



# Finding the Workers' Law

*Ellen Dannin*

A FEW YEARS AGO, a local public radio producer called. He wanted a nonpartisan, expert guest to analyze issues involved in a strike for a talk show. I answered his questions about collective bargaining and strikes with basic labor law: an employer must bargain with a union; the law protects employees' right to strike for higher wages; and an employer violates the law if it fires them for striking.

I was not surprised that the producer did not call back, for I could sense that to him my explanation of black letter labor law seemed so radical, it could not be true. Instead, the show's sole guest was the struck company's human resources director.

I suspect that few in the audience thought it odd to hear the views of only one party to a dispute when that person was a company

official. Today, most people may regard any business representative as neutral and reliable, while unions are partisan and a special interest. If correct, this explains why the National Labor Relations Act (NLRA), the National Labor Relations Board (NLRB), and unions are popularly regarded as irrelevant and even un-American. If true, this experience may capture some reasons why union membership is declining.

## Of What Use Are Unions?

Certainly, union membership is not declining because they have no work to do. Unions still help bring the poor out of poverty. Unionized workers make from \$4,000 to \$10,000 more a year than unorganized workers doing the same work.<sup>1</sup> Unionized work-

---

*Ellen Dannin is a professor of law at Wayne State University Law School. The case discussed is from a book in progress, GOVERNMENT WORK – THE TRIALS OF A GOVERNMENT ATTORNEY. The litigation strategy sketched below is from a work in progress, Taking Back the Workers' Law: A Strategy for Labor Law Reform Now, and From Dictator Game to Ultimatum Game ... and Back Again: Judicial Amendment Posing as Legal Interpretation, 6 U. PENN. J. LAB. & EMPL. L. 241 (2004).*

- 1 Barry T. Hirsch & David A. MacPherson, HOW UNIONS BRING LOW WAGE WORKERS OUT OF POVERTY: PAY OF UNION AND NONUNION WORKERS IN SELECTED OCCUPATIONS – 2000 (2001). Lawrence Mishel & Matthew Walters, *How Unions Help All Workers* (August 2003), [www.epinet.org/content.cfm/briefingpapers\\_bp143](http://www.epinet.org/content.cfm/briefingpapers_bp143).

ers can only be fired for cause, and they have an advocate to stand beside them in resolving workplace problems.

Unions also make all our lives better. It is only through the hard work and dedication of millions of union men and women that many of our basic rights exist:

- ◊ Ending child labor
- ◊ Establishing the eight-hour work day, paid overtime, and a guaranteed minimum wage
- ◊ Winning workers' comp benefits for workers injured on the job
- ◊ Securing unemployment insurance for workers who lose their jobs
- ◊ Improving workplace safety and reducing on-the-job fatalities
- ◊ Winning secured pensions for workers through the Employee Retirement Income Security Act
- ◊ Establishing paid sick leave, vacations, holidays, and health insurance as standard benefits
- ◊ Promoting equality through passage of the Civil Rights Acts, Title VII, the Equal Pay Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and state laws that outlaw job discrimination
- ◊ Winning passage of the Occupational Safety and Health Act, the Family and Medical Leave Act, and Living Wage laws

None of these only or primarily benefits unions or their members. Each grows out of

the labor movement's commitment to social justice and to promoting democratic participation. Union members vote in percentages far exceeding nonunion workers. In the 2000 elections unions registered 2.3 million new voters, made 8 million calls to get out the vote, passed out more than 14 million leaflets, and emailed people urging them to vote.

Without unions, what will happen to law and citizen participation? A radically different society will emerge with the loss of unions as an important counterweight to the power of corporations, and democracies depend on counterweights.

### Why Are Unions Declining, According to Unions?

Many factors seem to be affecting union decline, but, if you ask union leaders, enemies number one and two are the NLRB and the NLRB. For example, recently, union representative Wade Rathke called the NLRB "complicit with employers"<sup>2</sup> and Communications Workers of America President Larry Cohen advocated a national day of disobedience to shut down every NLRB office across the country.<sup>3</sup> This is not a new trend. Former AFL-CIO President Lane Kirkland repeatedly said he would prefer "no law" to current labor law and that he preferred "the law of the jungle."<sup>4</sup> Richard Trumka, former president of the United Mine Workers of America, described the NLRB as "clinically dead"<sup>5</sup> and

2 Wade Rathke, *Majority Unionism: Strategies for Organizing the 21<sup>st</sup> Century Labor Movement* (June 2002) (unpublished paper). See also Barbara Ehrenreich @ Thomas Geoghegan, *Lighting Labor's Fire*, *THE NATION* (Dec. 23, 2002).

