

CHAPTER FOUR:
COLLECTIVE LABOR LAW UNDER THE THATCHER AND REAGAN
ADMINISTRATIONS

Introduction

This chapter examines changes in collective labor law policies in Great Britain and the United States during the early 1980s. I specifically address those changes in state labor law practice that took place from the time the Thatcher and Reagan administrations each initially assumed power, in 1979 and 1981 respectively, and up to and through the year 1984. I argue that primarily during this period, roughly encompassing the first terms of office for both governments, the collective labor law strategies for each administration found initial expression and were to a large degree fully implemented. Though additional changes in collective labor law policy certainly occurred in both nations after 1984, I contend that these were primarily incremental modifications that served to extend and elaborate the already

established strategic agendas of the early Thatcher and Reagan governments.

I begin the chapter by situating the collective labor law policies of the Thatcher and Reagan administrations within the broader neo-liberal state projects pursued in each country in response to the breakdown of the postwar Keynesian accord. I first review the three major pieces of industrial relations legislation enacted by the Thatcher administration in Great Britain in the early 1980s. Specific attention is paid to those provisions pertaining to strike activity by trade unions. An overview of the Reagan administration's labor law project in the United States then follows, with a primary focus on the National Labor Relations Board (NLRB). Again, particular attention is paid to strike-relevant decisions and policies.

Neo-Liberalism and the State: Bringing Markets Back In

Beginning in the mid-1970s and continuing through the early 1980s, as postwar expansion came to an end and economic crisis increasingly became the norm for many capitalist democracies,

experimentation with newer forms of macro-economic management became a pressing necessity for many Western governments. While such a characterization risks glossing over many national variations, it is nonetheless useful to delineate two divergent paths taken by state governments struggling to restore economic growth and political stability to their respective countries during this period. One tack, followed by states adhering to the assumption that it was through “more government” that economic crisis and social unrest could be stemmed, involved expanding the state's regulatory role and further institutionalizing other Keynesian practices. Overall, it was typically nations marked by strong corporatist traditions, such as Austria and Sweden, or those which saw Left-leaning parties ascend to power, such as Britain in 1974-79, that adopted this “neo-statist” strategy (Jessop et al., 1986: 8-9).

In contrast to the neo-statist path, a second path adopted by some governments was premised on a reduction or curtailment of the institutional practices of the Keynesian era. This tack, which can be labeled a “neo-liberal” strategy (Jessop et al., 1986: 8-9), operated on the assumption that “less government” was the necessary condition for escaping what had become in some nations chronic political and

economic instability. As Moody (1997: 119-120) summarizes it, neo-liberalism can be described as:

a mixture of neoclassical economic fundamentalism, market regulation in place of state guidance, economic redistribution in favor of capital (known as “supply-side” economics), moral authoritarianism with an idealized family at its center, international free-trade principles...and a thorough intolerance of trade unionism.

Importantly, state managers in the United States and Great Britain adopted and pursued this strategic response in the early 1980s (e. g. P. A. Hall, 1992; Krieger, 1986; Pierson, 1994). I now turn to a more detailed characterization of the neoliberal state projects of the Thatcher and Reagan administrations.

Margaret Thatcher and Ronald Reagan were each elected to office on party platforms promising a drastic reduction in government regulation and a greater reliance on market forces for alleviating economic and social ills. As characterized by Whitaker (1987: 1):

...Reaganism and Thatcherism [were] preeminently laissez faire attacks on the state. From 'deregulation' in America to 'privatisation' in Britain, the message...seemed clear: the social democratic/Keynesian welfare state [was] under assault from those who [wished] to substitute markets for politics.

Indeed, the transformations in political and economic management ushered in by the Thatcher and Reagan governments were thought to be

so impressive that many contemporary observers proclaimed that a "revolution" had occurred in both Great Britain and the United States (Smith, 1990: 1). Pierson (1994: 4) describes the situation this way:

Asked what her government had changed, Margaret Thatcher once confidently replied, "Everything." American conservatives were equally bold in proclaiming a "Reagan Revolution." That such hyperbolic claims could even be advanced suggests the strong reformist ambitions of both administrations. Each could take credit for striking departures from the status quo in a number of arenas.

While the characterization of the early Thatcher and Reagan administrations as 'revolutionary' may now, in retrospect, seem somewhat overstated, what nonetheless remains evident is that they were at a minimum "the first truly post-Keynesian governments in their construction of political meanings" (Krieger, 1986: 27).

If the Thatcher and Reagan governments are to be characterized as "attacking" the institutions of the Keynesian welfare state in their respective countries, they clearly did so in a highly selective and uneven manner. Specifically, what Pierson (1994: 4-5) has called the "programmatic retrenchment" efforts of the two conservative administrations "varied significantly, both within and across policy arenas." In Great Britain, for example, the Thatcher government mandated relatively minimal reductions in widely popular welfare

programs such as national health care and pensions for the elderly. Public housing, unemployment compensation and other means-tested programs saw much deeper cuts however (Krieger, 1986: 96-101). The Reagan administration's attack on the welfare state followed a similar pattern. As summarized by Piven and Cloward (1985: 15-19):

Non-means-tested programs such as Social Security and Medicare and a variety of veterans' benefits [were] dealt with delicately and cautiously. The brunt of the cuts [fell] on public service employment, unemployment insurance, Medicaid, public welfare, low-income housing subsidies, and the disability and food stamp programs.

Clearly, then, during the early 1980s, state managers in Great Britain and the United States were not engaged in wholesale assaults on their respective Keynesian institutional heritages, but rather conducted more measured and tactical strikes.

In addition, despite the ideological rhetoric about minimizing the role of government, the broad neo-liberal state projects of both the Thatcher and Reagan administrations paradoxically resulted in an overall strengthening of their respective state apparatuses. Whitaker (1987), for example, argues that in practice the British and American governments moved closer to Thomas Hobbes' ideal of the state and away from that of Adam Smith. According to Whitaker (1987: 6; emphasis in original):

There are three major areas of conservative concern which point directly away from laissez faire toward a Leviathan state. These are the military powers and resources of the National Security State (NSS); the internal policing and surveillance powers of the NSS; and the demands for censorship of expression and control of private behaviour inherent in 'moral majority' conservatism. Already in Reagan's America many of these elements of Leviathan are already in place...Thatcher's Leviathan exhibits some variations on the same theme.⁶⁹

Krieger (1986) has made similar observations, arguing that an increase in state power was necessary for the Reagan and Thatcher administrations to successfully accomplish a selective withdrawal from Keynesian rituals of political exchange and class compromise. Specifically, though each used different institutional mechanisms, both administrations ultimately increased and expanded the power of the executive branch vis-à-vis other state sectors and civil society as a whole (Krieger, 1986: 31-35).

This selective restructuring of the Keynesian welfare state in both Great Britain and the United States during the early 1980s is best understood in the context of the Thatcher and Reagan administration's respective attempts to orchestrate two critical facets of their broader neo-liberal state strategies. Drawing on Jessop's conceptualization (1990:

⁶⁹ Though Whitaker labels the Thatcher and Reagan administrations as "neo-conservative", his characterization of the term is virtually indistinguishable from the definition of "neo-liberalism" used by Jessop et al. (1986) and which I employ here.

196-217; also see Jessop et al., 1988: 158-163), all state projects, at least in their broadest sense, can be broken down into the two strategic components of “accumulation strategy” and “hegemonic project”. The former “refers to a specific pattern, or model, of economic growth together with both its associated social framework of institutions (or ‘mode of regulation’) and the range of government policies conducive to its stable reproduction” (Jessop et al., 1988: 158). At the most general level, for example, a distinction between "Fordist" and "post-Fordist" accumulation strategies can be made; at a more specific level, the differences may be whether supply- or demand-side economic management is favored. As addressed above, the accumulation strategies of the Thatcher and Reagan governments were largely centered around ‘bringing markets back in’ to the political economies of Great Britain and the United States, with economic growth to be accomplished through such means as de-regulation, privatization, tax cuts and other supply-side measures.

