A Simulation of Union Organizing in a Labor Law Class

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Since I started teaching, in 1990, I have realized that the vast majority (probably more than 95 percent) of the students in my class on labor relations law have never worked in a unionized environment. Indeed, a great many have not worked in what has sometimes been termed an "industrial" or "blue collar" environment. As a result, I have found it difficult in class to contextualize cases and inculcate an appreciation for the collective consciousness that characterizes the union experience, especially in the industrial setting.

It was surprising to me how much this lack of union or industrial experience affects the students' understanding of the regime erected by the National Labor Relations Act. For example, students have a difficult time understanding how an employer's creation of work teams could possibly undermine independent employee efforts at unionization. Having never attempted to deal with management in a concerted way, students have no appreciation for the extent of an employer's coercive power over employees. That makes it hard for them to understand certain doctrines in labor law related to union organizing, like section 8(c)'s prohibition of promises of benefits, which stems from an understanding that well-timed benefits can serve as forceful reminders to employees that the employer truly controls their economic destiny.[1]

After reading David Dominguez's description of a simulation experience involving zero-sum bargaining related to minority rights,[2] I decided to try a simulation experiment in my labor law class: I would allow students, if they chose, to form a union and bargain with me about terms and conditions of the

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1. 29 U.S.C. § 158(c); see NLRB v. Exchange Parts Co., 375 U.S. 405 (1964).
2. Beyond Zero-Sum Games: Multiculturalism as Enriched Law Training for *All* Students, 44 J. Legal Educ. 175 (1994).

class.[3] My modest initial goal was to have students appreciate the value of a strong section 8(a)(2)—prohibiting employer domination of labor unions—at a time when the section is under heavy attack for its apparent obsolescence.

The Plan

The "Terms and Conditions" of the Class[4]

To ensure that the students would feel the sense of common purpose that is often present when workers choose to join a union, it was important to structure the simulation around issues that students care about a great deal. But this subject required careful thought since the students would later be studying the implications of "terms and conditions." If the students embraced the simulation wholeheartedly, their tactical decisions upon discovering the privileged nature of the use of self-help to force agreement on a "mandatory subject of bargaining" might leave me in the unenviable position of explaining a "study stoppage" or student walkout to the dean. One of the issues students care about, at least in my classes, has been the format for the final examination. Students care about whether they will have to write an in-class or a take-home examination. They are also interested in whether the exam will consist of short answers or long hypotheticals, and in the space and time constraints that will be placed upon them. So I decided to start with a definition of "terms and conditions" that would include the form and length of the final examination.

I added two other terms and conditions. First, I thought it would be interesting to see how students would approach the ever-thorny issue of class participation—whether it should be required at all, how it should be effected, and how it should be evaluated if required. Second, I decided to add the subject matter of the course to the terms and conditions. Now that Denver has reduced the labor law course to three credits, I face the excruciating task each year of deciding which major labor law doctrines to omit. It might be enlightening, I thought, to get the students' input. I would give them an overview of the NLRA and then ask them which doctrines they would most like to explore.

The "terms and conditions" of the class thus became "any and all issues concerning the subject matter of the class and the form of evaluation for the students in the class, including final examinations and class participation."

Administrative Issues

One of the first administrative questions that arose was how to replicate in miniature the structure of the National Labor Relations Board with over-

3. In spring 1995, the students voted against union representation, and therefore this article discusses only the phase of the simulation dealing with the student union organizing campaign, the election, and the postelection hearing. But I conducted the simulation again in spring 1996, and this time the students voted in favor of labor representation, which led to a labor contract between the teacher and the student union. I hope to describe that part of the simulation in a future article.

4. Once a union is properly recognized, it may begin collective bargaining with the employer. 29 U.S.C. § 159(a). Collective bargaining encompasses "rates of pay, wages, hours of employment, or other conditions of employment," commonly referred to as "terms and conditions of employment."

