

LABOR LAW I
Summer Quarter, 2010
Professor Ira Sills

“[L]abor is the technical term used for human beings[.]”

-Karl Polyani, *The Great Transformation: The Political & Economic Origins of Our Time*, Boston: Beacon Press, 2001 ed., at p. 79 [orig. ed. 1994].

“The main object of labour law has always been, and I venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent, and must be inherent, in the employment relationship.”

-Otto Kahn-Freund, *Labor & the Law*, London: Stevens, 2d ed. 1977, at p. 6.

Course Materials

The course materials consist of two, photocopied class packets available at Gnomon Copy.

- Class Packet #1 is a casebook entitled LABOR LAW: EMPLOYEE ORGANIZATION & CONCRETED ACTION (13th ed. 2009). The casebook is designated “CB” in the syllabus.¹
- Class Packet #2 is entitled SUPPLEMENT – STATUTES &c. (5th ed. 2009), designated “Supp” in the syllabus. Please bring the Supplement to every class session.

Syllabus and Reading Assignments

Copies of the syllabus will be distributed in class. All readings are required, unless otherwise indicated.

¹ I owe a debt of gratitude to Professor Karl Klare who assembled the Casebook and Supplement. He continues to be an inspiration to those of us “laboring” in the vineyards of Labor Law.

SYLLABUS & REQUIRED READINGS

Please note that the class numbers do not necessarily coincide with chapter numbers in the materials.

I. INTRODUCTION

Class #1 – Introduction

Class #2, Class #3 – Overview of the NLRA

Chart, Structures of Workplace Rights, CB: 1-1

Chart, US Unionization Statistical Portrait, CB: 1-2 to 1-3

“Good Cause” Clause, Sample language from a collective bargaining agreement,
Supp: 110

ILO Declaration on Fundamental Principles & Rights at Work, Supp: 7

International Covenant on Civil & Political Rights, Supp: 8

National Labor Relations Act (NLRA)—Read editor’s introduction (Supp: 29-31)
and §§ 1, 3(a), 3(d), 6, 7, 8(a)(1) – (5), 8(b)(1) – (3), 9(a), 9(c)(1), 10(a)–
(f), 10(j) & 10(l), 13

Note, Statutory Goals, CB: 2-1

Chart, ULP Procedure, CB: 2-2

Note, Case Names, CB: 2-3 to 2-4

Table, NLRB Case Intake, CB: 2-5

Table, Composition of NLRB Case-Load, CB: 2-6

Table, Recent Employer Violation Levels, CB: 2-7

Table, Backpay Received, CB: 2-8

Table, Elapsed Time (C-Cases), CB: 2-9

ULP Charge Form (CA-Cases). CB: 2-10

Employee Free Choice Act, Sec. 4, Supp: 104-05

Class #4 – jurisdiction and coverage

NLRA §§ 2(2), 2(3), 2(6), 2(7), 10(a) & 14(c)

Note, To Which Employers & Employees Does the NLRA Apply?, CB: 3-1 to 3-3

Note, The Commerce Factor, CB: 3-4 to 3-5

Note, NLRA Coverage, CB: 3-6 to 3-11

Chart, NLRA Application, CB: 3-12

Truth In Employment Bill, Supp: 98-99

Class #5 – Coverage (con’d): undocumented workers, independent contractors

Hoffman Plastic, CB: 3-13 to 3-24

DOL Fact Sheet on Hoffman, CB: 3-25

NLRA §§ 2(3), 2(11), 2(12) & 14(a)

Hearst Publications, CB: 4-1 to 4-8

Restatement, 2d, Agency § 220, CB: 4-9
Pennsylvania Academy of the Fine Arts, CB: 4-10 to 4-16

Class #6 – supervisors, managerial employees

Packard Motor Car Co., CB: 4-17 to 4-22
Note, Managerial Exclusion, CB: 4-23
Note on Yeshiva University, CB: 4-24 to 4-27

II. PROTECTED, CONCERTED ACTIVITY

Class #7 – concerted activity

NLRA §§ 7 & 8(a)(1)
Washington Aluminum, CB: 5-1 to 5-6
Sherman Anti-trust Act, §§ 1 & 7, Supp: 15-16
SCTLA, CB: 5-7 to 5-10

Class #8 – section 7 rights; “other mutual aid or protection”; 8(a)(1) retaliation cases; *Weingarten* rights; waiver

ULP’s Under § 8(a)(1), CB: 6-1 to 6-2
Note, Protected Conduct, CB: 6-3 to 6-5
Orchard Park Health Care Center, CB: 6-6
J. Weingarten, Inc., CB: 6-7 to 6-16
Application of *Weingarten* in Non-Union Workplaces, CB: 6-17 to 6-21
Memo, Waiver, CB: 6-22
Problem for Discussion, CB: 6-23