Hegemonic projects, on the other hand, are concerned less with economic policy and more with resolving “conflicts between particular interests and the general interest” (Jessop, 1990: 208). More specifically, a hegemonic project can be characterized as:

a national-popular programme of political, intellectual and moral leadership which advances the long-term interests of the leading sectors in the accumulation strategy while granting concessions to the masses of the social base (Jessop et al., 1988: 162; emphasis in original).⁷⁰

As I will discuss further below, hegemonic projects vary in terms of their inclusiveness and may range from the more encompassing, as with Keynesian social welfare projects, to the more exclusive, as with the more divisive strategies of fascist governments. Though accumulation strategies and hegemonic projects frequently overlap and mutually shape one another, the latter has pivotal importance for the overall success of the broader state project. Indeed, hegemonic projects are the linchpin of any state project, for they “have a crucial role in maintaining the substantive unity of the state apparatus as a complex institutional ensemble” (Jessop, 1990: 210). In effect, the hegemonic project of a dominant bloc of state actors allows “the state” to be an active agent or actor.⁷¹

⁷⁰ Jessop’s indebtedness to a Gramscian conception of politics and the emphasis on the ideological role of the state is clearly in evidence here. For more on Jessop’s interpretation of Gramsci, see Jessop (1982: 142-210).

⁷¹ Recall the discussion in Chapter Two on the problematic nature of state agency.

Hegemonic projects typically tend toward one of two ideal types.⁷² First, there is the “one nation” hegemonic project, which aims at establishing broad popular support through inclusive political discourse and a more equitable distribution of material rewards and sacrifices. Jessop (1990: 211) offers the consensus-building and political exchange practices characteristic of many postwar Keynesian state projects as the classic example of this type of hegemonic strategy. Secondly, the “two nations” hegemonic project aims “at a more limited hegemony concerned to mobilize the support of strategically significant sectors of the population and to pass the costs of the project to other sectors” (Jessop, 1990: 211). In effect, this political strategy “consciously plays on the divisions in society to mobilize a majority of the satisfied at the expense of the dissatisfied” (Jessop et al., 1988: 163).⁷³

The Thatcher and Reagan administrations were to rely heavily on ‘two nations’ hegemonic strategies as a way to mobilize popular support for their respective agendas in the early 1980s. And they each did so

⁷² While conceptually viewing these two types of hegemonic projects as polar ends of a continuum is useful, empirically a particular state strategy may incorporate elements of both.

⁷³ Pierson (1994: 19-24) makes a similar distinction between what he calls “strategies of division” and “strategies of compensation”. He also adds a third type, “strategies of obfuscation”, “which involves efforts to manipulate information concerning policy changes” (Pierson, 1994: 19).

quite successfully. Not only did a divisive and exclusive political discourse help each administration get elected (and re-elected) to office,⁷⁴ but it simultaneously helped pave the way for the implementation of their neoliberal accumulation strategies. Specifically, in both the British and American cases, primarily the working class and other disenfranchised groups were frequently stigmatized as that “other nation” which stood in the way of economic revitalization. These “special interest” groups, portrayed as both the causes and the prime beneficiaries of excessive government spending and intervention, would have to sacrifice if economic markets were to be freed from the shackles of the Keynesian welfare state.

Importantly for purposes here, labor unions in particular became the central targets of the hegemonic efforts of state managers in Great Britain and the United States. As argued by Krieger (1987: 179; emphasis in original), the political and ideological assault on organized labor entailed two components:

first, the ‘de-sanctioning’ of working class demands and...the de-legitimation of trade unions as the central agency for their collective expression; and second, the manipulation of fiscal policy and economic rationale to make working class

⁷⁴ See Krieger (1986: 79-153; 1987: 194-196) for a discussion of how Thatcher and Reagan employed what he calls “arithmetic politics”, whereby electoral success “relies on the sum of diverse particularistic appeals” to significant sectors of the electorate on an array of divisive issues (Krieger, 1986: 86).

and underclass demands appear incompatible with rational economic goals and the 'national interest'.

In effect, the first component represented a direct attack on the institutions and practices of organized labor, while the second was more indirect in nature. Krieger (1987: 179-180) goes on to note that "Thatcher's industrial relations policy most clearly demonstrates the first approach", while the Reagan administration leaned more toward the second. Nevertheless, he also acknowledges that the latter's "politicalization of the National Labor Relations Board" and its treatment of striking government workers in the early 1980s can be characterized as fairly direct attempts to undermine the legitimacy of labor unions (Krieger, 1987: 179-180).

At this point, a more detailed discussion of the Thatcher and Reagan administrations' neoliberalist assaults on organized labor is in order. For reasons discussed in Chapter Three, I specifically address state-enacted changes in collective labor law policies and practices that pertain to strike activity by unions. I assess the effects of these changes on the effectiveness of union strike activity in each country using case studies from Great Britain (Chapter Five) and the United States (Chapter Six).

One Step at a Time: Labor Legislation under Thatcher

The Conservative Party's strategy for curtailing trade union power by introducing new industrial relations legislation had its origins in the tumultuous decade preceding Margaret Thatcher's election to office. The strategy was primarily formulated while Thatcher and fellow Conservatives were out of power and in opposition to the Labour Party's Callaghan administration between 1974 and 1979.⁷⁵ The Conservatives were not by definition viscerally opposed to the organized labor movement, having "always been divided in [their] attitude to trade unions, between co-operation and confrontation and between incomes policy and free bargaining" (Johnson, 1993: 217). By the late 1970s, however, many in the Conservative Party had begun to adopt a very strong anti-union position.

One factor that contributed to this hostility was the monetarist accumulation strategy pursued by Thatcher and the Conservatives, that

⁷⁵ For a dissenting view, one that argues that Thatcher's legislative agenda had much more recent origins and was geared toward reactively "legislating for the last [industrial] dispute", see Auerbach (1993). The issue of whether the Thatcher administration's collective labor law project was coherently planned in advance or constructed in an ad hoc manner will be addressed in Chapter Eight.

was premised in part on the belief that removing existing impediments to the operation of market forces was the swiftest means to economic recovery. While many market impediments existed, Thatcher and several of the more right-wing members of the party took the stance that obstacles in the labor market, specifically in the guise of unions, were the biggest problem.⁷⁶ This economic concern dovetailed with other factors to solidify the Conservative's anti-union platform. One was the lesson learned from the Conservative Heath government's experience with the 1971 Industrial Relations Act. The sweeping legislation met with widespread union resistance, and ultimately caused the downfall of the Heath government.

Union behavior in the late 1970s also had an impact in solidifying the Conservative's anti-union position. In 1978 and early 1979, an enormous number of strikes over the Labour Party's income policy, designed to reduce inflation, virtually crippled Britain's economy. Union demands for higher wages and the ensuing industrial conflict served to reinforce in the public mind the Conservatives' diagnosis of the country's economic ills. In the wake of this "Winter of Discontent",

⁷⁶ The writings of "one of Mrs Thatcher's favourite economists", F. A. Hayek, were undoubtedly strongly influential in this regard (Johnson, 1993: 220). A long-time proponent of free market policies, Hayek (1960, 1972, 1980) had argued that unions were one of the primary culprits in Britain's long-term economic decline.

Thatcher was easily elected Prime Minister in May of 1979 (Gourevitch et al., 1984: 62-64; P. A. Hall, 1992: 103-104).

Once in office members of the first Thatcher administration immediately began drafting legislation designed to achieve a wide range of goals the Conservative Party had set regarding unions. In general, five primary objectives were pursued (Shackleton, 1998: 587-588). One entailed putting limits on industrial action, specifically on how strikes could be conducted. A related objective involved making unions legally and financially liable for their members' activities, particularly those occurring during industrial action. Three other objectives pertained to removing official government support for collective bargaining; restricting practices associated with the closed union shop; and "democratizing" labor organizations by requiring ballots on a variety of union-related issues.⁷⁷

While some consensus emerged among members of the Thatcher administration as to the objectives of the new labor legislation, much dissensus existed on how it was to be introduced. Many in the Conservative Party wanted sweeping changes as quickly as possible

⁷⁷ As I discussed in Chapter Three, only those parts of the legislation that pertain directly or indirectly to union strike practices will be described here. For the most part, these provisions are encompassed by the first, second, and fifth objectives.