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whelming resource constraints. After discarding a number of alternatives such as setting up research assistants or secretaries as NLRB functionaries or administrative law judges, I decided that it would be best if I wore two hats, as employer and as NLRB. I thought I could act as professor/employer quite easily, but I would have to be carefully objective in my NLRB role so as not to undermine the credibility of the simulation. By maintaining objectivity, I would be able to receive any charges or petitions the students might wish to file. It should be noted that this did not stop the union organizers from calling the NLRB Regional Office in Denver for help with their election petition.

Although the students accepted my dual role as employer/NLRB with some grudging hesitation, they frequently attempted to use the duality to their advantage. But my role actually became problematic only once during the simulation. During the election campaign an issue arose over the *Excelsior* list: the student union organizer and I had both forgotten about the list, and the union procured a list of "employees" only two days before the election.[5] In a later hearing over election objections, the student playing the role of NLRB attorney (loosely representing the union's viewpoint on election objections) made me quite uncomfortable by asking whether I was the employer or the NLRB when I failed to turn over the *Excelsior* list in time. His theory: if I was the employer/professor, my failure to turn over the list in time was purposeful, given my "vast" experience in the labor field; if I was the NLRB, the election should be rerun on the theory that the NLRB has an affirmative duty to produce the list once it is received.

One final structural hurdle involved the use of self-help. If the students did form a union, and if bargaining resulted in an impasse despite my best efforts,[6] a prolonged strike would not necessarily be in the best interests of the students or the school. Still, if students decided that some issue about which I would not agree was important enough to lose schooling over, who was I to stand in their way? After all, the value of any law school class session could be reduced to dollar terms, with any loss in education analogous to the loss of a paycheck. In this sense, a study stoppage might be an important part of any realistic simulation. Nevertheless, a prolonged strike seemed an uninviting prospect. It struck me that the dean (with his consent, of course) might be viewed as the president of the United States for purposes of the simulation. As president, he would have the authority to declare a "national emergency" pursuant to

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5. Excelsior Underwear, 156 N.L.R.B. 1236, 1239–40 (1966), established a rule for NLRB elections that within seven days after the election has been directed or agreed upon,

> the employer must file with the Regional Director an election eligibility list, containing the names and addresses of all the eligible voters. The Regional Director, in turn, shall make this information available to all parties in the case. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

The rule was upheld in NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969).

6. I had decided before the simulation that I was prepared to agree to almost anything the students decided they would like to do with respect to the test or class participation. I was surprised, however, when I found out that the students were going to demand bargaining over implementation of a grade curve, which is not mandatory for upper-class elective courses like labor law, but to which I strive to adhere in the interest of fairness.

section 208 of the Labor-Management Relations Act,[7] and presumably would return the students and me to the classroom while we worked out our differences. Fortunately, the Denver dean, Dennis Lynch, is familiar with labor law, having taught it for a number of years at Miami and having served as an arbitrator. Once he agreed to serve as the president, I felt there was enough of a structure to proceed with the simulation.[8]

The Simulation

The Problems of Order and Section 8(a)(2)

Deciding to attempt the simulation was far easier than deciding how to teach the subject matter of the class in a way that would enhance the simulation. In the past, I had tried to follow the organization set out in the textbook for the course.[9] It introduces students to labor law by surveying the history of labor relations in the United States; then, after brief notes on jurisdiction and NLRB procedure, it delves into section 8(a)(1).[10] This presents some problems for a simulation: students are still wondering about the definition of a labor union after three or four weeks of study, and they have no idea how to proceed if they decide to begin organizing. To circumvent both problems, I chose to begin the class by exploring the definition of a labor union.

I started by assigning *Emporium Capwell Co. v. Western Addition Community Organization*[11] and *J. I. Case Co. v. NLRB*[12] to give the students some idea of the status that unions enjoy under the NLRA. Starting here allowed me to introduce notions of industrial democracy and exclusive representation. The obvious analogies to our own political system made this material easy for me to convey and for the students to understand in the early stages of the class. In addition, I could use these cases and section 9(a)[13] to talk about duties unions owe to bargaining unit members, and to discuss briefly how unions *actually* bargain with employers to hammer out labor contracts.

