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Divergent Strategies: Union Organizing and Alternative Dispute Resolution

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The Commission on the Future of Worker-Management Relations, the so-called "Dunlop Commission", is focusing on three principal subjects: (1) union organizing, (2) worker participation in management decision making, and (3) alternative dispute resolution (ADR). I am going to concentrate on the last, but first I'd like to say a few words about union organizing. After all, unionization and collective bargaining—and for that matter, worker participation as well—can fairly be viewed as special forms of alternative dispute resolution.

Union Organizing

I once believed that employer coercion or discrimination played a relatively minor role in defeating union organizational efforts and that denial of union access to employer premises to reach employees at work was a far more significant factor. My views reflected generally those of Derek Bok,[1] Jack Getman, and Steve Goldberg[2] in a famous empirical study they co-authored, and even those of a number of union organizers I interviewed some thirty years ago. But the times have changed and so have my views. I cite two pieces of evidence. First, on the basis of a study by Paul Weiler, I have calculated that an employee covered by the National Labor Relations Act was somewhere between four and seven times more likely to be fired for union activity in 1980 than during the 1950s.[3] Second, union membership in the private sector has declined from about 35 percent in 1954 to about 11.2 percent in 1993.[4]

Some may argue American workers have simply turned away from unionism, and I would concede that, among several other factors, that may contribute to the result. But I would also point out that, during those same years, the percentage of the full-time unionized work force in the public sector went from almost nothing in 1960 to 49.8 in 1976.[5] When a legislature and a governor approve collective bargaining for public employees, agency heads don't fight it. I should also note that many unionized public employ-

[1] Bok, "The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act," 78 *Harv. L. Rev.* 38, 88-92, 96-106 (1964).

[2] J. Getman, S. Goldberg & J. Herman, *Union Representation Elections: Law and Reality* 128-30, 146-52, 156-59 (1976).

[3] St. Antoine, "Federal Regulation of the Workplace in the Next Half Century," 61 *Chi.-Kent L. Rev.* 631, 639 (1985).

[4] C. Gifford, ed., *Directory of U.S. Labor Organizations 1992-93* (1992); U.S. Bur. Lab. Stat., USDL: 94-58 (Feb. 9, 1994).

[5] H. Edwards, R. Clark & C. Craver, *Labor Relations Law in the Public Sector* 4, 8-9 (2d ed. 1979), and authorities cited.

ees are persons who would have been deemed "unorganizable" a generation ago—school teachers, doctors, lawyers, engineers, technicians, and the like.

There are several steps that ought to be taken to provide a more "level playing field" for union organizing. The capacity of employers to permanently replace workers striking to improve their economic lot is an anomaly in the modern industrial world and should be prohibited under most circumstances. Probably few Americans, even those working in industrial relations, are aware, for example, that the International Labor Organization has effectively held that the United States is in violation of the "freedom of association" provision of the ILO's Constitution because the Supreme Court allowed permanent replacement of economic strikers in the *Mackay Radio* and *TWA* cases. [6] The practice is almost unheard of in Western Europe.

Second, while I think an "instant election" or the grant of representational rights on the basis of a card check alone would wrongly deprive employers of the opportunity to present their side of the case to the employees, the blunt reality is that prolonged campaigns are an invitation to coercive tactics by unscrupulous employers. A statutory time limit should be imposed on the processing of the routine representation case, a maximum of perhaps 30 to 40 days between the filing of the petition and the holding of the election. No more than two to three weeks should elapse between the date the election is ordered and the date it is conducted.

Third, I would grant unions some substantial access to an employer's premises to counter management campaigning prior to an election, at least at larger enterprises in urban areas where numerous employees disperse widely at the end of the working day. In such situations the plant or shop site is the natural forum for an exchange of views about unionization, and a party denied access is placed at a serious disadvantage in reaching the voters. In the *Lechmere* case, a National Labor Relations Board, whose membership consisted entirely of Reagan-Bush appointees, recognized the right of a union to solicit in a shopping mall's parking lot, which was open to the general public. Unfortunately, the Supreme Court, in an unrealistic, excessively doctrinaire opinion by Justice Thomas, refused to accept the expertise of the agency primarily charged with administering the statute. The employer was held entitled to forbid the union solicitation.

Finally, when an employer unlawfully refuses to bargain with a majority union, it should be subject to a sanction with more bite than today's bare bargaining order, which is equivalent to the hortatory injunction to "go ye and sin no more." [7] Honorable employers will comply; recalcitrant employers can stonewall for years. The NLRB should be able to provide monetary relief, at least if the employer's violation is flagrant and egregious. [8] The measure of the loss would be derived from a composite of collective agreements in similar union-management relationships in the same geographical area. Such make-whole relief would be no more speculative than many tort, contract, or antitrust damage awards.