(Auerbach, 1993: 40-41). They saw Thatcher's decisive electoral victory as a mandate to confront the unions and did not want to lose the momentum of public support. James Prior, the administration's first Employment Secretary, however, wanted "modest and moderate reform", arguing that a gradual approach would be best (Holmes, 1985:132-134). Ultimately, Prior's "step-by-step" strategy was adopted (Undy et al., 1996: 75), with the first piece of labor legislation being introduced in 1980.

The Employment Act of 1980

The Thatcher administration's Employment Act of 1980 was indeed a 'modest and moderate reform', yet it managed to address each of the government's key objectives to one degree or another. Several of the Act's measures pertain directly to the conduct of strike activity. Section 16 is subtitled "Picketing" and amends Section 13 of the Trade Union and Labour Relations Act (TULRA) of 1974. The 1974 Act granted

legal immunity⁷⁸ to any picketing that was done "in contemplation or furtherance of a trade dispute" (Mackie, 1981: 10). This immunity covered both secondary picketing against employers who conduct business with the employer being struck and sympathetic picketing by unions not directly involved in the dispute. The 1980 Act restricts the definition of lawful picketing to primary picketing only, meaning "picketing at or near premises where workers are in dispute with their employer" (Bercusson, 1980: 220). Specifically, picketing would now be considered legal in only three different instances: 1) workers picketing at or near their own place of employment; 2) union officials picketing at or near places of work where they represent members; and 3) workers picketing at any of their employers' premises if they work at different locations. Any other type of picketing would be considered illegal secondary action and open up the participants to injunctions and damage claims (Mackie, 1981: 9-10).

While Section 16 of the 1980 Employment Act indirectly puts restrictions on secondary industrial action by narrowing the definition of legal picketing, Section 17 ("Secondary Action") directly puts limits on

⁷⁸ Compared to other capitalist democracies, Great Britain was unique in that labor organizations had not been granted positive legal rights for most of the twentieth century. Rather, unions were granted "immunity" from prosecution for activities that would be illegal if engaged in by individuals, such as restraint of trade or breach of contract (Wedderburn, 1985: 26-28).

such behavior. Section 17 does not completely outlaw secondary action, but restricts its legality "basically to action taken within a cordon of first suppliers and customers of an employer in dispute" (Mackie, 1981:10). As Mackie (1981: 10; emphasis in original) elaborates, secondary action will be considered legal under the following conditions:

Picketing by employees of the employer in dispute...will retain immunity even where it has secondary effect, e.g. turning away the drivers of other employers. Any other secondary action must be taken for the purpose of directly preventing or disrupting supplies between the employer in dispute and other parties with whom the employer has a business relationship (i. e. a current contract)....

The "directness" test of Section 17 is perhaps the most complex and ambiguous portion of the entire Act, and in many respects may be viewed as a de facto limitation of nearly all types of secondary action.⁷⁹ For example, interfering with the employment contracts of workers at a supplier, by getting them to "black" (i. e. refuse to handle) goods destined for the employer in dispute or getting them to walk out in sympathy, is considered an indirect, and hence illegal, means to disrupt supplies. The only recourse, then, is for primary pickets to prevent the delivery of supplies themselves, which is lawful only if those making the

⁷⁹ For detailed discussions of Section 17 of the 1980 Employment Act and contrary opinions on its implications for secondary industrial action, see Bercusson (1980) and Wedderburn (1981).

delivery are directly employed by the supplier. If the supplier uses "an agent, middleman or carrier, interference with their contracts...would be unlawful secondary action" (Bercusson, 1980: 217; emphasis in original).⁸⁰

While Sections 16 and 17 explicitly address strike-related activity, other provisions of the 1980 Employment Act had indirect relevance for the conduct of industrial action as well. Sections 1 ("Payments in Respect of Secret Ballots") and 2 ("Secret Ballots on Employer's Premises") represented the Thatcher administration's first moves toward achieving its objective of "democratizing" trade unions. Section 1 allowed the administration to reimburse unions for costs incurred in the conducting of certain membership ballots. Unions were not required to hold ballots, but those who volunteered to do so had to meet two requirements to be eligible for the financial assistance: 1) the ballots must be secret; and 2) they must be on issues falling within a selected range considered legitimate by the Thatcher government. One issue that was considered legitimate was ballots "testing members' views on the calling or ending of

⁸⁰ Still other stipulations of Section 17 pertaining to secondary action are not addressed here. It is sufficient to note that the "mysteries of section 17" (Wedderburn, 1981: 118) require workers to have a highly detailed knowledge of the commercial contracts of their own employers, including those that they do business with, which is most unlikely.

industrial action" (Mackie, 1981: 6).⁸¹ Section 2 required employers to allow the use of their premises for such ballots if a recognized union requested permission to do so (Mackie, 1981: 6-7).

Section 3 ("Codes of Practice") of the 1980 Employment Act gives the Secretary of State "the power to issue codes containing 'practical guidance' for the 'improvement of industrial relations'" (Mackie, 1980: 9). Such codes are in essence recommendations and are not in themselves legally binding.⁸² Nevertheless, the Codes "are to be taken into account in any court proceedings to which they are relevant" (Kahn et al., 1983: 48), and in this regard they are used as aids for interpreting the law. They thus have the potential for significant legal repercussions. Important for my purposes here is the fact that a Code of Practice on Picketing was issued in late 1980. Its intent was to bring some order to picket line behavior, particularly with respect to mass picketing and the resulting intimidation of would-be strike breakers. To this end, its key recommendation stated that "pickets and their organisers should ensure

⁸¹ The Trade Union Act of 1984 would later mandate such industrial action ballots. See below.

⁸² Codes of Practice were previously the responsibility of the Advisory, Conciliation and Arbitration Service (ACAS). One reason for shifting this power to the executive branch might be the Government's belief that improving industrial relations "may require clearer political guidance than could be provided by a tripartite body such as ACAS" (Mackie, 1980: 9).

that in general the number of pickets does not exceed six at any entrance to a workplace, though frequently a smaller number will be appropriate" (quoted in Kahn et al., 1983: 48).

The Employment Act of 1982

Despite the appointment of Norman Tebbit as Employment Secretary in late 1981, a less moderate and more anti-union Conservative than Prior, the Thatcher Administration's labor legislation agenda maintained its step-by-step character (Johnson, 1993: 224-225). The Employment Act of 1982 focused on furthering two of the three primary objectives the Thatcher administration had set for its labor law project: curtailing customs relating to the closed shop practices and putting restrictions on the industrial action practices of trade unions. Again, of principal concern here are the legislative changes introduced with regard to the latter area of industrial relations. Though these changes were by no means revolutionary, the fact that they were building on restrictions already put in place by the Employment Act of 1980 gave them a significant cumulative effect. Thus, one labor law observer was moved to

state at the time that "[b]y any standard the industrial conflict provisions of the Employment Act 1982 are potentially devastating" for union strike activity (Ewing, 1982: 209).⁸³

Six provisions of the 1982 Act had direct implications for union strike activity, with each affecting the conduct of industrial action from a different angle and having greater or lesser consequence. Section 9 concerns the dismissal and re-engagement of striking employees by an employer. Under the 1978 Employment Protection (Consolidation) Act (EPCA), those dismissed during a strike or other form of industrial action could not file unfair dismissal claims with an Industrial Tribunal⁸⁴ if the employer had uniformly dismissed all workers involved in the action. In addition, unfair dismissal claims could be filed if the employer later selectively re-engaged some, but not all, of those dismissed during the strike any time after the dismissals occurred (Mackie, 1983a: 91).

