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Daniel R. ERNST. *Lawyers against Labor : From Individual Rights to Corporate Liberalism.*

Urbana & Chicago : University of Illinois Press, 1995, 334 pp.

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- 1 The late nineteenth and early twentieth centuries was a period of considerable change in American labour relations, a change which is at the very heart of Daniel D. Ernst's *Lawyers against Labor*. Economic changes were taking place with the decline of proprietary capitalism and the emergence, alongside the notion of "business trust," of what embattled proprietary capitalists saw as an equally dangerous "labor trust." The "age of the party" was coming to an end and being replaced by the "age of the group," leading Ernst to deal with the theory of interest groups and make clear that, in his opinion, pluralism appeared in the first decade of the new century and not, as many would have it, much later.
- 2 The concept of industrial pluralism is all the more vital in the book since the cultural backgrounds of the protagonists are given pride of place, shedding valuable light on the—at times paradoxical—strategies of the employers and their lawyers on the one hand, union representatives and their own lawyers on the other hand. For it is the evolution of the law that Ernst brilliantly and comprehensively presents by analysing the social, political, and economic changes of the first decade of the twentieth century from the perspective of an organisation set up by owners of family businesses to "litigate and lobby against organised labor:" the American Anti-Boycott Association.
- 3 Co-founded by two Connecticut hat-manufacturers, Charles Hart Merritt and Dietrich Eduard Loewe, in an attempt to resist unionisation of their companies under threat of strikes and boycotts, the AABA was operational in August 1903 and recruited Daniel Davenport, a lawyer with a Victorian education and outlook most suited to the defence of the interests of employers who cherished the values of freedom, laissez-faire and individualism and felt that the existing law should be enforced to protect them from unduly powerful enemies. The particular strengths of the AABA were that it could

finance legal actions in areas where employers did not have access to inexpensive and swift relief—secondary picketing and boycott cases—and that it could thus acquire valuable expertise in labour law, an expertise that could be used time and again in other cases, cases preferably chosen so as to obtain maximum publicity and a favourable jurisprudence nationwide.

- 4 Between the wave of cases of the “Great Upheaval” in the mid-1880s and the time when the underlying values of the AABA had been so upset that it had to change its name to the League for Industrial Rights (in 1918)—the genteel Victorian tradition was gradually becoming outdated and, with it, an individualistic, a priori conception of the law. (Charles Hart Merritt’s son, Gordon Merritt, who had assisted Davenport for many years as a young lawyer, embraced a more progressive approach, adopting a corporate form of liberal pluralism. Gordon Merritt took over from Davenport in 1915.) This happened under the influence of legal reformers whose ideas eventually seeped through into case-law.
- 5 Ernst insists on the importance of the educational backgrounds of the AABA lawyers (Davenport’s in Chapter 1 and Gordon Merritt’s in the last chapter) not only to underline the shift in the organisation’s values or to highlight the paradox that lies in Davenport’s legacy—an old-school Victorian individualist who worked hard for an organisation which was meant to defend Victorian values but whose successes in promoting the usefulness of his organisation among employers constitute a perfect example of pluralism at work and a textbook example of how to run an interest group (chapter 3)—, but also to demonstrate that the legal and political establishment had to undergo the same gradual conversion towards a vision of the law that increasingly reflected the changes in society and was more proactive, and that this conversion was spearheaded by legal intellectuals before being applied in the courtroom.
- 6 Ernst gives the example of the gradual decline in the use of criminal conspiracy in labour law cases and the increasing reliance on the law of intentional torts as a major step forward deriving from the feeling that employers were given too great an access to injunctions and from the rise of a new profession, that of the legal thinker, whose purpose was to adopt a more scientific approach to the law. An alternative was offered to the old *sic utere tuo ut non alienum non laedas* maxim (“so use your own as not to injure another”), so easily interpreted by judges as banning all boycotts. It allowed an exceptionally progressive judge like Oliver Wendell Holmes, in the 1890s, to launch a scathing attack on the genteel tradition and the conclusions reached by judges in the Great Upheaval cases: what he relied on to do so was the formula Sir Charles Bowen used in preference to malice (*Mogul Steamship Co. v. McGregor, Gow & Co.* (1889)) in a famous English case: the absence of “just cause and excuse.”
- 7 In spite of such developments, the AABA did not throw the genteel tradition overboard. Far from it. In the first decade of the new century, it persisted in following legal principles dating back to the 1880s, admittedly encouraged by the fact that most judges weren’t adapting fast either. That is particularly true of the organisation’s campaign to get the closed-shop declared illegal. On that front however, after a number of trials and many disagreements as to the interpretation of precedent, the AABA simply had to concede defeat and, in 1915, Daniel Davenport himself had to acknowledge the legality of the closed-shop (chapter 5).
- 8 Chapters 6, 7 and 8 of *Lawyers against Labor* focus on what the AABA will be remembered for. What Ernst demonstrates is that there were both successes and defeats in the

courtroom but, irrespective of the legal outcome of the individual cases, the AABA was extremely good at putting pressure on politicians, setting the agenda for its own purposes and having an impact on the public debate. The *Loewe v. Lawlor* (1903-1917) and *Buck's Stove and Range Company v. Gompers* (1907-1914) cases provide perfect illustrations of that.