3 Michelle Amber, *AFL-CIO Convenes Organizing Summit to Find New Ways to Expand Membership*, 9 *DAILY LAB. REP. (BNA)*, at C-1, Jan. 14, 2003.

4 *Kirkland Calls for Excluding Employers From Election Process*, 116 *DAILY LAB. REP. (BNA)*, June 18, 1993, at D-8; *Kirkland Says Many Unions Avoiding NLRB, Calls Board an "Impediment" to Organizing*, 167 *DAILY LAB. REP. (BNA)*, Aug. 30, 1989, at A-11; *Senate Labor Subcommittee Holds Hearing on Organizing Rights Under Taft-Hartley Act*, 20 *DAILY LAB. REP. (BNA)*, Feb. 1, 1988, at A-11.

5 Richard Trumka, *Build Rank-and-File Activism*, in *THE FUTURE OF LABOR* 64 (Labor Research Association 1992).

advocated repealing the NLRA.<sup>6</sup> Union leaders are rightfully outraged by election delays, striker replacement, and weak remedies for employer abuses, to name only a few.<sup>7</sup>

Unfortunately, union anti-NLRB invective has a price, and that price is that people will act on it. Why should Congress continue to fund an agency that is roundly attacked by what should be its main patron? Why should anyone who believes in unionism go to work for the NLRB? Why should law professors want to teach labor law, and why should students who support unions (or any students for that matter) study labor law? During the years in which unions have blamed the NLRB and NLRA for their problems, labor law has been disappearing from law school curricula. The result is that the bench is populated by judges and law clerks who have never taken a course in the subject, but who must apply a complex law to situations wholly outside their ken.

Most vulnerable, however, are workers who have been convinced that the NLRB is their enemy. Employees discharged for union activity have no other recourse than the NLRB. And even if its remedies are weak, the alternative is no remedy at all. In my experience, this anti-NLRB campaign leaves workers prey to charlatans, who, for a price, will promise workers huge awards if they avoid the NLRB. But those cases are quickly dismissed, because, without the NLRA, there is only the common law, and it offers nothing to protect them.

So let me tell you just how attractive such a message can be to desperate workers and how things played out in a case I handled as an NLRB attorney.

## Gyp City, Michigan<sup>8</sup>

You may be in a room right now with walls manufactured by men I met in Gypsum City, Michigan, far from the urbanized south. This part of Michigan is parallel to the parts of Canada where roads thin out, and soon vanish. Shortly after you pass the billboard that proclaims "You're in the North Country Now," highways narrow to two lanes. Pine and birch forests replace maple, elm, and oak and press close on either side. Then, just south of Gyp City, the road sweeps around the edge of Lake Huron, and that enormous interior sea stretches before you, a treacherous body of water, dividing the United States from Canada.

In early summer when I went north to investigate the case, I had a choice of two motels and managed to make a reservation at the one with no telephones in the rooms. It hadn't occurred to me to ask whether the rooms had telephones. In early January when I returned to try the case, jagged lake ice gleamed red from a sun that barely cleared the horizon.

In this world, all the men regularly carry knives so they can do their normal farming duties. The blonde, petite wife of Jim, one of the discharged workers, told me that Jim carried a large knife as a matter of course for things like "when he had to make a bull a steer." I later saw Jim on a videotape of the picket line holding that knife at the window of a car that would have been carrying strike breakers across the picket line but for the fact it was surrounded by enough pickets to actually push it backwards.

Change had been coming to this isolated town, and the changes led to the strike and Jim's discharge. A North Carolina company

---

6 Richard Trumka, *Why Labor Law Has Failed*, 89 W. VA. L. REV. 871, 881 (1987).

7 For examples of this discussion, see *Labor Notes Roundtable, Organizing: What's Needed* (Nov. 2002 – Apr. 2003), [www.labornotes.org/archives/2003/organizing.html](http://www.labornotes.org/archives/2003/organizing.html).

8 Most of the names related to this case have been changed.

had bought the plant where Jim worked and installed Mr. Fox as the plant manager to whip the quarry, plant, and port facility into shape. The union was changing too. Hal, the new union president, had left town for college ten years before, but dropped out and came home, and now worked a production job in the plant. The year before the strike, he was on a reform slate that had ousted the old officers.