Section 9 of the 1982 Act amended both of these provisions in ways

⁸³ Ewing (1982: 209) adds that the 1982 Act's potential for undermining union strikes "will depend to a large extent on the way in which the courts respond". The interpretation of the new labor legislation by the courts will come to light in the case studies in Chapter Five.

⁸⁴ Industrial Tribunals are tripartite organizations that "deal mainly with matters related to the individual employment relationship and the statutory rights of individual employees" (Rogers, 1985: 85). They are not legal institutions per se, but their decisions are enforceable by recourse to the courts.

beneficial to the employer. First, the new law "permits an employer to dismiss only those who are on strike at the date of their dismissal: he [or she] need not dismiss employees who have returned to work during the strike" (Ewing, 1982: 211). Second, the employer could selectively rehire any of those dismissed without fear of unfair dismissal claims from those not re-engaged if three months had elapsed since the dismissal notices were first issued (Ewing, 1982: 210; Mackie, 1983a: 91). Overall, then, Section 9 of the 1982 Act is a clear example of how individual labor law and collective labor law often blur together. In particular, it demonstrates how legislation aimed at collective action by trade unions can affect the legal options available to individual workers.

The 1982 Act also put limits on what was to be considered legitimate strike activity and hence immune from legal sanction. In Section 14, immunities were lost in any "industrial action intended to put pressure on employers to maintain union- and recognition-only practices" (Lewis and Simpson, 1982: 230). Thus, strikes conducted for the purpose of creating or maintaining a pre-entry closed shop were declared illegal under the 1982 Act.⁸⁵ Strikes conducted to force an

⁸⁵ A pre-entry closed shop requires all employees to be union members before being hired. This is usually insured through the establishment of a "union membership agreement" between an employer and a union (Rogers, 1985: 31-32).

employer to recognize a trade union or to get an employer to stop doing business with a non-union company were outlawed as well by Section 14.

The restrictions introduced in Section 14 of the 1982 Act paled in comparison to those of Section 18, which entailed an "enveloping attack on trade union action" (Dunn, 1985: 102). Section 18 amended Section 29 of the 1974 TULRA and did no less than provide a wholesale redefinition of what constituted a "trade dispute". The end result was a draconian narrowing of the types of strikes and other industrial actions that could "claim protection under the traditional golden formula 'in contemplation or furtherance of a trade dispute'" (Mackie, 1983a: 90). More specifically, as noted earlier Section 13 of the TULRA had granted trade unions immunity for a range of otherwise illegal activities (e. g. breach of contract, restraint of trade), and as long as such actions were taken in the context of a trade dispute, they were free from legal sanction. Under Section 18 of the Employment Act of 1982 however:

[I]mmunities would only seem to apply where a dispute is between workers and their employer and is related wholly or mainly to the workers' own conditions of employment (Dunn, 1985: 102).

Disputes that were now excluded from the "golden formula" included: those between workers and workers, those between unions and employer associations, and those between unions and the government. The

reasons for such conflicts might clearly be connected to the conditions of employment for a particular group of workers, albeit in a spatially (e. g. capital flight) or temporally (e. g. privatization) remote manner. Nevertheless, industrial action for such purposes would now be viewed as outside the definition of a trade dispute and thus open to legal intervention.

The 'potentially devastating' effects of the 1982 Employment Act on union industrial action become evident when the provisions of Section 15 are taken into consideration. Section 15 removes the trade unions' immunity from tort actions and makes them liable for damages. Previously, as collective entities, union organizations could not be sued; only individual trade unionists (usually officials) were open to tort actions from the parties affected by union activities such as strikes.⁸⁶ Section 15 potentially reshapes the nature of industrial conflict. As Mackie (1983a: 90) elaborates:

Actions against individual trade union officials in the past generally ended at the stage of a temporary injunction...this being usually sufficient to stop any industrial action the official might be organising. Actions against trade unions are perhaps more likely to carry on to the stage of a full court action and claim for damages.

⁸⁶ It should be noted that unions had lost their immunity from tort twice before in British industrial history. These periods were relatively brief, occurring between 1901 and 1906 after the Taff Vale case and again between 1971 and 1974 after the 1971 Industrial Relations Act (Ewing, 1982: 218-219).

Overall, when coupled with Sections 16 and 17 of the 1980 Act, which put limits on picketing and secondary action, respectively, and Sections 14 and 18 of the 1982 Act, which narrow the field of legitimate trade disputes, the removal of immunity from tort places unions in a legal minefield when it comes to engaging in industrial action.

The 1982 Act did not, however, unequivocally open up trade unions to any and all legal actions stemming from their activities during industrial conflict. Unions could be held liable only if the activity in question had been authorized or endorsed by a responsible person of the organization. "Responsible person" meant any one of the following five classes of people: 1) the union's primary executive committee; 2) anyone empowered by written rules to authorize or endorse the activity; 3) the union's president or general secretary; 4) employed union officials; and 5) "any union committee to whom an employed official regularly reports" (Mackie, 1983a: 91). Interestingly, however, "[t]he range of responsible persons in the Act is strangely limited for a union will not be liable in tort where the action complained of is authorised by a conference of the union or by a ballot of its members" (Ewing, 1982: 219).

The 1982 Act also protects unions to the extent that Section 16 sets "limitations on the amount of damages which are recoverable from a trade union 'in any proceedings in tort'" (Ewing, 1982: 224). These limitations do not apply to lawsuits stemming from actions that fall out of the purview of the new labor legislation, such as torts over negligence, nuisance and property damage. Rather, they specifically pertain to torts relating to industrial actions no longer considered immune. Maximum damage limits are set according to a sliding scale based on union size, with larger unions open to larger claims. Section 17 of the 1982 Act adds another restriction in this regard: union political and benefit funds, as well as the private property of union officials and members, are considered "protected" and thus cannot be confiscated to pay off damage claims (Ewing, 1982: 224; Mackie, 1983a: 91).

The Trade Union Act of 1984

Whereas the 1982 Employment Act focused on the issues of industrial action and the closed shop, the Trade Union Act of 1984 sought another objective of the Thatcher administration's labor law project: making trade unions more "democratic" organizations.⁸⁷ Once again, the new legislation was introduced by a different Employment Secretary.⁸⁸ Though shifting the content of the legislation considerably, Thomas King, who had succeeded Tebbit in late 1983, nevertheless maintained the gradualist pace (Johnson, 1993: 225). Overall, the 1984 Act sought to democratize three different facets of union activity by requiring periodic and secret ballots with regard to the election of union leaders; the use of union political funds; and, most important for my purposes, the calling of union industrial action (Mackie, 1984).

Part II of the 1984 Trade Union Act was entitled "Secret Ballots before Industrial Action" and contained two primary sections with direct

⁸⁷ The irony of the Conservative's program to promote "union democracy" is not lost on many observers (e. g. Mackie, 1984: 88-89). Specifically, the Thatcher administration, elected on the promise to minimize state regulation, mandates what the internal procedures of essentially private and voluntary associations are to be.

⁸⁸ By the time Thatcher resigned from office in November of 1990, six different Employment Secretaries had come and gone (see Johnson, 1993: 222).

relevance for the conduct of union strike activity. Section 10 of the 1984 Act further limited the types of strikes and other industrial actions considered legitimate and thus protected by Section 13 of the 1974 TULRA. Whereas Section 18 of the 1982 Act deemed only those industrial actions between workers and their own employers to be covered by the "golden formula", Section 10 of the 1984 Act required that these same actions be preceded by a secret ballot. Specifically, any "official" strikes or industrial actions, meaning activities "authorised or endorsed" by a responsible union leader (as defined in Section 15 of the 1982 Act) must first be voted on and approved by a majority of the membership (Hutton, 1984: 219). If a ballot of the membership was not held, the industrial action would not have immunity and the union would be "open to claims for injunctions or damages by employers, suppliers or workers who suffer or might suffer loss" as a consequence of the strike, overtime ban, or so on (Mackie, 1984: 96).

