

WHEN AN ASPIRING TAX LAWYER CONSIDERED LABOR UNIONS IMPORTANT TO THE FUTURE OF CAPITALISM

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I

INTRODUCTION

Stanley Surrey, like many young lawyers who graduated from law school in the early 1930s, headed to Washington, D.C. to work on the New Deal. Although he thought he would be a tax lawyer, he went to work for the National Recovery Administration (NRA). Then, when the Supreme Court declared the National Industrial Recovery Act unconstitutional, he stumbled into a job at the National Labor Relations Board (NLRB), where he wrote opinions and ran union elections. His reflections on his two years there, in the period when many—himself included—believed the Supreme Court would declare it unconstitutional, capture a lost era. At the time, labor law and the agency that enforced it seemed important enough to the future of American capitalism that a talented and ambitious young lawyer with an interest in tax would find inspiration in bringing the rule of law to the brutal fights over worker collective representation.

II

SURREY’S BRIEF BUT NOTEWORTHY STINT AT THE NLRB

A. Surrey’s Experience at the Establishment of the NLRB

Finding work at a large New York law firm “deadly dull,” Stanley Surrey—an aspiring tax lawyer—left the firm after only a few months and headed to Washington, D.C. to work on the New Deal.¹ He worked for his former Columbia

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1. STANLEY S. SURREY, A HALF-CENTURY WITH THE INTERNAL REVENUE CODE: THE MEMOIRS OF STANLEY S. SURREY 10 (Lawrence Zelenak & Ajay K. Mehrotra eds., 2022) [hereinafter SURREY MEMOIR]. This essay draws principally on the Surrey Memoir and the oral history of Stanley S. Surrey conducted by Judith H. Byrne in 1970 as part of the Cornell Program in Oral History collection on the National Labor Relations Board. *See generally* Interview by Judith H. Byrne with Stanley Surrey, Professor of L., Harvard Univ., in Cambridge, Mass. (Apr. 13, 1970) [hereinafter Surrey Oral History]. Where I rely on Surrey’s characterization of events, as I do here in describing the day as “gloomy and weird,” I quote his language from the Oral History. Memoirs and oral histories are not invariably reliable as to the facts; I have made no systematic effort to determine whether Surrey’s memories of his time at

professor, Milton Handler, as part of the National Recovery Administration until the “gloomy and weird” day in May 1935 when the Supreme Court declared the NRA unconstitutional and effectively eliminated the jobs of the many attorneys and others who worked for that agency.² Surrey was steered away from a job at the Bureau of Internal Revenue by a neighbor—a recent Yale Law grad—who told him the place was “deadly” and to avoid it “by all means.” Surrey was attracted to the new National Labor Relations Board, which had just been spurred to life by the enactment of the National Labor Relations Act (NLRA) in July 1935 and was hiring lawyers whom Surrey knew slightly from his NRA days and respected.³ By 1939, the NLRB was well stocked with elite lawyers: half of its 252 lawyers had graduated from Harvard, Columbia, Georgetown, or Yale.⁴

The NLRB as constituted by the NLRA was new in the sense that the statute creating it was new. Technically, it took over for the “old” NLRB, which had been created in June 1934 by Executive Order pursuant to Public Resolution No. 44, which had authorized the President to implement the labor provisions of the NRA by creating a labor board.⁵ Some of the lawyers who went to work at the NLRB in the early years were there because of their commitment to labor and civil liberties—which in the early 1930s were deeply intertwined.⁶ Two early recruits were Thomas Emerson and Nathan Witt. Thomas Emerson, who had graduated first in his class from Yale Law School and had served as editor-in-chief of the *Yale Law Journal*, was focused on civil liberties. Nathan Witt was devoted to the cause of labor; he had graduated from Harvard Law School, was a communist, the son of a working class, Jewish, immigrant family and had to drive a cab for two years to earn enough money to attend Harvard.⁷ Other lawyers, including Surrey, had no experience in labor and were just intrigued by

the NLRB are corroborated by other sources. To avoid the clumsy repetition of the phrase, “Surrey recalled” to preface every statement, except where otherwise indicated by citation, this essay recounts Surrey’s version of what happened and when. The reader, however, should bear in mind that memories are fallible, and many of us are prone in retrospect to exaggerate our own role in some events, and to forget or to minimize our own responsibility for others. It is a perspective on what happened, but not necessarily the only perspective. As the eminent historian E.J. Hobsbawm observed, “For all of us there is a twilight zone between history and memory; between the past as a generalized record which is open to relatively dispassionate inspection and the past as a remembered part of, or background to, one’s own life . . . The length of this zone may vary, and so will the obscurity and fuzziness that characterizes it. But there is always such a no-man’s land of time. It is by far the hardest part of history for historians, or anyone else, to grasp.” E.J. HOBBSAWM, *THE AGE OF EMPIRE: 1875–1914*, at 3 (1987).