7. 29 U.S.C. § 178.

8. The truth is that the dean did hesitate a bit, quietly contemplating all the ways in which this simulation could go bad. At another institution, a teacher might think about involving an experienced colleague or even a knowledgeable alumnus in this role.

A side benefit of the national emergency angle was that I was able to briefly review the president's powers in this context with the class, something I never normally have time to do. This paid off later in the semester when President Clinton became involved in the baseball strike and students began asking questions about the president's power to force a resolution without declaring the baseball strike a national emergency—something that (in 1994 and 1995) only a long-suffering Cleveland Indians fan would ever have contemplated.

9. Leroy S. Merrifield et al., Labor Relations Law: Cases and Materials, 9th ed. (Charlottesville, 1994).

10. Section 8(a)(1) provides that it is "an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7]." 29 U.S.C. § 158(a)(1). Section 7 grants to employees 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 other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157.

11. 420 U.S. 50 (1975).

12. 321 U.S. 332 (1944).

13. 29 U.S.C. § 159(a).

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From this discussion, it was easy to move into section 8(a)(2),[14] which requires a foray into section 2(5)'s statutory definition of "labor organization."[15] Since I had always had difficulty conveying to students the notion that an employer can easily subvert organizing efforts by creating employee action committees, I endeavored to put into practice what I had in the past been unable to teach effectively. I resolved to precede the discussion of *Electromation, Inc.*[16] with the creation of employee action committees in the classroom. I was curious to see how quickly students could perceive an unfair labor practice in the making.

I divided the class of forty-two students in four, asking each of the four groups to elect a leader and then to reach a consensus on the type of final examination they would prefer. My thinking was that each group would become invested in a different preference, so that it would be difficult to organize later around a single preference. I also thought that I would be able to challenge votes of the group leaders as "supervisors" in the case of any union election. The goal of all this was to demonstrate how an employer's sincere interest in receiving employee input could distort and deter an independent worker organizing drive, even in the absence of any anti-union animus.

Over the course of a week and a half, I had the student action groups meet for ten minutes before class, and then I met separately with the group leaders to poll them about the results of their discussion. At these meetings I tossed out ideas about how to reach consensus and made suggestions about alternative exam formats to explore in the groups. By virtue of my status as professor, the students went along unquestioningly, even though I had circulated a syllabus explaining that the goal of the class would be to have the students attempt to organize a union and then, if successful, enter into a "shared process" of bargaining about the terms and conditions of the class.

I was frustrated by the students' failure to link the student action groups I had created with the employee action committees in *Electromation.* That slowly changed, however, as the class began to discuss NLRA jurisdiction and procedure before the NLRB. While the class was discussing NLRB organization and procedure, I circulated copies of forms used by the NLRB to process various claims. I distributed copies of employer and union unfair labor practice charge forms as well as copies of union election petitions. In addition, I made sure to emphasize the uses of authorization cards, even though I did not distribute any facsimiles. From NLRB procedure and organization, I took the class into a detailed discussion of representation questions and union elections. We discussed questions concerning representation, consent election procedures, appropriate bargaining units, and laboratory conditions require-

14. Section 8(a)(2) provides that it is an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." 29 U.S.C. § 158(a)(2).

15. 29 U.S.C. § 152(5).

ments. At this point, I felt that I had quickly, but comprehensively, introduced the class to all the material they would need to conduct an organizing campaign and petition for an election. The rest would be up to them.

I was soon rewarded for my efforts. As we began our discussion of representation questions, I (the NLRB) received a charge alleging that I (the employer) had violated section 8(a)(2). The charge was aimed at the student action groups that I had formed, which were continuing to discuss terms and conditions of the class with me. A week later I announced that the NLRB and the employer had reached an informal settlement of the 8(a)(2) charge, which involved disestablishment of the student action groups and a posted notice.[17]

By this time two students had dropped the class. Apparently both felt they did not perform well on take-home exams, and they were certain that was what any student consensus would favor.

