LABOR LAW

Norman Vieira†

Labor Law: Cases, Materials and Problems (3d ed.). BERNARD D. MELTZER & STANLEY D. HENDERSON. Little, Brown & Company, Boston, 1985. Pp. xxix, 1386. $34.00.

The third edition of *Labor Law* succeeds, not surprisingly, in maintaining the high standard that Professor Meltzer set in the two earlier editions of the book.[1] Professor Meltzer and his new collaborator, Professor Stanley Henderson, have retained the basic organization of the previous volume and have taken essentially the same approach to their material. The decision to preserve continuity while thoroughly updating the cases and notes was a wise one, given the success that the book has deservedly enjoyed over the past 15 years.

There can be little doubt that a new edition of the casebook is timely. Eight years have passed since the previous edition was published, and much has happened in the interim. The new volume duly reflects the various changes. Among the leading cases which have been added are *NLRB v. City Disposal Systems*,[2] *Midland National Life Insurance Co.*,[3] *Jacksonville Bulk Terminals v. International Longshoremen's Association*,[4] *NLRB v. Retail Store Employees Union (Safeco Title Insurance Co.)*,[5] *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*,[6] and *First National Maintenance Corp. v. NLRB*.[7]

The coverage of *Labor Law* continues to be comprehensive even though the sections on fair employment regulation and public-sector labor relations have been eliminated. The material in

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† Professor of Law, Southern Illinois University.

[1] For reviews of the two previous editions, see Stewart, Review, 38 U. CHI. L. REV. 444 (1971), and Goetz, Review, 45 U. CHI. L. REV. 483 (1978).

[2] 465 U.S. 822 (1984).

[3] 263 N.L.R.B. 127 (1982).

[4] 457 U.S. 702 (1982).

[5] 447 U.S. 607 (1980).

[6] 436 U.S. 180 (1978).

[7] 452 U.S. 666 (1981).

chapters 4 through 11 will make up the core of most introductory labor law courses, albeit with appropriate deletions for those who cannot afford the luxury of assigning some 1150 pages. Those chapters deal with the protection of the organizing process against interference and discrimination, the selection of a bargaining representative, the regulation of collective action, federal preemption, collective bargaining, enforcement of collective agreements, and problems concerning the individual and collective action.

What I find most impressive about this book, however, is not the scope of its coverage—which, after all, is not substantially different from that of competing casebooks—but rather the depth of its coverage. It is difficult to convey an accurate impression of the book through a brief description of its general contents. For that reason, I have selected a segment of the text which can, even within the constraints of a book review, be examined in some detail. The segment I have chosen deals with the regulation of campaign techniques in representation elections. I choose this topic, first, because its treatment has been substantially revised in the new edition and, second, because it is heavily laden with first amendment issues and other matters not uniquely related to traditional labor law concerns. If the editors deal thoroughly with these issues, it should not be surprising that they are equally thorough in addressing material which is at the core of their subject matter.

Meltzer and Henderson begin their treatment of the regulation of campaign techniques with *NLRB v. Golub Corp.*,[8] in which the central conflict between the values of free speech and free choice was sharply drawn in opinions by Judge Friendly and Judge Hays. After noting the difficulty of reconciling those values in the context of union representation elections, the editors set forth the Labor Board's demand for "ideal" laboratory conditions in *General Shoe Corp.*[9] The reader's attention is specifically directed to the question of whether such a demand can be squared with the requirements of the first amendment. This, as the editors recognize, is a far more difficult question than courts have generally assumed. The tendency has been for federal courts to ignore the constitutional problem[10] or to equate misstatements in labor elections

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[8] 388 F.2d 921 (2d Cir. 1967).

[9] 77 N.L.R.B. 124, 127 (1948), *enforced sub nom.* General Shoe Corp. v. NLRB, 192 F.2d 504 (6th Cir. 1951), *cert. denied,* 343 U.S. 904 (1952).

[10] *See, e.g.,* S.H. Kress & Co. v. NLRB, 430 F.2d 1234 (5th Cir. 1970); NLRB v. Bata Shoe Co., 377 F.2d 821 (4th Cir.), *cert. denied,* 389 U.S. 917 (1967).

with calculated falsehood,[11] which is generally unprotected by the first amendment.[12] But such misstatements are not necessarily calculated, and labor-related speech is not readily distinguishable from other electioneering, either in its predisposition to error or in its importance to affected parties.