Section 11 of the 1984 Act placed specific requirements on who was to be balloted and how the ballot was to be conducted. These requirements were quite stringent and served to place the unions at both procedural and tactical disadvantage compared to employers. In terms of those eligible to be balloted, for example, Section 11 entitled "all those

members of the trade union who it is reasonable at the time of the ballot for the union to believe will be called upon in the strike or other industrial action in question..." (quoted in Hutton, 1984: 221). If all of those voting are not directly involved in the action (e. g. some are not called out from their particular place of work), the ballot becomes invalid and immunity is lost. If all those involved in the action were not balloted (e. g. some are honoring the picket lines of fellow union members), the action loses its immunity (Mackie, 1984: 86). While subsequent groups of workers can be balloted if the strike or other industrial action expands, such a requirement takes time and slows the momentum of collective solidarity. Thus, this provision puts pressure on a union to conduct as wide a ballot as possible with the necessary intent of conducting correspondingly wide industrial action.

Unfortunately, such a tactic serves to broadcast the union's "battle-plan for the dispute" as well as increases the probability of more negative votes being cast since those further removed from the center of the conflict will be less inclined to support the action (Hutton, 1984: 222).

The requirements on how the ballots are to be conducted are "tightly drawn" as well by Section 11 (Martin, 1985: 69). For example, the ballot is to be secret and thus the oft-used "show of hands"

technique is replaced by the ballot paper. To further insure anonymity, the balloting must either be conducted by mail or at the employee's workplace; ballots at union branch offices are prohibited. The question on the ballot paper itself must meet two qualifications. First, the question must be phrased in such a way as to allow those voting a "yes" or "no" response. Second, questions must ask union members if they are willing to engage in some particular form of industrial action and include the added phrase that by doing so they will be breaching their contracts of employment.⁸⁹ In addition, any industrial action approved by the union membership must start within four weeks after the ballot was held if immunity is to be retained. Otherwise, the initial ballot loses its validity and another has to be held (Hutton, 1984: 223-226; Mackie, 1984: 86-87; Martin, 1985: 69).

⁸⁹ As Mackie (1984: 86) elaborates, this results in "[a] rather weighted question which, apart from denying lawfulness to any form of industrial action--a ban on voluntary overtime?--informs the worker that, whether or not he helps to give the union immunity, his own action vis-a-vis his employer is unlawful and liable to lead to his dismissal."

Summary

With the passage of the 1984 Trade Union Act, I contend that the principal framework of the Thatcher administration's labor law project had been established. The legislation that followed for the most part elaborated upon or extended the provisions of the three earlier acts (e. g. Mackie, 1988). The 1988 Employment Act was broad in scope, addressing a variety of the government's objectives regarding closed shops, union democracy, and industrial action. In addition, some of the Act's provisions were simply responses "to experiences of union resistance to earlier legal controls" (Mackie, 1988: 265). Sections 1 and 17, for example, tightened the regulations pertaining to balloting procedures for industrial action in light of experiences with previous strike ballots. Section 3 of the 1988 Act did break some new ground, however, by offering protection to individual union members from disciplinary actions by their own unions for a range of behaviors, including strike-breaking (see Mackie, 1988: 266-267).

The 1990 Employment Act represented much of the same, being "a logical extension of the industrial relations laws post 1979" (Carty, 1991:

12). For instance, incremental changes were made regarding secondary action, which union leaders could authorize industrial action, and the procedures relating to union ballots for industrial action. Of course, when these incremental changes were added to those made in earlier legislation, a qualitative shift had indeed occurred. As Carty (1991: 12-13) notes, it became evident after the 1990 Act "that the very basis of trade union power--the ability to take effective industrial action--[was] rejected by the Government."⁹⁰

Thus, the first three pieces of labor legislation introduced by the first and second Thatcher administrations represented a large part of state managers' strategic project for legally curtailing the power of organized labor. With regard to one particular facet of union power, the ability to engage in collective industrial action, several new controls had been put in to place by 1984. The 1980 Employment Act put direct and indirect limits on secondary picketing, as well as recommended standards for picketing practices. The 1982 Employment Act constrained union industrial action along several different dimensions: employers had been granted greater leeway for the selective firing and rehiring of strikers; the definition of a trade dispute had been narrowed

⁹⁰ I will further address the cumulative nature of this 'step-by-step' strategy in Chapter Seven.

to encompass only conflicts between employees and their own employer; and unions had lost their organizational immunity from legal liability. The 1984 Trade Union Act added to the above provisions the requirement that a ballot of the membership be held by a union before any industrial action could be undertaken.

Having depicted the broad contours of the new legal context erected by the Thatcher administration for British industrial relations in the 1980s, the concrete effects of the legislation on union strike activity can now be examined. To this end, in Chapter Five I analyze three cases of union industrial action that occurred in Great Britain during the latter part of the 1980s. Before I do this, however, I first describe the collective labor law project of the Reagan administration in the United States.

Shifting Interpretations: The NLRB under the Reagan Administration

As I previously noted, at a broad level the state projects of the Thatcher and Reagan administrations converged strikingly in terms of neo-liberal rhetoric and political and economic objectives. Furthermore,

I also argued the executive branch of each government had singled out organized labor as the primary culprit for national economic woes. Consequently, curtailing union power was to become a central political goal in both Great Britain and the United States. Finally, I also contended that the two governments had settled on state-enacted changes in collective labor law as a means to achieve this end.

Despite these similarities, the concrete form that each state labor law project was to take diverged sharply across the two countries. As I recounted above, the strategy of the Thatcher administration, albeit incremental in its realization, ultimately took the shape of a fairly direct legislative assault on trade union power. The labor law strategy of the Reagan administration, in contrast, was less direct in its attempt at legally curtailing the power of organized labor. It specifically took an administrative form, and relied in particular on the interpretive restructuring of the existing legal framework for U. S. industrial relations to achieve its objectives. Before proceeding to a more detailed account of this effort, however, I need to first provide a brief sketch of how the nascent Reagan government dealt with the PATCO labor conflict in 1981. I contend that this early episode both marks the inauguration and

embodies the primary aims of the government's collective labor law project.⁹¹

The PATCO Strike

The 1981 strike by the Professional Air Traffic Controllers Organization (PATCO) was a pivotal event for several reasons. Indeed, not only was it the first major industrial conflict under the watch of the newly elected Reagan administration, it also directly involved employees of the federal government. In contrast to the Thatcher administration, which did not take on British labor until the early part of its second term,⁹² Reagan locked horns with American unions after less than eight months in power. Importantly, the resolution of the PATCO strike arguably set the tone for U. S. industrial relations for the rest of the decade.

⁹¹ I should note that there are some who disagree with this assertion about the significance of the PATCO dispute for other aspects of the Reagan labor law project (e. g. Northrup, 1997).

⁹² This occurred during the 1984-85 Miners' dispute, discussed in Chapter Five. For a comparison of the PATCO strike and the British miners' dispute, see Ghilarducci (1986).

Negotiations over a new contract between PATCO and the Federal Aviation Administration (FAA) began in February 1981, approximately one month before the existing three-year agreement was to expire. A variety of issues were on the bargaining table, yet agreement was reached on only a select few. While historically not a particularly militant union (e. g. Ghilarducci, 1986: 120), the current PATCO leaders had indicated that a walk-out was likely to occur if a contract with the FAA was not soon established. Such an action would be ultimately in violation of federal sector labor law, since federal employees are prohibited from striking.⁹³

Officials in the Reagan administration, as well as Republican Party members in the Senate and the House of Representatives, stressed to the union that an illegal strike would have severe repercussions. Specifically, striking controllers would lose their jobs and the union would be decertified (Shostack and Skocik, 1986: 252-253). To a large extent, however, PATCO members viewed such warnings as political bluster and partisan rhetoric. After all, PATCO controllers reasoned, the scarcity of their skills, the disruption to national air traffic, and the union's highly

⁹³ See Northrup and Thornton (1988: 12-19) for a brief overview of labor law covering the federal sector.

visible support of Reagan in the 1980 presidential campaign all combined to make any mass firings highly unlikely.