The Organizing Campaign

Although I had earlier informed the students that they were not to discuss their exam preferences outside the classroom, I decided to issue a written policy restricting the areas of the law school in which they could discuss the union. I had planned to tell them that I did not want the simulation to intrude on the life of the school or to interfere with other classes. I thought that a good tight rule restricting access and distribution would be a good way to begin our discussion of sections 8(a)(1) and 8(c).[18]

I was too late. On the very day that I was to announce the no-solicitation/no-distribution rule, I encountered two students posted at both ends of the classroom distributing authorization cards and soliciting on behalf of the union, the "American Federation of Labor Law Students—Colorado Chapter." By the end of the class, the student union organizer had filed an election petition supported by signed authorization cards from twenty-six of the forty members of the bargaining unit.

A former student who has been working as an attorney with the Federal Labor Relations Authority in Denver had volunteered to help with the simulation. I called and asked him to conduct the election. On February 23, 1995, the union organizer and I, with the help of the FLRA attorney, concluded a stipulated consent election agreement and set the date and time of the election: March 2, 1995, during the scheduled time for the labor law class.

Since we had just concluded our discussion of section 8(a)(1), I decided to schedule election speeches to be given during class two days prior to the

17. "Disestablishment" had precisely the hoped-for effect. Many students who were satisfied with the consensus that their student action group was reaching were unhappy that their efforts might be delayed—or worse, entirely disregarded. Moreover, they laid the blame on the NLRB, not the employer. I suggested to a few of the more frustrated students that they reread *Electromation* since I had followed the same course as the employer in that case.

18. Section 8(c) preserves to employers the right to free speech in labor/management relations, subject to the limitation that the employer may not threaten reprisal or force, or promise benefits. 29 U.S.C. § 158(c).

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election (to avoid violating the *Peerless Plywood Co.* twenty-four-hour rule[19]). To avoid any objections about campaign speeches to massed assemblies during any part of a union organizing campaign,[20] I decided the union should have equal time to speak to the class.[21]

I made sure that my speech was aggressive, but not coercive. I wanted the students to hear my message certainly, but also to think about the *Gissel Packing*[22] case. I hoped they would conclude that an employer could be quite persuasive without violating NLRA standards. The union representative spoke first (her choice). She emphasized having a student voice, and having a say in the way the final examination would be given. She talked about the harsh reputation of my final examinations and the importance of student input given that reputation. I opened by emphasizing that I would certainly bargain in good faith and would abide by any decision of the students regarding representation. Then I asked them to think about the hard work that would be involved in planning and carrying out a negotiation strategy. I also suggested that they might think about whether their representative would do what they wanted or, instead, would attempt to bargain for a consensus position that would not be tailored exactly to any particular student's liking. Each speech lasted about five minutes. We next proceeded to the election.

The Election and the Hearing

The election was held during one of the scheduled class times. I challenged the ballots of the four students who had been elected action group leaders, on the basis that they were "supervisors" under the NLRA. This set the stage for a discussion about the various considerations underlying a decision to challenge ballots. The move was also fruitful for discussing the apparent sense of disenfranchisement felt by the students whose ballots were challenged. The class concluded that the students probably were not "supervisors" since their positions were not accompanied by many of the attributes critical to the determination that a particular employee is a supervisor. For example, they did not have the ability to direct work or to hire and fire. My challenging the ballots in the face of a strong argument that the challenges would not be upheld allowed the students to see that employers and unions do not always act purely on the basis of what they think the legal outcome should be. The

19. 107 N.L.R.B. 427 (1953) (prohibiting either party from making election speeches on company time to massed assemblies of employees within 24 hours before the election).

20. See May Dep't Stores Co., 136 N.L.R.B. 797 (1962).

21. After I announced that there would be speeches, and explained how rare it would be for an employer to allow a union organizer to give a speech during working time, there was a brief discussion of my concession as an "iron fist in a velvet glove." Some students felt an employer (and apparently I) could gain an upper hand in the campaign by magnanimously granting equal time to the union. I was glad to see the way the students had internalized the lessons of *Exchange Parts* by linking the case's rule to the simulation.