The Supreme Court's major effort to accommodate the demands of free speech and free choice came in *NLRB v. Gissel Packing Co.*,[13] which Meltzer and Henderson include as a principal case. *Gissel,* of course, relied on the economic dependence of employees and on the employer's special knowledge and control of the employer-employee relationship.[14] But special knowledge of one's subject has generally not been a sufficient answer to first amendment claims even where, as in the case of pornography, the speech is arguably at the periphery of first amendment concerns.[15] And while the economic dependence of employees provides a basis for intervention in cases of coercive speech, Meltzer and Henderson recognize that it provides far less justification for demanding laboratory conditions in representation proceedings.

The tension between first amendment values and the laboratory conditions approach is well illustrated by the Board's rules on inflammatory appeals to racial prejudice. Meltzer and Henderson use *NLRB v. Bancroft Manufacturing Co.*[16] as a vehicle for consideration of that issue. One might well prefer the *Sewell* case,[17] which is still the leading decision in this area, but enough is set forth from the *Sewell* opinion to permit discussion of its first amendment implications. The *Sewell* case, seeking to promote sober and reasoned choice by employees, announced that racial appeals in representation elections would trigger an order for a new election unless the speaker limited himself "to truthfully setting forth another party's position on matters of racial interest"[18] without resorting to inflammatory utterances, and sustained the burden of proving that the message was both truthful and germane.[19]

Meltzer and Henderson capture the central difficulty with the

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[11] *See, e.g.,* Bausch & Lomb Inc. v. NLRB, 451 F.2d 873, 878 (2d Cir. 1971).

[12] *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[13] 395 U.S. 575 (1969).

[14] *Id.* at 620; *see also infra* note 21.

[15] *See, e.g.,* United States v. Dellapia, 433 F.2d 1252 (2d Cir. 1970); United States v. Klaw, 350 F.2d 155 (2d Cir. 1965).

[16] 516 F.2d 436 (5th Cir. 1975), *cert. denied,* 424 U.S. 914 (1976).

[17] Sewell Mfg. Co., 138 N.L.R.B. 66 (1962), *supp. opinion,* 140 N.L.R.B. 220 (1962).

[18] 138 N.L.R.B. at 71 (italics omitted).

[19] *Id.* at 72.

Sewell rules. Free speech, even though racial in nature, is not ordinarily limited to expression which the speaker can prove to be truthful and germane. The point is quickly made by a note discussing *Vanasco v. Schwartz*,[20] which invalidated government restrictions on race-oriented speech in the context of campaigns for public office. Students are thus invited to confront the question whether the Labor Board can justify departures from the standards governing political discourse when *noncoercive* speech is involved.[21] Meltzer and Henderson also focus attention on the Board's distinction between temperate and inflammatory racial appeals. Distinctions of this sort, as Derek Bok once remarked, make "a strong appeal to decency."[22] But whether the Labor Board's charge includes responsibility for assuring the decency of noncoercive speech is questionable, and whether Congress would have the power to issue such a charge is even more questionable. If the Board's mission in representation proceedings is to protect employee free choice, the editors pose the right question when they ask whether inflammatory appeals are more likely to affect voters than temperate ones.[23] There is reason to believe that the opposite is true. The Board's insistence on policing the relevancy of the debate is even more disquieting. One of the hallmarks of a free election is that the voters may decide for themselves what is relevant and what is not. In its quest to reconcile values of free speech and free choice, the Board has managed to undermine both.

Meltzer and Henderson give close attention to the treatment of campaign misrepresentations. They trace the Board's uneasy journey from *Hollywood Ceramics*[24] to *Midland Insurance*,[25] with intermediate 180-degree turns in *Shopping Kart*[26] and *General Knit*.[27] The discussion here does more than raise questions about the role of stare decisis in administrative proceedings. Meltzer and Henderson preface the *Midland Insurance* opinion with a detailed

[20] 401 F. Supp. 87 (E.D.N.Y. 1975), *aff'd mem.*, 423 U.S. 1041 (1976).

[21] The *Gissel* case suggested that union representation is distinguishable because it involves a "nonpermanent, limited relationship between the employer, his economically dependent employee and his union agent," but the speech in *Gissel* was found to be coercive. 395 U.S. at 617-19.

[22] Bok, *The Regulation of Campaign Tactics in Representation Elections Under The National Labor Relations Act*, 78 HARV. L. REV. 38, 67 (1964).

[23] *See* B. MELTZER & S. HENDERSON, LABOR LAW: CASES, MATERIALS, AND PROBLEMS 110 (3d ed. 1985) [hereinafter cited as LABOR LAW].

