A Case of Fortuitous Regulatory Expansion

Inflation and the NLRB

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THAT INFLATION distorts public and private policy in unanticipated ways is a melancholy commonplace of our time. A familiar example is the effect that inflation has on the progressive income tax, propelling taxpayers with larger nominal incomes into higher and higher brackets even though their real incomes have not increased. Less publicized is the subtle and equally unanticipated way in which inflation broadens the reach of any regulatory program whose jurisdiction is defined in fixed dollar terms. This process has been at work, as we shall show, in the field of labor regulation.

Setting the Stage

The possibility of inflation-induced distortion in the operations of the National Labor Relations Board (NLRB) was latent in Congress's response in 1959 to what was then a gap or jurisdictional "no-man's land" in governmental regulation of labor relations. That gap had been caused by two factors. The first was the NLRB's determination, for budgetary and other reasons, to put practical limits on its extremely broad statutory jurisdiction (which extends to virtually all firms). Initially the board took the approach of declining to exercise jurisdiction on a case-by-case basis, but beginning in 1950 it shifted to the use of industry-by-industry jurisdictional yardsticks stated largely in terms of dollar minima. The second factor causing the gap was the Supreme Court's decision in *Guss v. The Utah Labor Relations Board* (1957). There the Court held that the NLRB's refusal to act did not necessarily permit action by state labor boards or state courts, since the federal government continued to preempt most of the field. As a result, a substantial segment of the nation's business enterprises, those falling between the expansive scope of the commerce power and the NLRB's self-limiting jurisdictional yardsticks, were in a no-man's land where the national board would not enforce federal law and state boards and courts could not enforce any law at all (federal or state).

In the Landrum-Griffin Act of 1959, Congress responded to this bizarre situation by enacting section 14(c) of the labor act. Section 14(c) affirmed the authority of the board to decline to act in labor disputes when it deemed their impact on commerce to be insufficient. It also eliminated the no-man's land by permitting state bodies to act in disputes that the board declined to handle. But then, mindful of concerns expressed in the Landrum-Griffin debates that some states might engage in anti-union activities, Congress limited the board's freedom on the jurisdictional question. Specifically, it prohibited the board from declining jurisdiction over labor disputes involving firms that met the jurisdictional yardsticks prevailing on August 1, 1959—which implied, of course, that the board could not reduce its jurisdiction by raising the yardsticks.

Thus, by 1959 the stage was set for an inflation-induced expansion in the NLRB's effective jurisdiction. The 1959 standards (announced in 1958) spelled out the minimum annual dollar volumes of business that would be a prerequisite for the board's assertion of jurisdiction over firms in different industries. For example, the yardstick for department stores specified an annual sales volume of $500,000. So far, so good. But two decades later $500,000 in sales, adjusted to 1978 dollars to account for inflation, is the equivalent of $1.1 million in sales. Or to put it another way, to apply a

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$500,000 standard in 1978 is the equivalent of applying a standard of only $225,000 in 1959. Thus in two decades the minimum size of the qualifying department store was cut in half.

A Clear but Unmeasured Effect

Evidently, then, inflation has significantly expanded the reach of the board's yardsticks. It is not easy, however, to determine precisely the extent of that expansion—or its effect on the functioning of the agency. The difficulty is partly one of insufficient data. Typically the opinions handed down by the board state only that the firm involved meets the applicable jurisdictional yardstick and do not specify how much over the minimum the firm's sales may be. Accordingly, those opinions do not provide a basis for determining whether a given firm would meet the pertinent yardstick today if that yardstick were indexed for inflation.

A second difficulty is that it is not proper to estimate the expansion in caseload simply by extrapolating from the rate of inflation. That extrapolation would be reliable only if three factors were known: (1) the actual distribution of firm sizes for all types of industries, (2) the percentages for firms that would have satisfied the board's yardsticks in 1959, and (3) the relationship between the board's caseload and the number of firms satisfying these yardsticks. One obstacle to the usefulness of such extrapolation is that the impact of inflation on the coverage of a jurisdictional yardstick is a function of the percentage of firms not covered before the inflation. In other words, the larger the segment of uncovered firms to begin with, the greater the impact of a given rate of inflation.

But even if we had the data needed for determining the percentage increase in the number of firms brought within the board's yardsticks because of inflation, we would still not be warranted in projecting a corresponding increase—or indeed any particular increase—in the board's *actual* caseload. This is true primarily for two interrelated reasons. The firms that inflation sweeps within the board's yardsticks are the relatively small firms. And within that group, it is mostly the larger firms that become involved in board proceedings. An obvious reason for this possibility is that the board's work is increased by union-organizing campaigns and by the collective bargaining that follows the recognition of a union. It would be understandable if unions often concluded that the gains from organizing and representing a relatively small number of employees dispersed over many small firms did not warrant the time and expense involved. As a result, the increase in caseload is likely to be less than coverage of the yardsticks.