For years relations between the union and company had gone smoothly. But not this year. After a few meetings, the union saw that negotiations would involve far more than merely adjusting financial terms. The employer demanded major concessions as the price for a contract. Fancy customized vans with Ohio license plates – NUCK-1, NUCK-2, NUCK-3 – drove around town. Nuckles Security guards began moving video equipment into place by the new gates a mile down the road from the plant entrance. Nuckles guards were visible doing practice drills.

The company seemed to be pushing the workers to strike, but the union couldn't understand why it would want to hurt production when things could be worked out. In some ways the workers wanted the strike too. They'd been pulling hard shifts and lots of extra hours. They were just plain tired and wanted a break, and it was mid-summer.

So when the contract expired June 1, they struck. The workers burst out of the gates like kids free for summer vacation. They were joyful and playful. I saw this months later in a conference room at the Detroit NLRB offices, as the Nuckles guards, the company's attorney, and I watched tape after tape of the picket line.

Usually NLRB attorneys get secondhand descriptions in affidavits taken by NLRB investigators. Picket lines were described more often than seen. The odd thing is that the videotape did nothing to answer the ques-

tions that mattered in this case: what lay within the heart and mind – intent – when a man held a large knife in the face of a strike breaker about to cross the line to take the jobs of the knife-holder and his friends?

We sat in the conference room watching crowds of pickets thronging around each car trying to enter the plant and pushing car after car backwards. When one car threatened to overwhelm them, they shouted, "Get Tiny up here." A 300-pound man emerged from the crowd, put his hands on the hood, stared the driver in the eye, and stopped that car. By June 6, the company had an injunction limiting the picketing.

Wow! I thought, as I watched the videotapes, clearly illegal mass picketing that meant the company legally could have fired all the pickets involved. But it didn't. Instead, it sent six workers termination notices dated July 4 for picket line misconduct in early June. It was hard to understand why an employer would have waited a month, given the violent things it claimed these six had done. And typing terminations is an odd way to spend Independence Day. Why fire only these six workers when they could have gotten rid of all the employees for picket line misconduct, driven their labor costs down, and put a docile workforce in place? Was there some reason besides the obvious problem of recruiting a workforce when you've gotten rid of nearly all the able-bodied workers in the area? But unemployment was terrible then throughout the Midwest. At about the same time, in Austin, Minnesota, Hormel replaced its strikers and broke the union. But in Gyp City, the employer was satisfied to run the plant using supervisors pulled from plants in other states. What was the logic?

After the investigation, the NLRB decided the employer had legally fired four of the six workers. So I would go to trial on behalf of Jim and his co-worker Danny in six months.

On June 4, at 7 a.m., Jim had been beside a car trying to enter the plant. Eight security guards were near the car, six around it and two videotaping the picket line. There was banter and joking between the guards and pickets. One security guard testified that he heard Jim tap a knife handle on the window, put the knife away, and then open it and pose for a picture next to what the guard described as a frightened-looking passenger. Jim said he had been standing between two Nuckles guards when someone yelled, "Show them your knife." He had tapped his open knife on the rolled-up car window as play acting for a fellow employee's video camera. Jim's back was to the passengers, and he was smiling and laughing for the camera. The two guards standing next to him were almost bent over laughing, and the strike breakers in the car were laughing.

In the videotape everyone was laughing. The passenger swatted his hand as if to say, "This is ridiculous." None of the security guards tried to stop Jim or take away the knife, or even ask him to put it away. No report was made of the incident, and Jim was not barred from the picket line, although other pickets were for acts of violence.

The second fired worker, Danny, a well known practical joker, came to the plant about 5:40 p.m. on June 4 dressed in the blue suit and tie worn by Nuckles guards. He pulled up to a guard and said, "Union security. I have to get into the plant." The guard waved him on. At that point this guard and another realized from the strikers' reactions that something was unusual about the "union security" man they had just let in. Danny said he never dreamed they would let him in. After all, he had spent days talking with them on the picket line and had even been invited into the Nuckles command shack the day before to look at their electronic equipment. When they let him through, he decided he

might as well pick up the paycheck he hadn't been able to get when he was on vacation the week before.

Danny walked into and around the plant, talking with the evening shift people working there. Eventually, he was escorted to Mr. Fox, who called the police. About forty-five minutes after he had entered the plant, Danny reappeared at the picket line, where the security guards congratulated him on the joke and the pickets applauded.