The Model Employment Termination Act

Two years ago at the IRRA Spring Meeting, I discussed at some length the Model Employment Termination Act

[6] *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938), 1 LC ¶ 17,034; *Trans World Airlines v. Flight Attendants*, 489 U.S. 426 (1989), 112 LC ¶ 11,369. See 278th Report of the Committee on Freedom of Association, ILO, Case No. 1543, *AFL-CIO v. Govt. of United States* (ILO Gov. Body, 250th Sess., Geneva, May-June 1991).

[7] *Lechmere, Inc. v. NLRB*, 112 S.Ct. 841 (1992), 120 LC ¶ 11,066.

[8] See, e.g., *IUE v. NLRB [Tiidee Products]*, 426 F.2d 1243 (D.C. Cir.), 62 LC ¶ 10,772, cert. denied 400 U.S. 950 (1970). But cf. *Ex-Cell-O Corp.*, 185 N.L.R.B. 107 (1970), 77 LC ¶ 10,875.

(META),[9] then newly adopted by a resounding 39-11 vote of the state delegations of the Uniform Law Commissioners (ULC).[10] In brief, META would require "good cause" for the dismissal of most employees past a one-year probationary stage and working full time (at least 20 hours a week). Employers would benefit by having professional arbitrators rather than emotionally susceptible jurors as the usual enforcement mechanism and by having reinstatement with or without back pay or severance pay, the standard remedy, instead of general compensatory and punitive damages, which have often been in the devastating six and seven-figure range. All parties should benefit from the use of a cheaper, faster, and much simpler decision making process.

Despite the strong support of the prestigious ULC, META is going to have rough sledding in the state legislatures. It has been introduced in about a dozen states but passage seems unlikely anywhere soon. Almost by definition, its principal beneficiaries are unorganized employees, and they are lacking in political clout. In addition, legislatures tend to fear that adoption would place a state at a competitive disadvantage in relation to other states. I believe that worry is misguided but it is very real. The solution, as is so often the case in the labor field, would be the passage of a federal statute like META covering the entire country.

A federal law could also eliminate an employer objection to wrongful discharge legislation which I feel has considerable merit. That is the proliferation of tribunals and the subjection of employers to a series of actions in several different forums. We have tried to minimize this difficulty in META by providing that principles of res judicata apply whenever possible. But of course state law cannot control federal law and separate federal actions.

I have urged the Dunlop Commission to think boldly about the problem of multiple forums. Perhaps it is time to replace the National Labor Relations Board and the Equal Employment Opportunity Commission with a single National Employment Relations Board. This restructured agency could have jurisdiction not only over anti-union discrimination, but also over "status" discrimination on the basis of race, sex, age, disability, etc., and finally over terminations without good cause.

That is a large structural question that deserves much further airing. But on the central substantive issue, the right of employees not to be terminated without good cause, the United States is out of step with every other major industrial democracy in the world. Some 60 countries, including all our leading international competitors, have heeded the call of the International Labor Organization for the legal protection of workers' jobs. The requirement of good cause for dismissal has now become a moral and historical imperative.

ADR for Individual Statutory Claims

Let me now turn to the use of voluntary, contractual arbitration, rather than statutorily imposed arbitration, as the means of enforcing substantive rights under such statutes as the various civil rights and antidiscrimination laws. Once again, my experience in the drafting of the META is revealing. This country's regard for freedom of contract was reflected in the ULC's insistence that we permit employers and employees to opt out of the statutorily prescribed arbitration procedures and agree instead on private arbitration or other alternative mechanisms for resolving an employee's claim. Industrial relations specialists rightly tend to view freedom of contract with suspicion in the employment context because of the usual imbalance in bargaining power. Nonetheless, the natural

[9] 9A Lab. Rel. Rep. (BNA) IERM 540:21 (Dec. 1991).

[10] Labor Law Journal 495 (1991).

appeal of the concept is almost irresistible, and that should be a factor in any deliberations on the subject.

What is critical is that adequate procedural or "due process" safeguards be installed to ensure that statutory rights are not impaired by private adjudicators. That will probably also mean somewhat more searching judicial review than we are used to when only contract claims are at stake. The Model Act, for example, provides for vacation of an award if the arbitrator commits a prejudicial error of law. I realize this creates the risk of diluting the finality that is one of the great virtues of arbitration as we have come to know it in the collective bargaining setting. But when sensitive individual rights under antidiscrimination and other protective legislation are involved, I doubt that the courts will remain aloof and let an arbitrator mangle an employee's claim.

In *Gilmer v. Interstate/Johnson Lane Corp.*, [11] the Supreme Court sustained an individual brokerage employee's agreement to arbitrate a claim under the Age Discrimination in Employment Act. That holding was much more limited than some have supposed. It could mean no more than that the employee was obligated to exhaust private arbitral remedies before proceeding to court. It certainly gives no final answer to the question of the weight to be accorded the arbitration award once rendered, despite the distinction drawn in *Gilmer* between it and *Alexander v. Gardner-Denver Co.* [12] In the latter, the Court held that an arbitrator's finding of "just cause" for a termination under a collective bargaining agreement did not preclude the discharged employee's seeking a de novo trial for alleged racial discrimination in violation of Title VII of the 1964 Civil Rights Act.