After the expiration of the existing agreement in March 1981, PATCO members remained on the job for several months, working without a new contract and threatening a walkout at any minute, as negotiations between union leaders and the FAA continued. This delaying strategy proved to be a serious error, for it allowed the Reagan administration ample opportunity to prepare for a strike. For example, the federal government had time to develop a plan that involved utilizing retired and military air traffic controllers to keep major airports open in the event of a strike. In addition, government lawyers were able to explore the various legal options available to use against the union (Northrup and Thornton, 1988: 97-99). By the time more than 12,000 union air traffic controllers did walk out, at 7am on August 3, 1981, the Reagan administration was more than ready.

The government's response to the long-anticipated strike was as severe as it was rapid. At 11am on that same day, "[f]our hours after the strike began, President Reagan personally announced that any striker who was not back on the job within 48 hours would be discharged and could not be re-employed by any federal agency" (Northrup and

Thornton, 1988: 99). Approximately 900 PATCO members heeded the threat and returned to work. The other 11,300 strikers or so who remained on strike were fired by Reagan on August 5, 1981. By year's end, after initiating a barrage of legal and administrative actions, the federal government had succeeded in sequestering the PATCO strike fund to pay for court-imposed fines and eventually had the union decertified (Northrup and Thornton, 1988: 99; Shostack and Skocik, 1986: 253-256).

In retrospect, the Reagan administration's handling of the PATCO dispute served as a signpost for the beginning of a new industrial relations climate in the United States during the 1980s. A message had been sent to capital and labor alike regarding the nascent administration's attitude towards organized labor and its activities. Further, the firings and legal attacks on the union gave impetus and legitimacy to the growing wave of strident anti-unionism among American employers. Most importantly for my purposes here, however, was the fact that the PATCO episode served as a stark preview of the state labor law project that the Reagan administration would soon unveil.

The National Labor Relations Board

Before looking more closely at the operation of the National Labor Relations Board (NLRB) under the Reagan administration, a brief overview of this regulatory organization is in order. Established by the National Labor Relations (Wagner) Act in 1935, the NLRB is charged with the interpretation and enforcement of federal labor law in the United States. The five member "Board" typically has jurisdiction over two types of labor cases. On the one hand are cases involving unfair labor practices by employers, unions, or both. Such cases encompass violations pertaining to the establishment and administration of collective bargaining contracts. On the other hand are cases pertaining to the conduct of union certification and decertification elections (Falcone, 1962: 234; Gold, 1989: 16-22).

Though responsible for the administration and enforcement of federal labor law, the NLRB is not a legal body in the strict sense of the term. Board members⁹⁴ are not acting judges, they do not impound juries, and parties to a dispute can appeal NLRB decisions in federal

⁹⁴ NLRB appointees have generally come from the ranks of government, business, academia, and the bar (Bernstein and Gold, 1985: 213).

district court. Federal courts are, however, "instructed to respect the Board's special expertise in labor affairs" and thus seldom overturn NLRB decisions (Gold, 1989: 5). In addition, the NLRB takes on a "quasi-judicial" character with respect to its decision-making processes (Clark, 1989: 160). Specifically, efforts are taken to ensure consistency with previous Board decisions and precedents, as well as with those common-law cases issuing from the state and federal court systems.

Despite its legalistic pretensions, the NLRB is fundamentally a political body (e. g. Clark, 1989: 153; Oberer, 1987: 287-289). The five Board members are each appointed by a sitting U. S. president to five-year terms. These terms are both renewable and staggered, with the existing term of one member ending each year. While an "unwritten rule" exists that "no more than three of the five members can be Democrats or Republicans", each administration gets to appoint the Chair of the Board and is able to achieve a majority before the end of a four-year term (Bernstein and Gold, 1985: 213). The Board thus inevitably becomes skewed toward the ideological preferences of the current political party in office.

Reagan Appointments

The degree to which the ideological shift of the NLRB under the Reagan administration was a continuation of previous patterns of fluctuation or represented a qualitative divergence from past practices is an historical question beyond the scope of this research. For present purposes, it need only be recognized that Reagan appointments did indeed reflect the ideological preferences of the new Republican administration, and in that respect the new Board represented a departure from the previous one under the more labor-friendly and Democratic Carter administration. The first appointment made by Reagan in 1981, for example, was Robert Hunter, a leader of the right-wing Heritage Foundation and former aide to conservative Republican Senator Orrin Hatch (Bernstein and Gold, 1985: 214). As discussed below, Hunter and the Heritage Foundation were to provide the Reagan administration with a blueprint for federal labor policy (Davis, 1986: 139-140).

Reagan's second appointment was Republican John Van de Water as chairman of the NLRB in 1981. Van de Water "was a longtime

California 'management consultant' whose stock-in-trade was advising employers how to defeat union-organizing drives" (Bernstein and Gold, 1985: 214). Because of his explicitly anti-union bias, Van de Water was not confirmed for the post by the U. S. Senate, the first time in history that an NLRB nominee had ever been rejected. Nevertheless, Reagan gave Van de Water a "recess appointment" to the NLRB for 1981-82, "which enabled him to serve as Chairman without Senate confirmation for a year" (House Subcommittee on Labor-Management Relations, 1984: 15).

To replace Van de Water, Reagan appointed Donald Dotson as NLRB chairman in 1983. Another controversial nominee, Dotson had served as a management attorney prior to working in the Department of Labor in the early years of the Reagan administration. The controversy primarily stemmed from Dotson's various legal writings that blamed organized labor for industrial decline and depicted unions as a threat to individual freedom (House Subcommittee on Labor-Management Relations, 1984: 15). Though Dotson's stance was clearly anti-union, it was not as explicit and vehement as Van de Water's. Dotson's nomination thus passed the Senate confirmation process. Reagan appointees to the NLRB achieved a majority when in late 1983 Patricia Diaz Dennis was nominated and confirmed as Board member. Dennis, a

"relatively inexperienced" corporate attorney (Bernstein and Gold, 1985: 214) and former representative of the Business Roundtable (Davis, 1986: 139), was the administration's first Democratic appointment to the Board.

Having replaced three out of the NLRB's five members, Reagan left two Board seats vacant until 1985.⁹⁵ One organizational consequence of these vacancies was an unprecedented backlog in NLRB cases (e. g. Page, 1985: 595; Simon, 1983: 5). Even by early 1984, 1700 cases before the Board were waiting to be heard, "four times the number in 1978" (Business Week, 11 June 1984). In addition, the average time for processing an unfair labor practice case, from filing date to NLRB decision, increased from 484 days in 1980 to 627 days in 1983 (Moody, 1988: 120).

Of course, the NLRB case backlog was not entirely a function of administrative vacancies. At least part of the slowdown was due to the Board's preoccupation with strategically reviewing and reversing earlier NLRB decisions (Bernstein and Gold, 1985: 216; Simon, 1983: 5).

Following the aggressive lead of Dotson, the Board systematically

⁹⁵ Wilford W. Johansen, a long time NLRB employee and regional director, and Marshall B. Babson, a management attorney, were respectively appointed in May and July of 1985 (Daily Labor Report, 9 May 1985).

overturned numerous cases throughout 1984 and 1985 (Walther, 1985: 803). Hunter had laid out the goals of this project in 1980 in *Mandate for Leadership: Policy Management for a Conservative Administration*, which served as a “manifesto” for the Heritage Foundation and outlined labor policy recommendations for the first Reagan administration. The overriding theme of the document emphasized the need for a reassertion of individual employee rights, as opposed to the collective rights of unions, within labor law (Bernstein and Gold, 1985: 214-216; also see Davis, 1986: 139-140).