Class #9 – concert

Meyers Industries/Prill, CB: 7-1 to 7-22
Note, Concert Requirement, CB: 7-23 to 7-24
For further discussion: Problem, CB: 6-23

Class #10, Class #11 – loss of section 7 protection; sit-down strikes; indefensible disloyalty; partial strikes; slow-downs; worker efforts to organize production

NLRA § 10(c)
Bird Engineering, CB: 8-1 to 8-2
Johnson Technology, CB: 8-3 to 8-4
Note, Work-Rules, CB: 8-6 to 8-8
Jefferson Standard, CB: 8-9 to 8-15
Elk Lumber, CB: 8-16 to 8-18
Fansteel Metallurgical & Historical Background, CB: 8-19 to 8-29

Quietflex Mfg. Co., CB: 8-30 to 8-31
Memo, Loss of § 7 Protection, CB: 8-32
For further discussion, Problem, CB: 6-23
Problem for Discussion, CB: 8-33

III. ORGANIZING

A. On-premises activity & access to the premises

Class #12 - on-shift activity; the basic presumptions

Republic Aviation, CB: 9-1 to 9-6
Note, Employee Expression at the Workplace, CB: 9-7 to 9-18
Northeastern University, 1st. excerpt, CB: 9-19 to 9-20
Magnavox, CB: 9-21 to 9-24

Class #13, Class #14 – the basic presumptions (con'd): “non-employee” organizers; premises-access; constitutional and common law background; off-duty employees; waiver

Eastex, CB: 9-25 to 9-34
Note on Harrah’s Lake Tahoe Resort, CB: 9-35 to 9-36
First Amendment Access to Private Property? CB: 10-1 to 10-2
Harlan Fuel, CB: 10-3 to 10-4
Babcock & Wilcox, CB: 10-5 to 10-13
Lechmere, CB: 10-14 to 10-23
Right To Organize Bill, Sec. 2, Supp: 101
Note, Off-Shift Employees, CB: 10-24 to 10-25
ITT Industries, CB: 10-26 to 10-33
Guard Publishing, CB: 10-34 to 10-44
Problems for Discussion, CB: 10-45 to 10-46

B. Employer responses to organizing

Class #15 - union avoidance; union substitution; interrogation; supervisory campaigning

Note, Employer Responses to Organizing, Introduction, CB: 11-1
Note, Drafting History of § 8(a)(1), CB: 11-2
Chart, Employer Strategies, CB: 11-3
Note, The “Do’s & Don’t’s,” CB: 11-4
Violating § 8(a)(3) – Cost/Benefit Analysis, CB: 11-5 to 11-6
Interrogation and A & E Stores, CB: 11-7 to 11-8

Class #16 - coercive speech; captive-audience speeches; promises; grant of benefits

Exchange Parts, CB: 12-1 to 12-4
Union Substitution, CB: 12-5
Note, Employee "Free Choice," CB: 12-6 to 12-10
NLRA § 8(c)
Note, Labor Act Regulation of Speech (1), CB: 12-11
Federbush Co., CB: 12-12
Dal-Tex Optical, CB: 12-13 to 12-17
Gissel Packing (1st. excerpt), CB: 12-18 to 12-21
Village IX, Inc., CB: 12-22 to 12-24
Livingston Shirt Corp., CB: 12-25 to 12-28
Labor Law Reform Act of 1977, Sec. 3, Supp: 100
Right to Organize Bill, Sec. 2, Supp: 101
Problems for Discussion, CB: 12-29 to 12-31

C. Retaliatory discharge; plant closings; runaway shops

Class #17 – retaliatory discharge and refusal-to-hire

Read: NLRA §§ 8(a)(3), 10(c) & 10(m)
Memo, § 8(a)(3) Retaliation Cases, CB: 13-1 to 13-6
Note on Phelps Dodge, CB: 13-7
Edward G. Budd Mfg., CB: 13-8 to 13-9
Wright Line, CB: 13-10 to 13-19
Civil Rights Act, Title VII §§ 703(m) & 706, Supp: 13
Problems for Discussion, CB: 13-20 to 13-22

Class #18 - retaliatory plant closure; runaway shops

Note, Mass Dismissals, CB: 14-1 to 14-2
Darlington Mfg. Co., CB: 14-3 to 14-9
Weather Tamer, CB: 14-10 to 14-13
Problem for Discussion, CB: 14-14

[chapter 15 omitted from this edition]