2. SURREY MEMOIR, *supra* note 1.

3. *Id.*

4. PETER H. IRONS, *THE NEW DEAL LAWYERS* 236 (1982).

5. *See generally* JAMES A. GROSS, *THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD* (1974); IRVING BERNSTEIN, *TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER 1933–1941* (1969).

6. LAURA WEINRIB, *THE TAMING OF FREE SPEECH: AMERICA’S CIVIL LIBERTIES COMPROMISE* 1–2, 7–9, 11–12 (2016); *see generally* JEROLD S. AUERBACH, *LABOR AND LIBERTY: THE LA FOLLETTE COMMITTEE AND THE NEW DEAL* (1966).

7. IRONS, *supra* note 4, at 236.

playing a part in building a New Deal agency working on one of the most interesting and pressing issues of the era.⁸

Surrey was hired by the NLRB's first general counsel, Charles Fahy, at a time when many—Surrey included—believed that the Supreme Court would likely declare the agency and the statute that authorized it unconstitutional.⁹ Fahy believed the best chance the agency had to establish its legitimacy in the eyes of hostile business leaders and federal courts was through rigorous adherence to the practices of formal adjudication.¹⁰ So, the NLRB where Surrey went to work was at once radically new—a new statute, a new agency, and a very “explorative, step-by-step” process because there was “no experience” to draw on—and a fairly traditional adjudicative body.¹¹ The Review Division where Surrey worked followed a process of reviewing the transcript of administrative hearings along with documentary evidence submitted and drafting the decision for the three-member Board, just as clerks for appellate judges would do, complete with a statement of facts and conclusions of law.¹² And, although some critics of agency adjudication raised questions about whether an agency that combined a prosecutorial and adjudicative function could do justice when adjudicating cases that other agency lawyers had prosecuted, Surrey did not see any problem with the statute having combined the prosecutorial and adjudicative functions. He insisted that what the lawyer for the General Counsel would argue “wouldn't affect me” if he thought it was wrong.¹³

At the Board in those early days, Surrey worked with and for a number of people who went on to very distinguished careers. Louis Jaffe—later a Harvard Law professor and scholar of the administrative state—drafted the Board's decision in *Jones and Laughlin Steel*, which became the case in which the Supreme Court upheld the constitutionality of the NLRA and thus removed doubts as to whether the agency would survive.¹⁴ Surrey also worked with Thomas I. Emerson, later a Yale Law professor known for his research on civil liberties.¹⁵ Fahy had a number of positions in government, became Solicitor General of the United States in 1941, and served for nearly thirty years as a judge on the D.C. Circuit. That Fahy was not a committed progressive civil libertarian was clear to Surrey, who recalled him as a conservative and cautious lawyer. It became clear to all when Fahy defended the United States government's

8. Surrey Oral History, *supra* note 1, at 37.

9. SURREY MEMOIR, *supra* note 1, at 15; Surrey Oral History, *supra* note 1, at 8, 12, 20.

10. See GROSS, *supra* note 4, at 239 (describing the rigorous litigation strategy Fahy implemented).

11. Surrey Oral History, *supra* note 1, at 9.

12. *Id.* at 9–10.

13. *Id.* at 51.

14. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937) (upholding the constitutionality of the National Labor Relations Act); *Jones & Laughlin Steel Corp.*, 1 N.L.R.B. 503, 503 (1936) (listing Louis L. Jaffe as counsel to the Board).

15. IRONS, *supra* note 4, at 236. Thomas I. Emerson did two oral histories covering his work at the NLRB; one is archived at Cornell University, and the other at Columbia University as part of its New Deal oral history project.

incarceration of Japanese Americans as Solicitor General arguing *Korematsu v. United States*.¹⁶

Surrey's memories of his adventures at the NLRB convey the fun of being involved in creating an agency from scratch. The Board "seemed to me quite different from the Board later on, in that then legal issues came in, controversial issues came in, important interpretive decisions had to be made, important fork-in-the-road decisions had to be made."¹⁷ Labor lawyers today encounter a system encrusted with eight decades' worth of case law, and complex and cumbersome procedure. The NLRB's *Casehandling Manual* is now three volumes totaling nearly 1,000 pages.¹⁸ But then, everything was new; as Surrey recalled, "we just made up [the rules] as one went along, and later it just became part of the orthodox machinery for handling elections."¹⁹