- 9 *Buck's Stove* was a particularly prominent case and it achieved great political significance for a number of reasons: leaving aside the rather anecdotal fact that the judge's blatant bias and disgraceful behaviour caused him to resign in order to avoid impeachment, one of them was the personality of the litigants and what they represented: the action was brought by James Wallace Van Cleave, a very politically-minded anti-union employer who also happened to be President of the NAM, and the defendants were the AFL top brass, including Samuel Gompers. Another reason for the significance of *Buck's Stove* was that the period was characterized by deep incursions into party-politics, a trend exemplified by Gompers' unprecedented intervention in the congressional elections in 1906 and in the 1908 presidential elections. The legal significance of the case was limited and the result satisfied no-one but, partly because Gompers was jailed for contempt of court and turned the whole debate to questions of freedom of speech, *Buck's Stove* contributed to a cross-class collaboration which left the AFL closer to the Democrats than ever before, particularly after 1914, a situation all the more worrying for the AABA since the AFL were also building bridges with big business.
- 10 In *Loewe* on the other hand, the AABA achieved a great legal victory. To obtain more damages, a precedent binding on all federal courts and a national audience, it had chosen not to ground its action in the common law but to try to get the judges to decide that the Sherman Act applied to labour. In the face of a disastrous defence on the part of the United Hatters, the Danbury hat-manufacturer and the AABA got what they wanted in 1908 and once again with the rejection of the appeal. The provisions of the Sherman Act did not apply to the hatters collectively, as a separate legal entity, but to individual employees, a great many of whom endured incredible hardships even though they had no personal knowledge of the boycott, trapped as they were between the intransigence of the AABA lawyers who, having sued them individually, demanded the full amount due, and AFL leaders (particularly Gompers) who shared the AABA's individualism and fear of pluralism and vehemently rejected the idea of incorporation. *Loewe* was a great legal victory for the AABA but caused the debate on incorporation to gain momentum in intellectual and legal circles. The National Civic Federation, the corporate liberals and lawyers like Louis D. Brandeis and Felix Frankfurter led a campaign made more popular by both Davenport's and Gompers' resistance, and paved the way for pluralism, even in the ranks of the AABA. Gordon Merritt's involvement in the pluralist debate over the labour exemption (Chapter 9), albeit by bringing consumers into the equation, testifies to this changing climate.
- 11 The debate over the Clayton Act and organized Labour's exemption from antitrust legislation was a protracted one, and the AFL and AABA lobbied intensively from the outset to obtain favourable amendments. The result was an ambiguous piece of legislation and a good illustration of how Congress, faced with a politically sensitive situation, tends to burden the federal judges with the task of "establishing a clear meaning." It led some thinkers (Henry Seager in particular) to deplore the absence of legislation along the lines of the British Trade Disputes Act (1906). The unions claimed the Clayton Act was a "Magna Carta" but the "gold bricks" contained "dynamite," and

the judges established a “clear meaning” which actually made labour’s position worse by proclaiming the right of private parties to injunctions. Once again, the AABA’s legal expertise had prevailed over the AFL’s leader’s relative amateurism and, paradoxically, Daniel Davenport’s organisation had served pluralism well.

- 12 In the Woodtrim War, to which the tenth chapter is devoted, Ernst provides an even clearer example of the pluralist tide turning against the proprietary capitalists. The secondary boycott had been curtailed and so, from 1910 to 1917, employers had to face another form of industrial action, the “materials boycott,” most notably carried out by the New York City locals of the United Brotherhood of Carpenters and Joiners against non-union wood-products. The AABA used this opportunity to drum up more support from the business community and this time, it was Gordon Merritt who led the fight. The judges’ decision hinged on a procedural question and gave a rather disappointing conclusion to a case (*Paine Lumber Co. v. Neal* (1917)) where an impressive legal arsenal had been used (sweeping injunctions, criminal prosecutions, damages actions, contempt applications).
- 13 The conclusion—which was favourable to the carpenters in that it established that their boycott was compatible with New York’s conspiracy legislation—must be read in the broader context of the judges’ efforts to determine the limits of group solidarity, and Ernst uses the “Building Trades Councils” cases to point out the extent to which the scope for action was broadened between the “Great Upheaval” cases and the First World War. From the neo-classical reliance on (horizontal) competition as a prerequisite for secondary action to the acceptance of the “principle of trade unionism” and what the author refers to as the judges’ “policy of deference to organizing through the BTCs,” the general attitude evolved a good deal and the lack of contractual relationship with the subcontractor ceased to be seen as a problem. A battle was won by the carpenters in *Paine* but in that same decision, the Clayton Act was interpreted as submitting the unions to injunctions by private parties, an interpretation confirmed by the Supreme Court in 1921 (*Duplex Printing Press Co. v. Deering* (1921)). Nevertheless, despite this portent, the legal reformers had achieved much during the Woodtrim War and one of their feats had been to transform the AABA beyond recognition.
- 14 Steered by a new captain who had fully endorsed industrial pluralism and whose views were now roughly in tune with those of the legal reformers and the corporate liberals, the AABA became the League for Industrial Rights in 1918 and, leaving behind the genteel tradition so dear to Daniel Davenport and the new captain’s late father, “set sail for the uncharted waters of the corporatist political economy of interwar America” (*Lawyers against Labor*, 213).
- 15 One could certainly argue that the ways in which the legal reformers and corporate liberals succeeded in influencing the judges and legislators could have been explained in greater detail, but the demonstration that the ball had been set rolling not after the War—as some historians would have it—but as early as the turn of the century is most convincing. In what is undoubtedly one of the best books devoted to the law and labour history since E.P. Thomson, it is also shown in a masterly manner that in this “place of conflict” that is the law, the situation was far from monolithic and that legal practitioners and theoreticians alike fumbled more or less awkwardly towards a modernisation of the law of industrial relations, in the context of what, in reference to Robert Wiebe’s famous book, could be described as “the judge’s search for order.”

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