IV. OBTAINING REPRESENTATION RIGHTS

Class #19 – acquiring § 9(a) status and representation rights; R-Case procedure; QCR; bargaining units; objectionable conduct

R-Case Procedure

NLRA § 9
Note, Acquiring § 9(a) Status, CB: 16-1 to 16-2
Note, QCR, CB: 16-3 to 16-4

Chart, R-Case Procedure, CB: 16-5
Petition, CB: 16-6
Sample Union Authorization Card, CB: 16-7
Table, Elapsed Time (R-Cases), CB: 16-8
Note, Judicial Review of R-Case Decisions, CB: 16-9 to 16-10

Bargaining Units

Note, Appropriate Bargaining Unit, CB: 16-11 to 16-14 [the sample bargaining-unit descriptions may be skimmed]
Note, Single-Site Units, CB: 16-15 to 16-19

Objectionable conduct (OC)

General Shoe, CB: 16-20 to 16-21
Chart, NLRB Regulation of Speech (2), CB: 16-22
Chart, Peerless Plywood Speech, 16-23

Class #20 – non-electoral routes to obtaining bargaining rights; Gissel bargaining orders; voluntary recognition; card-check recognition

Note, Gissel Packing, CB: 17-1 to 17-3
Note, Linden Lumber, CB: 17-4 to 17-5
Note, Voluntary Recognition, CB: 17-6 to 17-9
Note, Non-Exclusive, Members-Only Bargaining, CB: 17-10 to 17-12
NLRA § 8(f)
Note, Polling, CB: 17-13
Summary, Establishing Bargaining Rights, CB: 17-14
Employee Free Choice Act [Bill], Sec. 2, Supp: 102-103
Massachusetts Written Majority Authorization Amendments, see underlined text in §§ 1 & 4 of the Mass. Public Employee Labor Relations Statute, Supp: 82 & 83-84
Secret Ballot Protection Act, Supp: 106-107

Class #21 – time-bars; withdrawal of recognition; termination of the collective bargaining relationship

Time-Bars, CB: 17-15 to 17-18
Termination of the Collective Bargaining Relationship, CB: 17-19 to 17-24

V. ECONOMIC WEAPONS

A. General

Class #22 - constitutional rights to engage in concerted political and/or labor action; economic weapons under the NLRA industrial-relations model

Claiborne Hardware, CB: 18-1 to 18-7
Note, Constitutional Right to Strike? CB: 18-8 to 18-11
NLRA § 13
Skim: LMRA §§ 206-210, Supp: 56-57
Note, Picketing & the First Amendment, CB: 18-12 to 18-18
Insurance Agents' Int'l. Union, CB: 18-19 to 18-26
Review: Note on Protected Conduct, CB: 6-3 to 6-5
Note, Holdings of Insurance Agents', CB: 18-27
Chart, Regulatory Models in Labor Law, CB: 18-28

B. Strikes, strike resistance weapons, lockouts & other pressure tactics

Class #23 - the distinction between economic strikes and unfair labor practice strikes; strike replacements

Mackay Radio, CB: 19-1 to 19-5
Note, Strikes, CB: 19-6 to 19-8
NLRA § 9(c)(3)
Fleetwood, CB: 19-9 to 19-11
Note on Laidlaw, CB: 19-12 to 19-13
Cesar Chavez Workplace Fairness Act, Supp: 108
Legislative Proposals to Overrule *Mackay Radio*, CB: 19-14 to 19-20

Class #24 – post-strike order of recall; waiver of recall rights

Erie Resistor, CB: 20-1 to 20-7
Int'l Paper Co. & "Inherently Destructive" Conduct, CB: 20-8 to 20-9
Examples of "Inherently Destructive" Conduct, CB: 20-10
Gem City, CB: 20-11 to 20-12
Problem for Discussion, CB: 20-13
Great Dane, CB: 20-14 to 20-16
Note, A Tension in § 8(a)(3) Law?, CB: 20-17
Chart, Analysis of Discrimination Cases, CB: 20-18
Summary Memo, Illegal Motive, CB: 20-19 to 20-21
Note, TWA, CB: 20-22 to 20-26
Chart, Legal Construction of Labor Markets, CB: 20-27
Note, Balancing, CB: 20-28 to 20-29
Problem for Discussion, CB: 20-30

Class #25 - waiver of the right to strike; no-strike clauses; wildcat strikes; ULP strikes; safety strikes; lockouts

"No-Strike" Clauses, Sample Contract Language, Supp: 112-113
Note, Sands Manufacturing, CB: 21-1
NLRA § 8(d) (read from the Proviso to the end of the section)

Mastro Plastics, CB: 21-2 to 21-8
Read: LMRA § 502, Supp: 62
Note, TNS, Inc., CB: 21-9 to 21-13
Memo, Lockouts, CB: 22-1 to 22-5

