. Conversely, most unions would not retain a firm which represents employers.

Such client preferences undoubtedly reflect certain elements of myopia and prejudice. Indeed, there may be merit to the suggestion that the insights and experiences gained by representation of one side renders that lawyer uniquely qualified to represent the other. Further, such client preferences are hardly consonant with the proposition that a competent lawyer is capable of quality representation regardless of the particular client's partisan cause and interest.

These client preferences also strike and reflect a deeper chord, for they are not cut from the whole cloth. They carry with them and represent all of the grandeur and the tragedy that has marked labor's long march toward worker betterment.<sup>2</sup> The banners of both labor and management are bloodied from this conflict.

Consequently, when labor or management retain a labor lawyer they are not simply seeking technical legal counsel in the classic, neutral sense. Rather, they are seeking a comrade, a fellow warrior, a true *landsmann*, in the basic socio-economic class struggle between labor and management. Sometimes, in an ultimate sense, the parties are seeking a champion for their cause.

With due regard for the progressive sophistication which has theoretically infused the modern labor-management sphere, union busting remains one of the hottest games in town. Destroying initial organizational efforts, thwarting employee free choice of union representation, and neutralizing or ousting the incumbent union remain a very large part of management labor practice. Conversely, resisting and counteracting such activities is a large part of union labor practice.

---

2. The writer is indebted to his dear friend Attorney Abe F. Levy of Los Angeles, California, for his unfailing support, guidance, and inspiration for over twenty-five years, and for his insights and teachings concerning the history, meaning, and realities of labor's long march. Attorney Levy is of course not responsible for those times when the writer failed to listen.

In many segments of the marketplace today unionism is no more accepted by employers than it was a half century ago. Indeed, there are portents of renewed onslaughts on the house of labor as an institution, from within as well as from without. In this struggle the labor lawyer, on either side, can be severely tempted or pressed to counsel and participate in borderline, if not illegal, tactics to achieve victory for the client.

Many labor lawyers desire partisan involvement with client and cause. For some, life and practice without such involvement is barren. Involvement which obscures or interferes with the lawyer's specialized function *qua* lawyer is of course improper and antithetical to that objectivity essential for effective legal representation. Properly and skillfully applied, however, involvement with client and cause can produce a most formidable and effective advisor and advocate. Many of this nation's labor lawyers, including house counsel, have become deeply involved and dedicated to the labor or management cause and have acquitted themselves with honor to the profession. Some have not. Labor law practice unfortunately has also lent itself to a small but rabid breed who render general disservice.

While direct involvement and alignment with labor-management client and cause need not be inconsistent with quality representation, neither is it the *sine qua non* of effective counsel. Many labor lawyers do not want such involvement and alignment but prefer instead the model of the classic neutral but vigorous advocate.

As a realistic matter, such neutrality may be extremely difficult to maintain. The foregoing exclusivity considerations are inextricably interwoven with career and financial considerations, and the pressures generated for partisan alignment are substantial. Too often these pressures make the lawyer a prostitute. As a general proposition, in private labor practice as in Harlan County there may well be "no neutrals there."<sup>3</sup>

The materials which follow in this symposium issue reflect some of these partisan tensions that underlie labor law. The materials cover timely, difficult issues and should prove of interest and value whichever side you are on.

---

3. Because the National Labor Relations Board (NLRB) represents public rather than private interests, governmental legal practice with the NLRB affords one alternative for some labor lawyers who would avoid the conflicts and pressures of partisan choice and representation. In return, however, the NLRB lawyer must forego much of the challenge and satisfaction offered by private practice.

Another alternative is the ivory tower of academia where one can succumb to the temptation to run the universe on paper.