These were the acts for which, on July 4, Jim and Danny were fired. The termination notices gave no specifics, but later the employer said Jim was terminated for "very vicious acts with a knife" and "very vicious threats." Danny was fired for a laundry list of actions, all later withdrawn, except for trespass.

The strike dragged on for months. Schedules were instituted, two pickets in the morning, two in the afternoon. Cars went through now slowly, waiting for the picket to finish his deliberate march, heel to toe crossing the roadway. The injunction lowered striker morale. Hal was feeling the heat as a new, untested union president. The old one was still around, smarting from his defeat by this college boy who was leading them into disaster.

On July 1, the employer gave the union its "last, best, and final offer" and scheduled it for implementation on July 5, if the parties remained at an impasse. The NLR says nothing about how an impasse in bargaining is resolved, but appellate judges have developed doctrines that let an employer implement its final offer at impasse. Implementation can demoralize the union and even destroy it.

On July 5, as he was preparing for the union vote on the employer's final offer, Hal learned of the terminations. After the discharges, the union had to divert its efforts from getting a decent contract to getting

those men back to work. The strike ended August 5, and the employees returned to work under a contract with real losses.

When I went to trial a few months later, my theory was not as strong as I would have liked. I argued that firing those workers the day before the crucial vote was a threat to the union membership. I also contended that the employer had condoned what it now claimed was dangerously violent behavior for over a month. This wasn't a bad theory, and the facts and timing supported it. Indeed, Mr. Fox testified that he had discharged the workers the week of the vote because the final offer was on the table and he wanted them discharged before the vote was taken. But it still didn't seem to capture what had happened. After all, July 2 or 3 would have been at least as effective. I had a gut feeling there was something more.

When I was in Gyp City in late July to investigate the firings, I could feel the union's frustration. It was making no headway in negotiations. There was the sniping by the ousted union president, and now there were the terminations. All of which made these people easy prey for the charlatan, Chester Nabors, who would soon make his way to Gyp City.

During the investigation I asked about the July 4 date, but no one could explain it, and after Nabors was on the scene no one wanted to help me solve the puzzle. It wasn't until I had rested my case at trial and we were into the employer's case that the evidence I had needed was presented, and that was very late to try to put a case together and find witnesses.

Mr. Fox testified that on July 4, at 10 a.m., he was at the town's Fourth of July parade when he saw that the union's float had a dead fox hanging from it. Fox was outraged. How dared these workers threaten him with bodily harm?

Suddenly I had a much better explanation for the firings. If Mr. Fox fired them in retaliation for the union's strong statement about the plant manager, then these men's actions were not the reason for their terminations. Instead, it was the union's vivid expression of its feelings about the bargaining and the way Mr. Fox was running the company. Mr. Fox had gone straight from the parade to the plant, where he had reviewed the strike records from June 1. By the time he got through the June 4 surveillance videotapes, he had enough incidents to fire six employees, enough to send his own strong message: industrial capital punishment was the penalty for threatening to kill the fox.

So this gave me two reasons why the company had fired these men on the day it did and also a defense. First, the employer used the terminations to threaten the workers as they voted on the contract. Second, it retaliated against the workers for expressing solidarity. And finally, the workers were not fired for their conduct. That was only a pretext. Mr. Fox was not terrified by a union threat against his life. A person who believed the threat was real would not fire a few workers for things done weeks before and say not a word to the police. With cooperation from the union members, I could have put together a good case. But there was no cooperation, even from the two whose cases I would be presenting.

The terminations, the industrial capital punishment, left dead bodies, and carrion brings parasites. Chester Nabors followed the smell of death into Gyp City. Nabors, a man who made a hobby of practicing law without a license, quickly gained the trust of the union membership, which willingly approved whatever expense it took to secure his services.

Hal had doubts, but he was in a hard place. On the one hand, he was committed

to the ideals of industrial democracy and felt bound to follow the will of the membership. On the other hand, he was convinced that Nabors was a fraud who was preying on the pain of the discharged and the guilt of those not discharged.