Surrey was the lawyer who drafted the NLRB's first decision: *Pennsylvania Greyhound Lines*, which appears at page one, volume one of the NLRB's decisions.²⁰ Acutely aware of the employer arguments that regulating labor relations exceeded Congress' power to regulate interstate commerce, General Counsel Fahy and members of the Board were on the lookout for good test cases to establish the Board's and the statute's constitutionality.²¹ A case involving an interstate bus transportation company was an ideal test case because the connection to interstate commerce was indisputable. Because the Supreme Court had upheld the constitutionality of the Railway Labor Act only a few years before, it would be difficult for the Court to conclude that labor relations on interstate rail transportation were within Congress' commerce power, but not on interstate bus transportation.²²

Surrey's years at the NLRB, he recalled, involved quite a bit of stumbling into cases and devising rules that proved to be momentous almost by chance. He was assigned to conduct one of the NLRB's first representation elections, which involved about 5000 employees at a Radio Corporation of America (RCA) plant

16. See Surrey Oral History, *supra* note 1, at 45 (describing Fahy as conservative and cautious); *Korematsu v. United States*, 323 U.S. 214, 223 (1942).

17. Surrey Oral History, *supra* note 1, at 42.

18. The NLRB Casehandling Manual is available on the NLRB website. *Manuals*, NAT'L LAB. RELS. BD., <https://www.nlr.gov/guidance/key-reference-materials/manuals-and-guides> [<https://perma.cc/3VEV-6HVA>] (last visited Feb. 2, 2023). It also has a style manual, and a variety of guides to various aspects of NLRB procedure. *Id.*

19. Surrey Oral History, *supra* note 1, at 17.

20. SURREY MEMOIR, *supra* note 1, at 15; In *re Pennsylvania Greyhound Lines, Inc.*, 1 N.L.R.B. 1, 38 (1935), the Board held that the operations of the interstate bus transportation company affected commerce and, therefore, the NLRA could constitutionally regulate its labor relations. The Board found that the company violated the NLRA by threatening employees who unionized, by surveilling their union activities, and by maintaining a company union. *Id.* at 26. All of this was garden variety anti-union activity then (the incidents happened in 1935 and the Board handed down its decision in December 1935). See *id.* at 1 (ruling on December 7, 1935). And they remain garden variety anti-union activity now.

21. IRONS, *supra* note 4, at 240–43.

22. See *Texas & New Orleans Ry. Co. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 570 (1930) (upholding the constitutionality of the Railway Labor Act).

in Camden, New Jersey.²³ RCA had launched an aggressive anti-union campaign in 1936, spending over a quarter of a million dollars on armed guards and strikebreakers and creating a company union. The United Electrical (UE) workers—a progressive union that affiliated with the Congress of Industrial Organizations (CIO) and was eventually purged from the CIO over the UE leadership’s refusal to sign federally-mandated affidavits of noncommunist affiliation as the Red Scare heated up in 1947—was organizing RCA along with the larger electrical device companies General Electric and Westinghouse.²⁴ Seeking guidance from Board Chairman Warren Madden about how to conduct the election because there was no precedent for how to conduct a union representation election, Surrey recalled Madden saying simply to do his best.²⁵ The company union decided to boycott the election, presumably at the behest of the company leaders.

When the time came to certify the election results, it turned out less than a majority of RCA employees had voted. Madden thought the Board could not certify the election if less than a majority had voted, and even admitted to having told RCA’s lawyer, Hugh S. Johnson—who had been fired as the head of the National Recovery Administration not long before it disintegrated—that the NLRA required a majority of employees to vote for a representation election to be valid.²⁶ Believing that such a rule was not compelled by the NLRA and would allow companies to scuttle unionization by suppressing the vote, Surrey convinced Madden to disregard his prior advice to RCA. After all, Surrey observed, Johnson could not plausibly have claimed to rely on Madden’s advice. Madden joked to Surrey that henceforward he should refrain from taking phone calls without first consulting his lawyer.²⁷ So Surrey wrote the ruling certifying UE as the representative of the RCA plant. Having successfully managed that election, Surrey became the Board’s first expert in how to do it.²⁸

After leaving the NLRB, Surrey went to work for one year at the Bureau of Internal Revenue, “a somewhat sleepy type” of agency, and then the Department of Treasury, which was “just so different [from the NLRB] I couldn’t compare them.”²⁹ The Board was small and new, and gave “a great deal of responsibility” to Surrey and the other young attorneys in his position.³⁰ He relished the chance to go out and have an impact in the world. He recalled with amusement that when he went to Camden to run the union election at RCA, he called the Camden chief of police and directed him to be sure that there was no violence, no arrests, and no photographs taken of the workers coming to vote because he wanted to be

23. SURREY MEMOIR, *supra* note 1, at 15–16.

24. RONALD W. SCHATZ, THE ELECTRICAL WORKERS: A HISTORY OF LABOR AT GENERAL ELECTRIC AND WESTINGHOUSE, 1923–1960, at 96 (1983).