Even so, available evidence indicates that cases involving smaller firms have become a larger proportion of the board's docket. The percentage of "situations" involving firms with less than ten employees rose from 19.9 percent in 1965 to 28.2 percent in 1978,* according to the NLRB's annual reports for those years. Furthermore, information supplied informally by an NLRB official suggests that the number of establishments covered by the board's jurisdictional yardsticks rose at a faster rate from 1959 to 1972 than the number of employees covered by those yardsticks. Although this evidence supports our intuition that inflation has increased the board's caseload, the difficulty of estimating that increase precisely remains.

A Swelling Caseload

In any event, the board has confronted an ever-increasing and much-bemoaned caseload. The entire agency disposed of 39,652 unfair labor practice charges in 1978, compared with 11,357 in 1960—as well as 13,609 union election proceedings in 1978, compared with 10,170 in 1960. The overwhelming majority of those matters were, however, screened out or settled without adjudications by the presidentially appointed members of the board itself. Nevertheless, as was to be expected, the number of contested unfair labor practice cases decided by those members increased sharply from 1960 to 1975. During that period, by contrast, the number of representation decisions made by board members declined significantly, largely because the NLRB had delegated most of its powers over representation to regional directors, in accordance with the authority granted it by the Congress in 1959. Incidentally, also during that period, the agency's budget (in real dollars) in-

* The board defines a "situation" to be "one or more unfair labor practice cases involving the same situation."

creased at approximately the same rate as the agency's workload, while the increase in its staff lagged somewhat behind. The number of board members has not increased since 1947, when Congress expanded the board from three to five members and authorized it to make decisions in three-member panels.

In coping with its increased load, the NLRB has been subject to a limitation not applicable to some other agencies—that is, the NLRB has not been given authority to delegate decision making to agency employees, except in election proceedings (where, as indicated above, it has used that authority liberally). Indeed, so insistent was Congress that decisions be made by the presidentially appointed members of the board that the Taft-Hartley Act prohibits the NLRB from employing lawyers for reviewing transcripts and the like. This prohibition was designed to eliminate the agency's Review Section, which (before Taft-Hartley) had served as a pool of lawyers for the board members, collectively. Yet, while closing down the Review Section, Congress opened a back door to such use of lawyers by permitting each board member to hire an assistant or assistants. How then did the board manage almost to quadruple its output of unfair labor practice decisions between 1960 and 1975? According to ex-Chairman Edward B. Miller, the explanation lies in the replacement of the Review Section with five separate twenty-lawyer staffs, one attached to the office of each of the five board members—with corresponding dilution of the members' personal participation.

The increase in caseload that has produced this bureaucratization of the board is, of course, not solely the result of inflation. Our population and economy have grown larger. Moreover, Congress has expanded the agency's jurisdiction—by extending it to approximately 650,000 postal workers in 1970 and to employees of nonprofit hospitals (who had been excluded by the Taft-Hartley Act) in 1974. And the NLRB itself has, by adjudication, repudiated prior self-limiting policies and has asserted jurisdiction in new fields bristling with difficulties—such as proprietary hospitals, private nonprofit universities, secondary schools owned and operated by religious institutions, and law firms. Furthermore the NLRB—by virtue of the ambiguity of, and fluctuation in, its substantive doctrines—has invited litigation on difficult issues, such as the duty to bargain and "free speech" during election campaigns.

But inflation has doubtlessly played a significant role in increasing the agency's load—a role not even mentioned in the legislative debates preceding Congress's decision to lock in the 1959 jurisdictional standards by enacting section 14(c). Plainly, the extent of inflation's impact should be of interest not only to the board when it formulates discretionary policies but also to Congress when it considers—as it should—whether it will permit the NLRB to "index" its jurisdictional standards or whether it will undertake the task itself.

As we have said, we can do no more here than note the probable importance of the NLRB's inflation-produced jurisdiction and caseload. To achieve a more precise analysis, several methods are available. One would be a case-by-case inquiry into the amount of business done by firms that are parties to board proceedings—a formidable and expensive inquiry. More feasible would be a random sampling of the firms involved in board cases during a given year in order to obtain figures on firm size. Finally, perhaps census data on the distribution of firms by size could provide the basis for a workable estimate—although we, as well as the board's staff, have found those data insufficient.

Inflation and Fortuitous Regulatory Expansion

In any event, the impact of inflation on the bite and broadening of regulation merits further study. And not only, it should be added, with respect to the NLRB. Programs implemented by many other agencies—for example, the exemptions from various registration requirements of the Securities and Exchange Commission, not to mention definitions of grand larceny—are also subject to financial yardsticks that endemic inflation can quickly render obsolete. On the other hand, some may be comforted to learn that the First Congress in proposing the Seventh Amendment to the Constitution in 1789, and the states in ratifying it in 1791, were apparently oblivious to the surprises inflation can bring: the Seventh Amendment preserves a right to jury trial in suits at common law when the value in controversy exceeds twenty dollars. ■