Nabors began filing long documents full of almost impenetrable legalese claiming that the NLRB, and I as the NLRB representative, were incompetent. He demanded that the full NLRB files be turned over to him as the representative of all the fired workers.<sup>9</sup> When he was told that this was against the law, he used this as proof the NLRB was not on the workers' side.<sup>10</sup> When I tried to prep Jim and Danny for trial, Nabors instructed them not to answer my questions and constantly interrupted as I tried to explain the trial process. Eventually he began a tirade in which he accused me and the NLRB of not representing his clients and of being corrupt. Finally, he told Jim and Danny it was time to leave, and that was my witness prep.

The fact that the NLRB had not gone to complaint on the other four fired workers meant they had no incentive to be witnesses in the case I was trying to make for Jim and Danny. As far as the rest of the employees were concerned, there was no reason to do anything to help with this case, so finding corroborating witnesses and information was impossible. Except for Hal, no one else in town was willing to step forward as a witness.

Later that day, Danny called to tell me that Nabors had told the union members that the NLRB case was only an inconvenient

preliminary they had to get through so they could get to the real case. In that case they would win a huge verdict and real justice – and for all the fired workers, not just for two. Nabors had told them that NLRB remedies were weak and he used the same hostile language I quote at the beginning of this article to persuade the workers to depend on him and not the NLRB.

The truth was that there could be no other case for Nabors – and Lois Walters, an attorney he brought in just before the trial – to bring, because the NLRA preempted all possible state causes of action. Even if it did not, Michigan law did not say that a termination must be for just cause. If Jim and Danny wanted their jobs and back pay, the NLRB case was their only hope.

But I didn't dare tell the workers Nabors was lying to them and stealing their money. They would only have been more suspicious of me. Instead of attacking Nabors, I tried to be reasonable and to suggest that, since it's better not to put all one's eggs in one basket, cooperating with me would be a good idea. But there were no ears to hear this. For the majority of those who were dismissed, it was not in their interest to believe that a state case was hopeless, and they had every reason to hate the agency that had not helped them.

Mr. Fox himself could not have calculated a better way to have left us in the weakest position. I lost the case. The state case was quickly dismissed. Nabors was sanctioned for practicing law without a license, and Walters was disbarred the year after.

---

9 NLRB practice permits nonattorneys to represent charging parties and respondents.

10 Lest anyone think that only a nonattorney would engage in these tactics, I also had another case where a union-side law firm pursued a similar course of action of trying to undermine the union members' faith in the NLRB. This was also in a case in a rural area of the state. These actions hamstrung trial preparation and seemed to be taken to demonstrate why they should pay the law firm when the government would have tried the case for free. Let me also say that normally I enjoyed having representation for charging parties during trials. It's fun to bat theories around and, since NLRB trials go all day, it is helpful to have help with the work of presenting a case.

## The Workers' Law

It is not wrong to criticize the law and the agency. Reasoned and reasonable criticism can make the NLRA and NLRB successful as the Workers' Law and the Workers' Agency. But union leaders need to know that when they tar the NLRA and NLRB as enemies of labor, they harm themselves and those they represent.

I will only lay out a few elements of that discussion here. First, the NLRB's mission continues to be to promote collective bargaining, equality of bargaining power, and the free choice of employee representatives. Those who investigate and try NLRB cases are union brothers and sisters. Unfortunately, the rhetoric of union leaders demoralizes public servants who feel called to this work to help people. The day will come when no one who sympathizes with unions will want to work for the NLRB. Attacks on the law and the agency contribute to a feeling that this is an unexciting area no one should be interested in. And, in all but a few pockets of this country, most feel that labor law is dead, and few lawyers are going into it. NLRB agents know the remedies are weak, but they also know how much it means when you have lost your job, to have a government attorney represent you free of charge and fight to get you reinstatement and backpay. More than one person whose case I handled cried when I told them their government would give them help and an attorney gratis.

Second, how do unions expect to attract new members when their biggest enemy is a very small government agency? This hardly suggests they have much to offer.

Third, I would ask union leaders who blame the NLRA for all their ills to take the time to read the statute impartially. When I

have taught labor law to union officials and asked them to read it, they have found it to be a noble law whose purpose is to promote freedom and democracy in industrial life and, by extension, the country as a whole.<sup>11</sup> In any case, they must know there will be no better statute in the foreseeable future and, therefore, they need to protect and enhance the one they have.

In fact, most of what union leaders hate about the NLRA is not in the statute. Striker replacement and other doctrines that hurt unions were created by judges and are nowhere to be found in the law. This distinction is anything but picky. It means that any new statute will suffer the same fate, and it creates a tool for restoring the NLRA to its status as the Workers' Law.