Thus, the task of repealing NLRB provisions that had established “collective rights as paramount to individual rights” took priority with the Dotson Board, and not the processing and resolution of unfair labor practice cases (Davis, 1986: 139). Dotson and other conservatives defended the judicial reviews and reversals as necessary correctives to the liberal excesses of the Democratic-dominated Board of the Carter administration, with the newly-appointed chair stating that “[t]he pendulum had swung too far to the Left” (quoted in *Business Week*, 11 June 1984). Others, however, deemed the practice to be “highly unusual”, driven solely by political ideology, and as thus moving too far

to the Right (Bernstein and Gold, 1985: 216; Moe, 1987: 270-271).

Whatever the situation, I will review those case reversals by the Dotson-led NLRB that are most pertinent for union strike activity, for these elements of the administration's collective labor law project are of most relevance to my present project.

NLRB Case Reversals, 1984-1985

As I previously noted, by late 1983, Reagan appointees had achieved a majority on the NLRB. In addition to Dotson, Hunter and Dennis, Don A. Zimmerman sat as the last Carter appointee on the Board. One seat remained vacant, and would be complemented by a second empty post when Zimmerman left in late 1984. At this point in time the Board began issuing what Dotson labeled "key decisions" that were essentially reversals of earlier NLRB cases handed down in the 1970s (Business Week, 11 June 1984; Subcommittee on Labor-Management Relations, 1984: 20). In all, "the Dotson-led Reagan board overturned some forty NLRB doctrines and developed a number of novel positions of its own, almost invariably antithetical to the union position" (Weiler,

1990: 19). Zimmerman was typically the sole dissenting voice in most of the reversals, while the three Reagan appointees were frequently united in favor of overturning precedents (e. g. *National Law Journal*, 6 February 1984).

Of NLRB reversals made in 1984 and 1985, five had importance for union strike activity.⁹⁶ The first decision, that came on January 6, 1984 in the case of *Meyers Industries* (268 NLRB 456), may be the least relevant to collective industrial action by unions, yet is highly interesting in terms of the overall goals of the Reagan administration's collective labor law project. *Meyers* involved a truck driver who had refused to work after making numerous complaints about safety problems with a company truck. When discharged, the truck driver filed a unfair labor practice claim against the company, arguing that his refusal to work was protected activity under Section 7 of the National Labor Relations Act (NLRA). Specifically, he asserted the right of individual employees to strike in protest of unsafe working conditions (Bethel, 1985: 273-274; Page, 1985: 599).

⁹⁶ I use Walther's (1985) cataloging of the 1984-85 reversals as the basis for this assessment. Other useful reviews of NLRB decisions during this period include Bernstein and Gold (1985), Bethel (1984), and Page (1985).

The truck driver's claim was not out of the ordinary. In the 1975 case of *Alleluia Cushion* (221 NLRB 999), the Board had ruled that an individual employee could legally strike over hazardous working conditions. The reasoning was as follows:

Even though there was no evidence that other employees shared the same concern, the Board noted the "vital interest" that employees in general have in employment safety and, absent evidence to the contrary, said it would presume such complaints had the support of other employees. The fiction of coemployee interest allowed the Board to circumvent the language of section 7, which protects "concerted activity for mutual aid and protection" (Bethel, 1985: 274).

While the logic employed in *Alleluia Cushion* may have been questionable if one considers the "literal language" of the NLRA, the precedent nonetheless found its way into several later decisions of the NLRB and was upheld by several federal administrative courts and the Supreme Court (Bethel, 1985: 274-75).⁹⁷ However, the *Dotson Board's Meyers Industries* decision held that such "constructive concerted activity" by a single individual was acceptable only with the explicit and prior consent of fellow employees. Any other instance would not be protected, since "one employee acting alone cannot, by definition, act in

⁹⁷ I should note that federal circuit courts did not always uphold *Aleluia Cushion*. See Bethel (1985: 275) and Walther (1985: 804) for examples.

concert” (Bethel, 1985: 275). Thus, Meyers Industries effectively reduced the range of what would be considered legitimate concerted activity.⁹⁸

On February 22, 1984 the Dotson Board issued another decision that had implications for workers’ right to strike. The Clear Pine Mouldings (268 NLRB 1044) case involved two union woodworkers who had been denied reinstatement after an unfair labor practice (ULP) strike. The employer maintained that throughout the dispute, the two striking employees had repeatedly threatened non-striking employees and supervisory personnel as they crossed the picket line, and for this reason they were not allowed to return to work when the strike was over. An administrative law judge (ALJ) who initially heard the case found that the workers did indeed engage in verbally threatening behavior, but he also concluded that this was not “serious enough to warrant discharge” (Bethel, 1985: 279). He thus found the two union members eligible for reinstatement and back pay.

The ALJ’s decision was consistent with previous NLRB rulings, with 1973’s Coronet Casuals (207 NLRB 304) being the most recent precedent.

⁹⁸ While the Meyers Industries ruling is only of peripheral importance for union strike activity, it does prove instructive with respect to the dialectics of state projects. Specifically, it shows how the broad rhetoric of the Reagan collective labor law project, which aimed to reestablish individual employee rights vis-a-vis unions and employers, can be contradicted when it comes to the more concrete situation of an actual employee in an actual firm. I will return to this issue in Chapter Eight.

The traditional rationale was that industrial disputes, particularly ULP strikes provoked by employer transgressions, were highly volatile episodes and “strikers [were] not expected to observe the ‘rules of the parlor’ and that some ‘exuberance’ is to be expected and tolerated during a strike” (Bethel, 1985: 279). While actual acts of violence on the picket line may have frequently warranted a denial of reinstatement after the dispute, the NLRB and the courts invariably dismissed verbal threats alone as insufficient cause for refusing reemployment. Integral to this reasoning was the notion that a relatively high standard as to what constituted “strike misconduct” would prevent employers from trying to provoke striking workers as a way to remove union members from the workforce (Craver, 1985: 609).

In *Clear Pine Mouldings*, the NLRB reversed the ALJ’s decision, and explicitly “rejected the notion that words alone, unaccompanied by physical acts or gestures, can never warrant a denial of reinstatement” (Bethel, 1985: 280). This marked a dramatic departure from the standard set in *Coronet Casuals*. Indeed, with the Reagan Board’s new interpretation of the Wagner Act, all but the most benign verbal behavior might be construed as ‘strike misconduct’:

We believe it appropriate...to state our view that the existence of a ‘strike’...does not in any way privilege [striking] employees to engage in other than peaceful

picketing and persuasion...As we view the statute, the only activity the statute privileges in this context, other than peaceful patrolling, is the nonthreatening expression of opinion, verbally or through signs and pamphleteering...(268 NLRB 1047).

The range of acceptable picket line behavior is thus considerably narrowed by *Clear Pine Mouldings*, with striking workers risking “their right to reinstatement if they are induced to engage in overly exuberant [verbal] behavior” (Craver, 1985: 609).⁹⁹

In the case of *Buttersworth-Manning-Ashmore Mortuary* (270 NLRB 1014), decided on May 31, 1984, the Dotson Board targeted the rights of sympathy strikers. At issue was whether or not those workers who refused to cross the picket line of others on strike could be permanently replaced, even if their existing contract had provided that there would be no discharge or discipline imposed in situations of sympathetic action. The NLRB had previously held that “[s]ympathy strikers are akin to economic strikers and may not be discharged because of their protected activity, but an employer is entitled to replace a sympathy striker permanently in order to continue the efficient operation of its

⁹⁹ While the Board was unified in its stance that verbal threats and the like could be deemed strike misconduct, they were divided with respect to how stringent the new standard would be. Specifically, *Dotson* and *Hunter* held that any and all verbal threats were grounds for denying reinstatement; *Dennis* and *Zimmerman*, however, felt the context and coercive impact of the threat should be assessed on a case by case basis. See *Bethel* (1985: 280-281).

business” (270 NLRB 1018). Nevertheless, in the 1978 case of Torrington Construction Co. (235 NLRB 1540), the Board also had concluded contract language that explicitly permitted such secondary activity effectively represented a waiver of the right to permanently replace sympathy strikers.