[chapter 23 omitted from this edition]

C. Secondary pressure

Class #26 - secondary pressure; employee appeals vs. consumer appeals; hot goods; picketing vs. non-picketing pressure; ally doctrine

Read: NLRA §§ 8(b)(4), 8(e), and 10(l); LMRA § 303, Supp: 61-62
Basic Doctrine, CB: 24-1 to 24-3
Chart, Analysis of § 8(b)(4)(B) Cases, CB: 24-4
Allied International, CB: 24-5 to 24-9
Royal Typewriter, CB: 24-10 to 24-12
Note on Royal Typewriter, CB: 24-13
Notes, Ally Status, CB: 24-14 to 24-15
AFTRA, CB: 24-16 to 24-20

Class #27, Class #28 - common-situs; roving-situs; reserved gates; consumer appeals; merged product; following the product; picketing vs. handbilling

Moore Dry Dock, CB: 24-21 to 24-24
GE, CB: 24-25 to 24-28
Tree Fruits, CB: 25-1 to 25-6
Note, What is Picketing?, CB: 25-7 to 25-9
Safeco, CB: 25-10 to 25-17
Note, "Speech-Plus", CB: 25-18 to 25-23
Read the final proviso to § 8(b)(4) ("publicity proviso")
DeBartolo I, CB: 25-24 to 25-27
Leaflet in the DeBartolo case, CB: 25-28
DeBartolo II, CB: 25-29 to 25-34
Recap: Issues in DeBartolo, CB: 25-35

Class #29 – further issues and problems on secondary pressure

Chart, Secondary Boycott Appeals, CB: 25-36
K Mart Corporation, CB: 25-37 to 25-41
Problems for Discussion, CB: 25-42 to 25-45

[chapters 26-28 omitted from this edition]

VI. MAJORITY RULE & THE DUTY TO BARGAIN

Class #30 - majority rule; dissenting concerted activity

Read: NLRA §§ 8(a)(5), 8(b)(3), and 9(a)

J. I. Case and notes, CB: 29-1 to 29-6

Civil Rights Act of 1964, Title VII (as amended) §§ 703(a)-(c) & 704(a), Supp:
11-13

Emporium Capwell, CB: 29-7 to 29-15

Leaflet in the Capwell case, CB: 29-16

Class #31 - good faith; hard vs. surface bargaining; information disclosure; the first-contract problem

NLRA § 8(d) (read from the beginning of the section up to the Proviso)

H.J. Heinz, CB: 30-1 to 30-2

Reed & Prince, CB: 30-3 to 30-9

Note, Information Disclosure, CB: 30-10 to 30-11

Problem for Discussion, CB: 30-12 to 30-13

H. K. Porter, CB: 30-14 to 30-19

Note, Hard Bargaining & Withdrawal of Recognition, CB: 30-20

Employee Free Choice Act [Bill], § 3, Supp: 103

Problem for Discussion, CB: 30-21

Class #32, Class #33 - unilateral changes; impasse; subjects-of-bargaining doctrine; midterm bargaining; management rights clauses

Note, Unilateral Changes, CB: 31-1 to 31-4

Borg-Warner, CB: 31-5 to 31-9

Note, Significance of Borg-Warner, CB: 31-10

Note, Subjects-of-Bargaining Doctrine, CB: 31-11 to 31-12

Summary Chart, Subjects-of-Bargaining Doctrine, CB: 31-13

[skim] Categorization of Bargaining Subjects, CB: 31-14 to 31-16

Note, Midterm Bargaining, CB: 31-17 to 31-19

Note, Management Rights Clauses, CB: 31-20 to 31-21

Sample Contract Language:

- management rights clause, Supp: 112
- grievance & arbitration procedures, Supp: 110-111
- no-strike clause, Supp: 112-113
- zipper clause, Supp: 115

American Nat'l. Insurance Co., CB: 31-22 to 31-27

Note, Significance of American Nat'l Insurance Co., CB: 31-28

Chart, Freedom of Contract, CB: 31-29

Duty-to-Bargain Time-Line, CB: 31-30

Class #34 - the duty to bargain over the firm's strategic decisions; decision-bargaining vs. effects-bargaining; the "core of entrepreneurial control"

Fibreboard Paper Products, CB: 32-1 to 32-8
First Nat'l. Maintenance, CB: 32-9 to 32-17
Chart, Decision Bargaining, CB: 32-18
Distribution of Profits, Sample Contract Language, Supp: 111-112
Problem for Discussion, CB: 32-19

Class #35 – decision-bargaining (con'd); review