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## A Treatise on Labor Law, by Morris D. Forkosch

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A TREATISE ON LABOR LAW. By Morris D. Forkosch. Indianapolis: Bobbs-Merrill, 1953. Pp. xiv, 1197. \$10.00.

"She is neither fish, nor flesh, nor good red herring." A book, too, should be one thing or another. The lack of a clear purpose, faithfully carried out, may be the cause of the disappointing quality of *A Treatise on Labor Law*. As a student's textbook, it is at once too summary and too detailed. The text is often a bare paraphrase of state and federal statutes from which the author descends at once to detailed and voluminous footnotes. The practicing attorney will at times find the volume a useful handbook of information concerning the myriad laws affecting the employment relation, but it will not serve as a tool of research leading to the cases because the effort to cover so wide a field has compelled the omission of many aspects of the topics.<sup>1</sup> Nor is the volume a substantial contribution to the analysis of labor law problems—not so much for lack of occasional bits of keen analysis or stimulating insights, for they are there, but because the best parts are tucked away in footnotes where the reader cannot find them without considerable difficulty. Like most academicians, Professor Forkosch seems to have amassed a file full of articles, memoranda, notes for the classroom, and occasional jottings—some good, some bad, and some indifferent. But this is not enough for a treatise.

*A Treatise on Labor Law* presents a broad panorama of the statutes and judicial doctrines affecting workers. Its author views "security as the key to labor law."<sup>2</sup> "Security of job and standards of living are the core of labor's demands. Radiating from them, as spokes from a hub, are to be found items which unquestionably relate to, and impinge upon, these basic considerations."<sup>3</sup> But security is not to be understood in a narrow sense; it includes "the striving for minimum, and then increased, standards of living which compels various actions. . . ."<sup>4</sup>

Book I covers the direct legislation through which workers have obtained minimum labor standards: the Social Security Act and the corresponding Railroad Retirement Act, unemployment insurance, wage and hour legislation, and a multiplicity of state laws ranging from factory

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1. The reviewer, at any rate, was unsuccessful in using the volume for quick reference to the cases on the picketing of one man businesses. Decisions concerning strikes against technological innovations or other labor-saving devices are omitted from the discussion of the law of strikes and picketing but can be found in footnotes to a summary of the Lea Act, 60 STAT. 89 (1946), 47 U.S.C. §506(a) (1946), which appears in a chapter chiefly concerned with wage and hour laws, workmen's compensation, and similar legislation protecting employees.

2. P. 2.

3. P. 5.

4. Pp. 2-3.

inspection acts through workmen's compensation to various forms of health insurance. Even the employer's liability statutes and fair employment practice acts come in for brief mention.

Book II describes the group organization of workers. Its initial chapter surveys the evolution of modern labor organizations from the English craft guild to the Congress of Industrial Organizations. Most of the material is factual and has been presented better elsewhere. The second chapter describes the internal structure of the labor movement accurately and in detail. It is good to have this kind of material brought into legal literature—especially where it is likely to reach law students. The final chapter, which is much the shortest, summarizes the law governing the internal affairs of labor unions.

Book III, entitled "The Development of Union Liability Through Common Law, Judicial and Statutory Doctrines," deals with the law of strikes and picketing except that the restrictions imposed by NLRA, Section 8, are relegated to the end of a separate book dealing with the National Labor Relations Act. Possibly chronology and the statutory arrangement justify the division, but to the reviewer it seems to destroy a more important unity.

"The Statutory Law of Collective Bargaining" is the subject of Book IV. As the title suggests, it is concerned with unfair labor practice and representation proceedings under the Wagner Act and the Taft-Hartley Amendments. Some of this material forms the best and most useful part of the book, for it brings together a wealth of information concerning NLRB jurisdiction, practice, and procedure which is not readily accessible. Unfortunately, the emphasis placed upon these aspects of the national labor policy results in slighting more important subjects. For example, cases defining NLRB jurisdiction cover eighteen pages, while treatment of the duty to bargain collectively is so sketchy that it foregoes any real analysis of "good faith," majority rule, and the limitations on individual bargaining and unilateral action.

Book V is a brief description of the statutes and judicial decisions relating to the negotiation and administration of collective bargaining agreements. Except for a long list of topics which an agreement may cover, there is little effort to give students a sense of the system of private lawmaking by which employers and employees, through their chosen representatives, legislate, interpret, and administer the rules governing life in large-scale industrial establishments.

In the fourteen years since the publication of Ludwig Teller's three volumes,<sup>5</sup> there has been no new major treatise on labor law. Yet ample

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5. TELLER, *LABOR DISPUTES AND COLLECTIVE BARGAINING* (1940).

incentive exists. No one who has practiced or taught in the field of industrial relations doubts its intellectual fascination. The law review articles reveal no shortage of competent, articulate scholars. And if scholars can be influenced by wordly rewards, the zealotry with which publishers print manuscripts on industrial relations attests to the size of the market. Why are the texts not forthcoming?

A partial explanation may be that the men best qualified to write about labor law are too busy creating it. The number of experienced arbitrators has not kept pace with the increase in the use of arbitration as the final step in contract administration. Government service on the Wage Stabilization Board and all sorts of *ad hoc* emergency boards and special panels has drained much time and energy, especially in the case of men like David Cole, Harry Shulman, and Willard Wirtz, who have understanding and a gift of expression. Possibly some blame (if blame it be) must also be laid to the academic pressure of new courses, new casebooks, and new classroom methods.