The Dotson Board conceded that the relevant contract language in Butterworth-Manning-Ashmore Mortuary was “virtually identical” (270 NLRB 1019) to that used in the Torrington Construction Co.¹⁰⁰ It also held, however, that in both cases no specific reference was made about the use of permanent replacements. The Board thus proclaimed: “we have reconsidered our decision in Torrington and we have decided to overrule it to the extent that it holds that [such] contractual language constitutes a waiver of an employer’s right to permanently replace sympathy strikers” (270 NLRB 1020). Consequently, the Board overturned an ALJ’s earlier ruling on Butterworth-Manning-Ashmore

¹⁰⁰ The relevant passage in Buttersworth states that there will be “no discharge or disciplinary action” if an “employee refuses to enter upon any property involved in a labor dispute or refuses to go through or work behind a picket line” (270 NLRB 1015). In Torrington it is stated that there will be no “discharge or disciplinary action in the event an employee refuses to enter upon any property involved in a primary labor dispute, or refuses to work behind any primary picket line...” (quoted in 270 NLRB 1019).

Mortuary, which was based on Torrington and had ruled against the employer.¹⁰¹

On June 22, 1984 the NLRB issued a decision in Neufeld Porsche-Audi (270 NLRB 1330), yet another reversal of Board doctrine that had implications for union strike activity. The overturned case was 1982's Dalmo Victor II, decided just before a majority was achieved by Reagan appointees. The ruling in Dalmo Victor II (263 NLRB 984) upheld the right of a labor union to place minimal resignation requirements on its members. In this particular instance, a machinists' local had been charged with unfairly fining and restricting the resignations of its members, particularly during strike periods. The Board's decision was only a partial victory for labor. While the NLRB ruled that a union could, as a "general rule", require its members to give thirty days notice before resigning, it could not constitutionally develop restrictions based on a differentiation between strike and non-strike periods (263 NLRB

¹⁰¹ As I will make evident below and later in Chapter Eight, this reversal by the NLRB is instructive primarily with respect to the different standards to which it holds employers and unions to in terms of the explicit and implicit waiver of rights vis-à-vis contract language (e. g. Gold and Silberman, 1985).

999). In effect, union rules had to be uniform across periods of industrial conflict and peace.¹⁰²

The two Reagan appointees on the NLRB when the *Dalmo Victor II* case was decided, Hunter and Board Chair Van de Water, issued a concurring opinion which held that even a union rule that required up to thirty days notice prior to resignation was unreasonable, particularly in strike situations (263 NLRB 1001-1025). In *Neufeld Porsche-Audi*, the NLRB, now under Dotson, built explicitly upon Hunter and Van de Water's concurrence to "overrule the Board's decision in *Dalmo Victor II* and its progeny" (270 NLRB 1338). The Dotson Board recognized that "a union rule restricting resignations plainly advances legitimate union interests of maintaining strike solidarity and protecting the interests of those employees who desire to continue a strike", yet immediately added that "[i]t is equally plain, however, that such a rule substantially impairs fundamental policies embedded in the labor laws" (270 NLRB 1345). Specifically, according to the Board, it pits the Section 7 rights of individual employees against the Section 8(b)(1) rights of unions.

¹⁰² Some unions may impose stricter restrictions on resignations before or during a strike as a way to maintain solidarity and ensure strike effectiveness. As becomes evident in *Neufeld Porsche-Audi*, the Reagan Board was quite aware of this fact.

Section 7, as modified by the Taft-Hartley Act and on which the board based its decision:

...expressly grants employees “the right to refrain from any or all” protected concerted activities. This statutory right encompasses not only the right to refrain from strikes, but also the right to resign union membership (270 NLRB 1345).

While Section 8(b)(1) rights under the NLRA, which allow a union to make its own rules and regulations for its membership, are recognized by the Dotson Board as well, the right of individual workers takes precedence in their interpretation. Thus, Neufeld Porsche-Audi establishes that union members can resign at will, particularly in those situations where they may want to exercise their right to ‘refrain’ from collective action.

I find that Neufeld Porsche-Audi is a particularly significant case reversal by the Reagan NLRB for at least three reasons. First, even observers more sympathetic to the Dotson Board find it to be “a major change in the law as it has historically been” (Walther, 1985: 813). Second, some have claimed that the decision “seriously impairs a union’s ability to conduct an effective strike” (Page, 1985: 599; also see Weiler, 1990: 19), a contention I will assess in Chapter Six. Third, in its privileging of individual over collective rights in the arena of industrial

relations, Neufeld Porsche-Audi serves as an exemplar of the Reagan administration's collective labor law project.

In Indianapolis Power and Light Company (273 NLRB 1715), decided by the three sole Reagan appointees¹⁰³ to the NLRB on January 31, 1985, "the Board reversed a ten-year old line of cases to hold that a broad no-strike clause waives an employee's statutory right to honor stranger picket lines" (Page, 1985: 600). The right to sympathy strike is guaranteed in Section 8(b)(4)(D) of the NLRA. In Indianapolis Power and Light Company, the employer had disciplined and threatened to terminate a union electrician who refused to cross a picket line of striking communication workers. The employer maintained that the electrician's union had signed a contract with a "no-strike clause", and that this also encompassed any sympathy action. The Dotson Board sided with the employer, ruling "that a normal no-strike clause does in fact cover sympathetic strikes unless it is clear by the bargaining or the language of the contract that it was not intended to do so" (Walther, 1985: 814).

The contradictory standards to which the Reagan NLRB held employers and unions becomes most evident with the Indianapolis

¹⁰³ The other two NLRB seats were vacant at the time.

Power and Light Company ruling. Recall that in *Butterworth-Manning-Ashmore Mortuary*, the employer would have to explicitly waive the right to use permanent replacements in a sympathy strike. Thus, the right was presumed intact unless otherwise stated. In *Indianapolis Power and Light Company*, a waiver of rights by the union is presumed to be implicit in a no-strike clause. The problem, as summarized nicely by Page (1985: 600), is that:

It simply does not follow that where a union agrees not to strike in exchange for a labor agreement that it also intended to waive its legal rights to honor the legal picket line of another group of employees not covered by its labor agreement.

Overall, then, the union must explicitly state it does not waive the privilege of sympathetic action in order to retain that right, whereas employers need not make any declaration to retain their rights.

Summary

I contend that the five NLRB case reversals reviewed above constitute the core of the Reagan administration's collective labor law project as it pertained to industrial action by organized labor. Hopefully

I have demonstrated how once Reagan appointees achieved a majority on the Board, they began to systematically reinterpret key elements of NLRB doctrine with an eye toward crippling union strike effectiveness. Though a few relevant decisions and clarifications of doctrine occur later,¹⁰⁴ the bulk of this activity occurred during 1984 and 1985 (e. g. Davis, 1986; Bernstein and Gold, 1985; and Walther, 1985). I also maintain that the Reagan administration's handling of the PATCO dispute, though not directly involving substantive legal changes, was integral, at least symbolically, to the state's labor law project as well. Hence, many of the key elements of the new labor law policy were clearly in place by mid-decade. I will try to tease out the concrete effects of these changes in Chapter Six, where I look in detail at three union strikes in the United States that occurred during the latter part of the 1980s.

¹⁰⁴ In November 1986 the Dotson-led Board ruled in two cases that picketing did not necessarily have to take place directly in front of an employers' business if alternative locations were just as visible (Daily Labor Report, 24 August 1987). Also, when James Stephens replaced Dotson as NLRB Chair in 1988, the Indianapolis Power and Light Company decision was "updated": "[t]he board said it would adhere to the original view that a broad no-strike clause bars sympathy strikes, but at the same time it would give careful consideration to bargaining history and past practice to determine the parties' actual intent" (Daily Labor Report, 23 December 1988).