25. Surrey Oral History, *supra* note 1, at 13.

26. *Id.* at 14–15.

27. *Id.* at 14–16; SURREY MEMOIR, *supra* note 1, at 15–16.

28. SURREY MEMOIR, *supra* note 1, at 15–17.

29. Surrey Oral History, *supra* note 1, at 15–17.

30. *Id.*

sure that those who voted could do so without retaliation.³¹ Given that the anti-UE forces were boycotting the election, anyone who showed up to vote might be assumed to support the UE. It was important to prevent the company from having photos to prove who had voted. It was also important to prove that the NLRB could conduct a union election without turmoil.³² “I told him he had no authority to arrest anybody unless he got my consent, which he agreed to. I was then at the time about twenty-five years old and was a little startled he agreed with this.”³³ Plus, he was gratified to be able to reassure an elderly worker during a union election at Studebaker that he would be sure that the U.S. government would run a fair union election and to have the man shake his hand and say “he had never expected to see this day.”³⁴

B. Bringing the Rule of Law to Violent Repression of Unions

American workers had encountered violent repression of their efforts to unionize for decades. But even by the standard of American violence, the mid-1930s were sobering for the lawyers at the NLRB. Estelle Frankfurter, an NLRB staff member, recalled Fahy saying he “wouldn’t have believed until he read the *Jones & Laughlin* record that employers could behave the way that Jones and Laughlin behaved.”³⁵ Perhaps Fahy was surprised because he had no experience in the labor movement; anyone who knew about labor and labor history would not have been surprised at all. But Fahy had other qualities that made him well suited to the task of winning legitimacy and constitutionality of the Board. Nat Witt recalled Fahy as being “very deliberate, very patient, very careful,” but “he was not as devoted to the Act the way I and some of the younger people were. To him it was just another career.”³⁶ As Witt said: “He got there by accident; I got there by design.”³⁷

One goal of the Board was to educate judges about the scale of the problem. This was one of Surrey’s major objectives in drafting opinions, and he took very seriously the assignment to educate judges and the legal community about management’s flagrant disregard of labor rights. An early Board decision involved a sustained union-busting effort of the Remington Rand company that adhered to a well-organized and highly coercive system devised by an employer association; the system was so well orchestrated that it became known as the “Mohawk Valley formula.”³⁸ At the time, Chairman Madden believed that the

31. *Id.* at 14; SURREY MEMOIR, *supra* note 1, at 15–16.

32. Surrey Oral History, *supra* note 1, at 14; *see* SURREY MEMOIR, *supra* note 1, at 15–16 (explaining that this was the first large election the Board had ordered).

33. Surrey Oral History, *supra* note 1, at 14.

34. SURREY MEMOIR, *supra* note 1, at 17.

35. GROSS, *supra* note 4, at 9 (quoting the Estelle Frankfurter Oral History, Cornell Oral History Project).

36. IRONS, *supra* note 4, at 235.

37. *Id.*

38. SURREY MEMOIR, *supra* note 1, at 17; Remington Rand, Inc., 2 N.L.R.B. 626, 664 (1937). *See* JAMES A. GROSS, THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD: NATIONAL LABOR

Supreme Court would declare the NLRA unconstitutional and the Board would be disbanded, so he wanted Surrey to write an opinion that would powerfully tell the world exactly how violent, repressive, and devastating corporate union-busting was.³⁹ “At least it will be educational after we’re declared unconstitutional,” Madden explained.⁴⁰ “So I did,” Surrey recalled, adding, “It’s much more a narrative story and a story designed pretty clearly to show what went on.”⁴¹