22. NLRB v. Gissel Packing Co., 395 U.S. 575 (1969) (establishing test to determine whether employer predictions of consequences of voting for a union are coercive in violation of § 8(a)(1)).

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fact that many considerations surrounding an election are tactical or strategic is not an insight that can be very easily gleaned from the case law.

The election result was a surprise to me. The union's ability to get signed authorization cards so quickly from twenty-six of the forty students had given the election all the looks of a union landslide. But out of thirty-seven students who voted, nineteen voted against union representation, fourteen voted in favor, and four ballots were challenged. The challenged ballots were ruled not determinative since counting them in the union's favor would still leave the union shy of a majority. To the student union organizers, the result was also surprising. They seemed to feel that the swing in union sentiment was mostly due to my campaign speech, which they immediately deemed "coercive."[23] Perhaps mostly spurred on by the closeness of the vote, one of the pro-union students filed election objections on March 7, five days after the election. The student alleged a violation of section 9, saying that my failure to release an *Excelsior* list in a timely manner upset the "laboratory conditions" required of a valid election.[24] The student also alleged a violation of both section 9 and section 8(a)(1), saying that my campaign speech was coercive and therefore created an "atmosphere of fear" that at the very least compromised laboratory conditions for the election.

A date was set for the hearing on the objections. The student who had filed the charges was asked to act as the NLRB attorney (in this case generally representing the union's perspective). A student volunteer was needed to represent me since I would be a key witness. I feared that nobody would accept the task, but one student did volunteer. I then asked the dean if he would preside, as administrative law judge, over the hearing. I thought the dean would be sympathetic to the union, particularly since the remedy for any violation would likely be a rerun election. The student representing me found case law suggesting that a late release of an *Excelsior* list does not disturb laboratory conditions if the union is not prejudiced by the delay. She argued that the union had substantial and frequent access to the students in the class. As I mentioned before, the student acting as the NLRB attorney made much of my expertise and also suggested that the NLRB itself might be at fault. In addition, he argued that my speech was coercive because it suggested that the students would have to do more work if the union were elected. It struck me as odd that my suggestion that continuing the simulation would take more time could be viewed as "creating an atmosphere of fear," but I realized I had been naive about that point. Many students are generally put off by more work if it is not tied to a grade, even if it means that they will learn more.

23. One of the organizers later told me that the union's failure was probably due mostly to the fact that they had not rallied the class around a particular final exam format. If they could have posited a specific position that they would bargain for, they felt they could have eliminated a lot of the uncertainty that must have been present in the minds of some voters.

24. Although the date of the stipulated consent election agreement was February 23, and the list of names was released on February 28 (within the seven days required under *Excelsior Underwear)*, the student alleged that the spirit of *Excelsior* and, thus, laboratory conditions were affected by the list's release only two days before the actual election.

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The NLRB attorney argued that my earlier section 8(a)(2) violation should be considered in deciding whether the speech was intended to be coercive. I quickly reminded the student representing me about the case law—studied a month earlier when reviewing section 8(c)—suggesting that it may be improper to consider a prior unfair labor practice as evidence that a speech is coercive. When she looked at me blankly, I realized I had covered that fairly subtle material much too quickly. At the end of the hearing I took the opportunity to remind the class, using the argument put forward in the hearing, of the doctrine surrounding using speech to prove an unfair labor practice and, vice versa, using ULPs to prove that a speech is coercive.

The dean (somewhat surprisingly) ruled against the union on the objections.[25] He felt the late *Excelsior* list had resulted in no prejudice to the union, particularly because of the small size of the unit and the ease of access to class members. As for my speech, he felt that although I had spoken strongly, my statements nevertheless seemed truthful and not threatening. With his ruling, the simulation was effectively ended.

Lessons

The only real disadvantage to the experiment was the impact of the simulation on course coverage: I had to narrow the scope to conduct simulation activities. Surprisingly, though, the coverage came close to the norm of prior years, probably because coverage of jurisdiction, procedure, and representation issues went more quickly. I felt more comfortable lecturing through this material in the beginning, knowing we could cover it again more deeply when questions involving any organization attempt began to arise.