[24] Hollywood Ceramics Co., 140 N.L.R.B. 221 (1962).

[25] Midland Nat'l Life Ins. Co., 263 N.L.R.B. 127 (1982).

[26] Shopping Kart Food Mkt., Inc., 228 N.L.R.B. 1311 (1977).

[27] General Knit of Cal., Inc., 239 N.L.R.B. 619 (1978).

consideration of the study by Getman, Goldberg, and Herman,[28] which recommended a broad-scale deregulation of campaign communications. The editors include a careful statement of the study's major findings and note important questions that have been raised about the desirability of deregulation.[29] In addition, they cite numerous commentaries on the Getman study and offer occasional excerpts from the literature. A serious student will come away from these materials with a much better understanding of the costs and benefits of campaign regulation than the cases alone could possibly provide.

After dealing with campaign misrepresentations, Meltzer and Henderson turn to the interrogation of employees and the promise or conferral of benefits. They begin with *Teamsters, Local 633 v. NLRB*[30] and conclude with the Supreme Court's decisions in *Exchange Parts*[31] and *Savair.*[32] *Local 633* is a convenient vehicle for consideration of both the *Struksnes*[33] and *Bourne*[34] approaches to interrogation. It is also useful for its provocative suggestion that "[t]here is *always* an iron 'fist inside the velvet glove' of [employer] persuasion."[35] That suggestion may prompt students to reevaluate the cases on employer free speech and to ponder the problem posed by promises of benefit. Meltzer and Henderson illustrate the latter problem in the notes following *Exchange Parts,* but their evenhanded presentation also shows the dilemma that employers may face in some cases. They ask, for example, what an employer is permitted to say about employee complaints that merit, but cannot be assured of, remedial action: "Must the company state that the law requires 'no promises' regarding employee complaints? Indeed, would such a statement be lawful?"[36]

I have concentrated thus far on the regulation of campaign techniques in representation elections. But Meltzer and Henderson are equally attentive to important issues in other areas. I will offer only one illustration, drawn from the section on regulation of secondary pressures by labor unions. Among a number of recent deci-

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[28] J. Getman, S. Goldberg, & J. Herman, Union Representation Elections: Law and Reality (1976).

[29] Labor Law, *supra* note 23, at 114-19.

[30] 509 F.2d 490 (D.C. Cir. 1974).

[31] NLRB v. Exchange Parts Co., 375 U.S. 405 (1964).

[32] NLRB v. Savair Mfg. Co., 414 U.S. 270 (1973).

[33] Struksnes Constr. Co., 165 N.L.R.B. 1062 (1967).

[34] Bourne v. NLRB, 332 F.2d 47 (2d Cir. 1964) (per curiam).

[35] *Teamsters, Local 633,* 509 F.2d at 493 (quoting *Exchange Parts,* 375 U.S. at 409) (emphasis added).

[36] Labor Law, *supra* note 23, at 144.

sions added to that section is the Supreme Court's opinion in the *Safeco* case,[37] which upheld congressional power to regulate consumer picketing at a secondary situs in order to protect neutral parties from efforts to persuade customers to cease doing business with them. Meltzer and Henderson pose challenging questions about the basis for distinguishing "between an enterprise boycott implemented by handbilling and one implemented by picketing" or between successful primary and secondary activities that impose identical losses on neutral parties.[38] They also include a note on *NAACP v. Claiborne Hardware Co.*,[39] which held that the first amendment protects nonviolent secondary activity designed to induce boycotted merchants to pressure the government into attacking racial inequality. The *Claiborne* note, like the one dealing with *Vanasco v. Schwartz*, is aimed at encouraging students to consider the soundness of the distinction between communications involving political activity and communications involving labor activity.

The sensitive treatment which Meltzer and Henderson give to issues somewhat removed from the core of traditional labor law concerns is suggestive of the care that has attended the collection and presentation of material throughout the book. This scholarly care promises substantial dividends for those who use the casebook. Of course, many factors will enter into a decision whether to adopt a new book, including the considerable cost involved in abandoning an old one which has already proved to be serviceable. But beginning teachers can start on a sound footing by adopting this casebook, and those who have used it in the past will surely welcome the arrival of a new edition. Other labor law teachers, though currently using a different book, might well wish to consider the advantages of this one.

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[37] NLRB v. Retail Store Employees Union, Local 1001 (Safeco Title Ins. Co.), 447 U.S. 607 (1980).

[38] LABOR LAW, *supra* note 23, at 596.

[39] 458 U.S. 886 (1982).