The opinion differed from the way NLRB decisions are written now by recounting the facts at much greater length than were devoted to the conclusions of law; Surrey described writing in “dramatic narrative form.”⁴² It explained that Remington Rand was a manufacturer of typewriters, adding machines, and other office equipment with plants in New York, Connecticut, and Ohio.⁴³ In response to an extended union organizing effort, Remington Rand refused to recognize or bargain with the union and instead hired a team of anti-union and strike breaking businesses to manage its effort to break the union.⁴⁴ They coordinated an anti-union propaganda campaign, emphasizing the possibility that the plant would be closed and the work transferred elsewhere, and branding union supporters as outside agitators.⁴⁵ They surveilled the workforce in various ways, seeking to determine who was a union supporter.⁴⁶ When peaceful picketing commenced, the company hired hundreds of men armed with guns and clubs to patrol the plants.⁴⁷ As the company prepared to reopen a plant, by the use of force if necessary, a lawyer for the company appealed to the mayor of one community to swear in the men as sheriff’s deputies, without identifying the men as employees hired by the Burns Detective Agency.⁴⁸ A mayor of one town where the company had a plant declared a state of emergency and prohibited anyone to enter the town without permission.⁴⁹ Over 300 special deputies patrolled the streets, along with town police, all armed with shotguns.⁵⁰ They padlocked the union headquarters to prevent workers from congregating there.⁵¹ And then, the opinion continued, “With the village thus turned into a fort, the foremen on June

POLICY IN TRANSITION 9 (1981) (describing James H. Rand, President of Remington Rand, as “the super-strategist of strikebreaking” who had “completely destroyed unionism in his plants” and boasted that “two million business men have been looking for a formula like this and business has hoped for, dreamed of and prayed for such an example.”).

39. Surrey Oral History, *supra* note 1, at 21.

40. *Id.*

41. *Id.*

42. SURREY MEMOIR, *supra* note 1, at 17.

43. Remington Rand, 2 N.L.R.B. at 630.

44. *Id.* at 648–50.

45. *Id.* at 651–56.

46. *Id.* at 649.

47. *Id.* at 651–52.

48. *Id.* at 652.

49. *Id.* at 657.

50. *Id.* at 657–58.

51. *Id.*

11 visited the homes of the employees to persuade them to return.”⁵² For the next few weeks, foremen and supervisory employees visited the homes of striking workers to persuade them to return to work on the day that the company, with much fanfare, announced it was reopening the plant. The strike collapsed and the company declared victory.⁵³ This, Rand touted to visiting representatives of the National Association of Manufacturers, was the “Mohawk Valley Formula.”⁵⁴

The court of appeals upheld the Board, although Judge Learned Hand’s opinion observed that the Board’s decision was “rather in the nature of a discursive opinion than of specific findings of fact” and the “tone and the style of the decision may not indeed have evinced that judicial detachment which is the surest guarantee of even justice.”⁵⁵ Surrey said the Board members took that to mean that the novelistic style of the writing was not a wise strategy, although Surrey insisted that it was a good way to write to explain “what the shooting is all about.”⁵⁶ Duly chastened, the Board henceforward adopted the dry and more legalistic style that has characterized its opinions ever since. Yet, in the thirty-five years after leaving the Board, Surrey had once or twice reread the decision he had drafted, and still found the story astounding.⁵⁷ The attorney who tried the case did:

[A] terrific job in getting all the facts in there of how you try to break a labor union and how you use strikebreakers and spies and how you go into a community and foment disruption in the community, tell them the plant’s going to move, and all that sort of thing. . . . No one would believe, you know, a nice guy like Rand who’s a pillar of the community, why in the world is he going to consort with all these hoodlums? And of course he did.⁵⁸

Even all those years later, Surrey thought “James Rand must have been a strange psychological character.”⁵⁹

If *Remington Rand* was notable for its effort to educate readers, especially the bench and bar, about the horrors of union-busting, other cases were chosen for their likelihood of getting a favorable decision about the constitutionality of the NLRA. Thomas Emerson and three other lawyers at the old NLRB had written a strategy memo laying out how to choose test cases to establish the constitutionality of the NLRA even before the NLRA was enacted, and presented it to the new Board—whose members had not yet been chosen or confirmed—only four days after the NLRA was enacted.⁶⁰ Fahy embraced the strategy, and it shaped Surrey’s two years at the Board.⁶¹

52. *Id.* at 658.

53. *Id.* at 658–59.

54. *Id.* at 664.

55. NLRB v. Remington Rand, Inc., 94 F.2d 862, 865 (2d Cir. 1938); *see also id.* at 873.

56. Surrey Oral History, *supra* note 1, at 21.

57. *Id.* at 52.

58. *Id.* at 52–53.

59. *Id.* at 52.