Fourth, unions need to realize that the NLRA is radical legislation that was intended to replace a dictatorial workplace regime with one that gives workers the right to co-determination. It was intended to supplant thousands of years of master-and-servant and property law concepts. In addition, the NLRA's express purpose of increasing wages and ending competition based on wages and working conditions is a radical concept in the age of Wal-Mart. A society based on an NLRA vision is one in which unions would thrive.

The NLRA vision is so radical that it should be no surprise that it would take at least sixty-five years of committed work to make those goals more than a utopian dream. Sadly, too few have worked to make this vision a reality. If only the energy unions pour into anti-NLRB/anti-NLRA rhetoric and actions were, instead, harnessed to strengthen this vision, unions would create a powerful tool for themselves. After sixty-five years, is it too late?

---

11 Cynthia Estlund, *United States: Reflections on the Declining Prestige of American Labor Law Scholarship*, 23 COMP. LAB. L. S POL'Y J. 789, 790-93 (2002).



## What Is to Be Done?

Unions are under siege on every front. Since 1980, administrations and Congresses have, at best, been inattentive to unions and workers, and often openly hostile. They have banned unionization of the Department of Homeland Security; appointed persons opposed to unions to administrative agencies; failed to keep the NLRB at full strength; attacked agency funding; and appointed conservative judges. It should be no surprise that unions have been hard put to thrive and survive during the past twenty-five years.

The identity of the judges on the federal bench is a political problem, and, with lifetime appointment, it will remain so for decades to come. If past performance predicts the future, labor law and every other law unions care about will be interpreted and applied by judges who are likely to be ideologically unsympathetic. Unions cannot avoid the courts, so they need strategies for this environment. The most promising is a litigation strategy that draws on that of the NAACP Legal Defense Fund as described by Richard Kluger in *Simple Justice* to restore the original vision of the NLRA.

What are the elements of this strategy? First, Professor James Brudney found that judges who know more about labor law, even former management attorneys, tend to uphold NLRB decisions. This suggests that educating judges about labor law is crucial.<sup>12</sup> NLRB cases must be tried by speaking directly to court of appeals judges who know nothing about labor law. For decades, NLRB cases have been tried by expert lawyers to expert administrative law judges. The shorthand evidence and jargon that result cannot develop a record that is comprehensible or persuasive to most court of appeals judges. NAACP lawyers overcame a similar problem

by using social science evidence and expert witnesses to demonstrate otherwise incomprehensible concepts, such as the effects of segregation. NLRB cases must be tried in this way. This program can only succeed if it is coupled with activism by unions and the creation and promotion of a vision of unionism that speaks to the unorganized.

Second, the NLRA sets out policies that must be the focus of this strategy. Those policies embody a vision that must be the subject of union activism. The policies must be used in all cases to give judges guidance as to whether a decision promotes or undermines those goals. Trying cases with a policy-centered strategy is particularly important in the cases that seek to overturn longstanding judicial interpretations of the statute, such as striker replacement.

The problem of remedies illustrates how this strategy would work. Many have rightly criticized the NLRA's remedies as weak, especially the remedies for bad faith bargaining. The standard remedy is an order to bargain in good faith. This remedy is not in the NLRA. Section 10(c) of the NLRA says only that remedies must promote the NLRA's policies. The task then is to present evidence as to whether, given the facts in the case, a bargaining order furthers NLRA policies, and, if not, what will. The evidence can include social science research and expert testimony as to experience with the effectiveness of this remedy. It could include evidence as to alternative remedies, such as interest arbitration.

Low backpay awards are another example. Section 10(c) mentions backpay but does not prohibit other monetary awards. Again, expert testimony on the impact of low backpay awards on employees' willingness to organize unions and engage in concerted activities for

<sup>12</sup> James J. Brudney, *Judicial Hostility Towards Labor Unions? Applying the Social Science Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675 (1999).

mutual aid and protection can demonstrate that current award structures need to be replaced with more effective remedies. Recently, the NLRB successfully used social science evidence in a case involving union dues.<sup>13</sup> These strategies can be extended to other critical

issues.

In sum, all is not hopeless with unions and labor law, but there is work to be done. Unions are a necessary partner in that work. Only with their active support in this strategy is success possible. *GB*

---

<sup>13</sup> See *United Food and Commercial Workers Union, Local 1036 v. NLRB*, 307 F.3d 760 (9th Cir. 2002).