A more fundamental explanation may be doubt concerning the usefulness of a treatise on labor law, which arises partly from a particularistic approach to its problems and partly from the danger of sudden changes of policy. The latter risk is greatly exaggerated. The problems of labor law are those of men in an industrial society. Since neither human nature nor the economic system changes overnight, the problems, too, are relatively constant. Should not the function of a treatise on labor law be to analyze the issues rather than merely to describe the existing statutes and court decisions? And perhaps the mass of unorganized material should be cut through in an effort at synthesis and systemization.

It seems likely that the law would gain from drawing together problems that recur in differing contexts. The definition of "employee" is a good illustration. Scattered through American industry are large numbers of persons who have, in varying degrees, some of the characteristics of a typical wage earner and other characteristics of a small, independent entrepreneur. Many of these arrangements grew up without conscious direction. Others, especially in the distribution trades, stem from well-planned efforts to avoid the burden of a fixed weekly payroll. During the 1930's, for example, the so-called peddler system spread rapidly in many milk markets. Instead of employing drivers to make deliveries of milk to retail stores at a weekly salary, many dairies sold their milk to peddlers who resold it to the stores; the peddlers received no salary but depended for their living on the margin between the price they paid the dairy and the amount they received from the stores. To this kind of business advantage social and economic legislation, as well as tax laws,

added further stimuli. To the extent that a business is carried on through true independent contractors, it may avoid the expense of compliance with minimum labor standards and, even if it exceeds the minimum, can reduce the burden of record-keeping and similar indirect costs. The interplay of competitive forces not only adds to the difficulty of defining the scope of social and economic legislation but also gives rise to the related problem of determining the extent to which wage earners may resort to concerted activities to protect their labor standards against the competition of peddlers. It was imperative that the administration of social and economic legislation break away from the technical concepts measuring a master's liability for the acts of his servants. This could not have been accomplished without focusing attention on whether "the particular workers . . . are subject, as a matter of economic fact, to the evils the statute was designed to eradicate and [whether] the remedies it affords are appropriate for preventing them or curing their harmful effects."<sup>6</sup> The time may now have come, however, for synthesizing the rulings under different statutes even at the risk of creating an employee status. The advantages of particularization in any single case may well be outweighed by the greater clarity and simplicity of furnishing employers and employees with a single definition governing the application of the now considerable number of statutes that affect them.

The opportunities for synthesis and systemization are greatest, I suspect, in fitting the institutions of collective bargaining into their surrounding legal framework. Collective bargaining has evolved private pension plans and social insurance, some supplementing statutory protection and some filling needs that legislation does not cover. The result of this haphazard growth is inconsistencies, gaps, and the expenditure of time and effort in deciding the pocket out of which a worker should be compensated. Lawyers alone cannot work out the philosophy and administrative arrangements necessary to reduce costs and eliminate gaps and inconsistencies, but surely the profession has an important role to play in the endeavor. The same need for meshing public and private institutions exists in the case of grievance arbitration. A good many arbitrators proceed on the hypothesis that the law is to be ignored, while judges approach arbitration awards with a skepticism begotten of distrust for labor arbitration. The National Labor Relations Board is not unready to exercise a considerable degree of supervision over collective bargaining during the term of an agreement—even to the exclusion of the normal processes of contract administration. Should any tendency develop to invoke the jurisdiction conferred on the federal courts under LMRA:

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6. *NLRB v. Hearst Publication, Inc.*, 322 U.S. 111, 127 (1944).

Section 301 as an alternative method of enforcing rights under collective agreements or should employees resort to state court actions with greater frequency, the necessity of preserving a degree of coherence between arbitration practice and rules of judicial decision would be heightened. The successful reconciliation of the functions of the judiciary, NLRB, and private arbitrators requires not only further definition of their respective jurisdictions but also the mutual understanding and respect which can be achieved only through evolution of basic principles commanding common acceptance.

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EFFECTS OF TAXATION: INVESTMENTS BY INDIVIDUALS. By J. Keith Butters, Lawrence E. Thompson, and Lynn L. Bollinger. Boston: Harvard Graduate School of Business Administration, Division of Research, 1953. Pp. xxxiv, 533. \$6.25.

This work by Professor Butters and his Harvard associates, the seventh and final volume in their series of studies of the effects of taxation on business, deals with questions which are at the very heart of the battle raging in Congress at this writing in connection with the pending tax revision bill. The bill, as passed by the House of Representatives,<sup>1</sup> would reduce taxes on dividend income by an estimated \$240 million in the fiscal year 1955 and by \$814 million in each year thereafter.<sup>2</sup> This reduction is supported in part by the argument that a reduction in taxes on dividend income will encourage investment in equity capital and thereby contribute to the expansion of our economy. The Democratic opposition, on the other hand, is urging, in lieu of a reduction in taxes on dividends, increases in personal exemptions in order to offset the current business recession.

In the great debate now going on, glib assumptions and facile rationalizations are being widely substituted for facts, partly because of the political character of the debate but also because of the lack of empirical data as to many of the basic issues involved. The work by Butters and his associates seeks to substitute factual data for conjecture as to the impact of taxation on investment by individuals. And a striking feature of the work is the extent to which the study negates postulates accepted as gospel in many financial and investment circles.

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1. H.R. 8300, 83d Cong., 2d Sess. (1954).

2. H.R. REP. No. 1337, 83d Cong., 2d Sess. (1954).