The student evaluations for the course supported my feeling that the simulation had gone well. The evaluations were among the best I have received, and, more important, not a single one of them was negative. Most of the evaluations commented favorably upon the exercise and noted, in particular, the students' positive feelings about changing the traditional law school class. Most felt that the simulation should be repeated. Among the few criticisms offered by students was that the union organization process moved too slowly (ironic in that the simulation let the students dictate the speed of organization). Significantly, only one student evaluation remarked about the unfairness of announcing the form of the final examination so late in the semester.

From my point of view, there were three substantial benefits to the simulation that I believe outweighed any costs. First, the simulation placed labor law in a context meaningful for law students. As a result, they learned more, and learned better. They were understandably more engaged in the material, knowing that it had meaning for them from day to day. Even after the

simulation ended, it continued to serve as a learning resource for the class. For example, when we later covered collective bargaining, students formulated questions around what might have happened in class if the union had been elected. For me, the simulation was an easy source of hypotheticals for teaching material under both sections 8(a)(3) and 8(a)(5).[26]

Second, the simulation gave the students some insight into the nuts and bolts of labor law practice. I should note that I am not necessarily a fervent supporter of skills learning at the expense of theory. The simulation, however, allowed me to touch upon both theory and skills at the expense of neither because the skills component was largely addressed outside the classroom as students grappled with the particulars of forming a union. Students would approach me after class or in my office to ask skills-oriented questions. On one occasion, as I mentioned, they even called the NLRB Regional Office to resolve issues.

This is not to say that skills were ignored in the classroom. On the contrary, I could handle skills questions that arose in class more efficiently and meaningfully because students knew the facts and history of the classroom organizing campaign. Since the facts did not have to be explained each time, I could convey a good deal of skills information fairly quickly. The students' growing skills knowledge created more interest in the procedural issues surrounding the cases covered in the text. In the past I had had a difficult time getting students interested in the procedural posture of a case, particularly where it was important to understand issues surrounding organizing questions. I believe that one reason for this was the strangeness of the unionized environment to most students. But the simulation seemed to change matters. As students realized that the organizing issues or the chronology in the case law paralleled their own experience, they became more confident about answering questions involving these issues and in probing the implications of the various procedural choices made by unions and management.

Nowhere was this more evident than in the postsimulation discussion of section 8(a)(2). As students began to question the reasons for the failure of the unionization attempt, they began, I believe, to understand more about the insidious (and pernicious) other side of employer involvement in employee committees. I talked in class about how dividing the class initially into four groups could have impeded organizing aimed at garnering majority support. I think students began to understand, at least at some level, that the structure created by the employer could also serve as a disincentive to the initiation of an organizing effort. Indeed, in our simulation, no independent organizing effort was mounted until after the student action groups were dissolved as a remedy for the violation of section 8(a)(2).

Third, the simulation was effective in conveying the tension in labor law between individual and group rights. Until the simulation, I had not realized that this tension was not effectively conveyed through the case law. Certainly,

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the tension is revealed in *Pattern Makers' League of North America v. NLRB,*[27] but there the worker who had resigned from the union was completely at odds with the union by the time a charge was filed. The tension I am referring to is the constant struggle between choosing to add to group leverage by joining in, or deciding instead that the group's goals are not your own and choosing to opt out. Students had to decide whether a student union would be in their own best interest. It was interesting that two students chose to drop the class when they decided that a student consensus was forming in favor of a take-home exam. Other students clearly decided that the goal of collective action was more important than that they ultimately receive everything they wanted. These students, perhaps ennobled by their decision, became some of the most fervent union advocates. Still others, however, decided that my traditional examination format, stated in the class syllabus, was to their liking, and they worked subtly to defeat the union effort. These issues of inclusion and exclusion forced students to make decisions about whether they were in favor of the union or not. The tension involved in this sort of decision-making, not conveyed very well in the traditional labor law class, became clear to my students because of the simulation.

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