60. IRONS, *supra* note 4, at 240.

61. *Id.*

C. Ideology: Recalling the Thirties Through a Rose (Pink?) Colored Lens

Although some conservative politicians lambasted the Board and its staff for being too pro-labor or communist, or both, the lawyers who worked at the Board considered themselves both pro-labor and pro-rule of law. The threat to the rule of law, as they saw it, came from the employers and business lawyers who flouted or disregarded the NLRA, insisting it was unconstitutional. The attorneys at the Board were “pro-Labor Relations Act, which would mean in a sense that they would tend to be pro-labor because the Act was being just violated quite a bit.”⁶² But “the staff nevertheless recognized that you have to decide the cases carefully and you have to protect the Board in the courts,” which required caution and attention to legal detail.⁶³

Recalling the thirties is always through the lens of the accusations of communism. Charges were leveled at some early Board attorneys, including Surrey’s boss, Nat Witt. In the many oral histories of lawyers involved in the New Deal and twentieth-century labor, few topics are as sensitive as the question of communism and the Communist Party’s influence on labor policy. Perhaps because the red-baiting and the bitter conflict over naming names that pervaded the twentieth century—from the Palmer raids of the teens, to Congressional and business attacks on the NLRB in the late thirties, to the Smith Act prosecutions and HUAC hearings of the forties and fifties—lawyers were understandably reluctant to talk about what they thought about others who were rumored to be communists. Surrey was no different. He described Saposs as “nice” and Nat Witt as “abrasive,” but claimed he was “too young” to know whether ideological differences generated friction among NLRB lawyers.⁶⁴

Surrey said he came to the job with no knowledge of labor or labor law, because one couldn’t study it in law school, and he “just drifted into” his views that workers should have rights to organize and bargain collectively.⁶⁵ The fact that employers “were really high-handed and arbitrary,” also led him to think that the attitudes and actions of companies trying to prevent workers from unionizing “just seemed to me outrageous and utterly . . . just morally wrong.”⁶⁶ And the lawyers for employers arguing that the whole statute was unconstitutional “annoyed all of us down there because it seemed to be so utterly wrong and conservative.”⁶⁷ So, Surrey insisted, it was simply a sensible conclusion that labor had rights, rather than the influence of communists like Nat Witt. “I think a number of us put Nat’s ideologies to one side and let him have it – that’s not necessary and it doesn’t have to be a part of what we’re doing here.”⁶⁸ Rather, Surrey said, conflicts between liberals and communists “were reserved for life

62. Surrey Oral History, *supra* note 1, at 26.

63. *Id.*

64. *Id.* at 30, 31, 39.

65. *Id.* at 37.

66. *Id.* at 37–38 (ellipses in original).

67. *Id.* at 38.

68. *Id.* at 38–39.

outside the Board, not life within the Board.”⁶⁹ So when he resigned from the National Lawyers Guild because he felt—privately, though said nothing publicly—that it was dominated by Communists, he thought that had nothing to do with his work at the Board.⁷⁰

The legalism that later came to characterize the NLRB was prompted by more than an effort to insulate the Board’s decisions from hostile federal courts. It was also the result of Congress having enacted legislation in 1947 that banned the agency from hiring economists. Section 4(a) of the NLRA as amended specifically says “Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, or for economic analysis.”⁷¹ It was adopted because some members of Congress believed the Economics Division was a hotbed of communist sympathy.⁷² But Surrey considered David Saposs, the head of the division, as a “sweet, nice economist ... a rather sweet, gentle fellow.”⁷³

Reflecting that, as a young lawyer, he did not quite grasp the significance of what they were doing in creating a new agency and bringing some legal restraint to employer anti-union tactics, Surrey said: “[Y]ou never realize the importance of the issues you’re living through when you’re living through them at the time.”⁷⁴

One case he did not mention in his oral history or memoir proved to be more significant decades after he left the agency than many cases he’d handled. Even in 1970 when Surrey sat down for his oral history on his NLRB years, the importance of the case had not yet become clear to him. But in the 1980s, when unions grew weak enough that employers could systematically permanently replace striking workers, the case of *Mackay Radio*, for which Surrey had drafted the opinion for the Board in 1935, became tremendously important.

Mackay Radio Company—Western Union’s principal competitor—had flown radio operators to its San Francisco office to continue operations during a strike called by workers seeking representation by the American Radio Telegraphists’ Association.⁷⁵ As the strike collapsed, San Francisco workers sought to return to work, and the company said it would not displace the replacements. In choosing which workers would be reinstated, the company preferred those who had not been leaders in the union and the strike.⁷⁶ The

69. *Id.* at 30.

70. *Id.*

71. 29 U.S.C. §154(a) (1964).

72. James A. Gross, *Economics, Politics, and the Law: The NLRB’s Division of Economic Research, 1935–1940*, 55 CORNELL L. REV. 321, 322 (1970).

73. Surrey Oral History, *supra* note 1, at 30–31.

74. *Id.* at 53. Surrey obviously wasn’t referring to *Mackay Radio*, as he never mentioned it in his oral history; rather, he referred generally to his inability to recall all the significant cases he worked on in his time at the Board.

75. This account of *Mackay Radio* draws on the facts recited in the opinion, *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 337 (1938), and Julius G. Getman & Thomas C. Kohler, *The Story of NLRB v. Mackay Radio & Telegraph Co.*, in *LABOR LAW STORIES* 13, 27–33 (Laura Cooper & Catherine Fisk eds., 2005).

76. *Mackay Radio*, 304 U.S. at 339.

NLRB's San Francisco Region, represented by Bertram Edises—who later became a notable Bay Area labor and civil rights lawyer—issued an unfair labor practice complaint charging discrimination against strike leaders.⁷⁷ If the NLRA was constitutional, it should have been a straightforward case—the connection to interstate commerce was indisputable, and the discrimination against strike leaders was well-documented. Indeed, for that reason *Mackay Radio* was one of the five test cases that Fahy had presented to the Board to be the first case to reach the Supreme Court.⁷⁸ But the Ninth Circuit spent months drafting the opinion, thus derailing it as a Supreme Court vehicle.⁷⁹ The Ninth Circuit ultimately issued its opinion in *Mackay Radio* in January 1937. It held the NLRA unconstitutional and it had the temerity to adhere to that view on rehearing in October even after the Supreme Court upheld the Act in April.⁸⁰ Unsurprisingly, the Supreme Court granted review. Charles Fahy argued the case, and the Court reversed the Ninth Circuit in May 1938.⁸¹

In the reply brief, which Fahy wrote, the Board conceded that an employer could offer permanent employment to replacement workers and need not discharge them to make room for returning strikers.⁸² The issue was whether the employer could discriminate against strike leaders or union leaders in offering reinstatement to whatever vacant positions were available, and on that issue the Board won in the Supreme Court.⁸³ But Fahy's lack of experience as a labor lawyer—and perhaps his ignorance of the realities of labor, along with his cautiousness, qualities Surrey also saw in himself—meant that neither of them saw the grievous harm that permanently replacing striking workers could do to labor, and their caution may have led them not to care.⁸⁴

Their view that employers have a right to permanently replace striking workers was not obvious to scholars at the time. Henry M. Hart, Jr. and Edward F. Prichard, Jr. wrote in the 1939 *Harvard Law Review* that, at least when a strike is precipitated by an unfair labor practice, such as the refusal to recognize or bargain with a union, “employers are disabled, in combating the strike, from offering permanent employment to strikebreakers.”⁸⁵

Although both at the time and in retrospect it was unnecessary for the Board to concede that employers do not abridge the statutory right to strike by permanently replacing striking workers, the impact of the concession did not immediately appear. However, it proved to be catastrophic in the recessionary early 1980s when employers made a practice of it and union density had declined

77. *Mackay Radio & Tel. Co.*, 1 N.L.R.B. 201 (1936).

78. IRONS, *supra* note 4, at 267.

79. Getman & Kohler, *supra* note 75, at 39–40.

80. *NLRB v. Mackay Radio & Tel. Co.*, 92 F.2d 761, 761 (9th Cir. 1937).

81. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 333 (1938).

82. Getman & Kohler, *supra* note 75, at 43–44.

83. *Mackay Radio*, 304 U.S. at 347.

84. Surrey Oral History, *supra* note 1, at 47; IRONS, *supra* note 4, at 235.

85. Henry M. Hart, Jr. & Edwin F. Prichard, Jr., *The Fansteel Case: Employee Misconduct and the Remedial Powers of the National Labor Relations Board*, 52 HARV. L. REV. 1275, 1303 (1939).

to the point that unions could not stop it.⁸⁶ The International Paper Company used the tactic to wipe out the union at its facility in Maine and devastated the communities that had been built around good union jobs.⁸⁷ A bitter strike at a Hormel meatpacking plant—the largest employer in the small town of Austin, Minnesota—ended with the permanent replacement of striking workers and, as in Maine, the effects of the lost strike included families not on speaking terms and families moving away.⁸⁸ In response, Minnesota enacted legislation prohibiting permanently replacing striking workers, but the Eighth Circuit held it preempted by the NLRA.⁸⁹ The concession also seemed, at least to some and at least in retrospect, to be flatly inconsistent with the language of the statute, which protects a right to strike and treats employees who are on strike as employees with rights under the NLRA.⁹⁰ In 1935 and 1936, labor was powerful but the NLRB was vulnerable. A nationwide network of influential corporate lawyers affiliated with the Liberty League and the National Association of Manufacturers was advising their clients—the auto, steel, rubber, and electrical industries—to flout the law because they were so sure it would be declared unconstitutional.⁹¹ Thus, it perhaps seemed wise to lawyers not experienced in labor to concede that a statutory right to strike did not encompass a right not to lose your job for striking. Forty years after *Mackay Radio*, the Board's concession seemed like a grievous mistake, although whether the Court would have said otherwise even had the Board not conceded the issue is anyone's guess.

86. The most extended history of the use of permanent replacements to deunionize an industry is JULIUS GETMAN, *THE BETRAYAL OF LOCAL 14* (1998).

87. *Id.*

88. The story of the Hormel strike was told in HARDY GREEN, *ON STRIKE AT HORMEL: THE STRUGGLE FOR A DEMOCRATIC LABOR MOVEMENT* (1990) and in a documentary film by Barbara Kopple, *AMERICAN DREAM* (Channel 4 Films 1990).

89. *Emps. Ass'n Inc. v. United Steelworkers*, 32 F.3d 1297 (8th Cir. 1994). See generally Michael H. LeRoy, *The Mackay Radio Doctrine of Permanent Striker Replacements and the Minnesota Picket Line Peace Act: A Question of Preemption*, 77 MINN. L. REV. 843 (1993) (examining the policies underpinning the Minnesota Picket Line Peace Act and assessing whether such laws are preempted).

90. See Getman & Kohler, *supra* note 75, at 46 (“By the mid 1960’s, the *Mackay* doctrine had become obviously inconsistent with the interpretation of § 8(a)(3) developed by the Board and the courts.”). However, not all observers agree that permanent replacement of strikers is inconsistent with the purpose or language of the NLRA. Samuel Estreicher, *Collective Bargaining or Collective Begging: Reflections on Antistrikebreaker Legislation*, 93 MICH. L. REV. 577, 580–81 (1994) (arguing that a “flat-out ban on permanent replacements even when they are truly necessary to continue operations would represent an unprecedented instance in which the law gives a particular stakeholder a right to continue its dispute with the firm indefinitely while simultaneously preventing the firm from breaking the relationship and turning to a different party for the same resource”).

91. MELVYN DUBOFSKY, *THE STATE AND LABOR IN MODERN AMERICA* 131–32 (1994) (noting that major industries continued to flout the law, on advice of counsel, until the Supreme Court held it constitutional); IRONS, *supra* note 4, at 244.

III CONCLUSION

Reflecting in 1970 on the success of the NLRB in the early years, Surrey was proud of having been part of “establishing the Board as a proper legal vehicle under an act that made good sense to me.”⁹² Toting up the successes, the Board “got declared constitutional, it got accepted, so you’d have to say its primary purpose was done, it succeeded. Most of its decisions were upheld by the courts in the beginning stage, so I would say therefore it did its job responsibly as a Board.”⁹³ Moreover, it educated the public about “what employers were doing at that time. Those were pretty rough, untutored days, with goon squads and labor spies and all that sort of thing, and most people didn’t realize that, and I think the Board did get *that* across.”⁹⁴

Surrey left the NLRB in 1937 to go work on tax issues because he was not interested in work in the field and found writing opinions in Washington to be “repetitious.”⁹⁵ He resigned from the National Lawyers Guild, which was built to be an alternative to the racist, elitist, and reactionary American Bar Association, because he found the influence of leftists and Communists to be too oppressive.⁹⁶ Thus ended his early flirtation with using law to build a more equal division of power in the workplace and in the economy. His few years working in labor law in Washington revealed him as more enamored with the craft of law practice than driven by a mission to protect workers’ rights, more interested in building the administrative state than in building a legal framework in which workers could exercise countervailing power against the power of management.⁹⁷ He was part of the team who created a “lawyer’s administrative state,”⁹⁸ but he was ultimately more of a lawyer’s lawyer than a people’s lawyer.⁹⁹

92. Surrey Oral History, *supra* note 1, at 44.

93. *Id.* at 47.

94. *Id.* at 47–48.

95. SURREY MEMOIR, *supra* note 1, at 19.

96. *Id.*

97. See Surrey Oral History, *supra* note 1, at 41 (insisting he recalled dealing with Board matters “in a lawyer-like way” rather than through the prism of a policy commitment or ideology about labor).

98. DANIEL R. ERNST, TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940, at 76 (2014).

99. Arthur Kinoy, a lifelong civil rights and labor lawyer and activist, titled his memoir RIGHTS ON TRIAL: THE ODYSSEY OF A PEOPLE’S LAWYER (1984) to connote his commitment to the cause; Surrey, in contrast, insisted he had no deep or longstanding commitment to the labor movement.