Alexander should be modified and *Gilmer* extended to authorize the final and binding arbitration of statutory claims when that is provided for in either a collective bargaining agreement or an individual employment contract. I realize there are risks to subjecting important statutory rights to private enforcement procedures. But the alternative is something close to nonenforcement in many instances. Federal dockets are full to overflowing. The NLRB and the EEOC have inadequate budgets. Persons with small claims are unable to obtain legal representation, and the delay and uncertainty are intolerable for everyone. There would be need, of course, especially in the individual case, for close scrutiny of private arbitration arrangements to prevent any possible coercion, surprise, or other overreaching by a more powerful employer. [13]

My views on the desirability of an increasing resort to private arbitration for the resolution of statutory disputes, including civil rights issues, find confirmation in the words of such distinguished federal appellate judges as Alvin Rubin of the Fifth Circuit, Betty Fletcher of the Ninth Circuit, and Harry T. Edwards of the D.C. Circuit. Judge Rubin suggested that "some problems can best be resolved by giving a wider hand to collective bargaining and to resolution of disputes in arbitration." [14] Even more pointedly, Judge Fletcher declared that "arbitration . . . is the best forum for the grievant . . . arbitrators have it within their power and their grasp to improve the process in order to accomplish the goals of Title VII." [15]

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[11] 111 S.Ct. 1647 (1991), 56 EPD ¶ 40,704.

[12] 415 U.S. 36 (1974), 7 EPD ¶ 9148.

[13] Presumably an amendment of the Federal Arbitration Act, 9 U.S.C. 1 (1988), would eliminate the long-standing doubts about the applicability of that statute to contracts of employment.

[14] Rubin, "Arbitration: Toward a Rebirth," in *Truth, Lie Detectors and Other Problems in Arbitration, Proc. 31st Ann. Meeting of Nat. Acad. Arbs.*, pp. 30, 36 (J. Stern & B. Dennis eds. 1979).

[15] Fletcher, "Arbitration of Title VII Claims: Some Judicial Perceptions," in *Arbitration Issues for the 1980's, Proc. 34th Ann. Meeting of Nat. Acad. Arbs.*, pp. 218, 228 (J. Stern & B. Dennis eds. 1982).

Perhaps most noteworthy of all are the observations of Judge Harry Edwards, because he was an active practitioner in labor law and an eminent labor scholar at both Michigan and Harvard before ascending the bench, and because he formerly often expressed "grave reservations about arbitrators deciding public law issues." [16] On the basis of his experience on the court, Judge Edwards changed his mind. Said he: "I believe that arbitration should be explored as a mechanism for the resolution of individual claims of discrimination in *unorganized*, as well as unionized, sectors of the employment market." [17] Like Judges Rubin and Fletcher, Judge Edwards stressed the speed and cost savings of arbitration as advantages over litigation in the resolving of disputes. The greater informality of arbitration can also be conducive to a lessening of employer-employee hostility, which is especially desirable in the event reinstatement is ultimately ordered.

If private procedures like arbitration, agreed to by the employer and the employee, are to supersede the administrative or judicial procedures prescribed by a statute, there should be guarantees that customary "due process" standards are applicable. With some adaptation, section 101(a)(5) of the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act, [18] dealing with internal union disciplinary proceedings, can provide suitable guidelines. An employee, for example, would be entitled to written specific reasons for a termination, a reasonable opportunity to prepare a case, and a full and fair hearing. To help ensure the use of an impartial hearing officer, the employee should have a genuine voice in the selection of that person.

Next, there is the question of remedy. In traditional union-management arbitration, the accepted remedy is reinstatement, with or without back pay. Other damages, compensatory or punitive, are uncommon. Statutes permitting the use of alternative dispute resolution procedures might very well require that the arbitrator or other private adjudicator be authorized to furnish at least as full a remedy as the statute itself. Otherwise, the binding effect of the arbitrator's award could be limited to fact-finding, or the award could be given no more effect than under existing law.

I have a caveat to all this. In my judgment, the National Labor Relations Board has been too quick to conclude that it should "defer" to arbitration when an individual employee files a charge alleging unlawful discrimination, just because the employee could have raised the issue under a contract grievance procedure. [19] I do not see why a union's or an employee's obtaining of a new and arguably additional contractual right should necessarily deprive the employee of a preexisting statutory right. At least there should be an inquiry on a case-by-case basis as to the evidence of an intent to waive the procedures and remedies provided by the statute when adding the new contract protections. Similarly, here, I would not leap to the conclusion that a provision for contract arbitration automatically divests an employee in every case of the option of recourse to the statute itself.

Conclusion

Despite their evident drawbacks, I am convinced that private dispute-resolution procedures may have a significant role to play in making statutory rights more accessible to employees, at a saving to everyone of time, money, and psychic wear

[16] Edwards, "Advantages of Arbitration over Litigation: Reflections of a Judge," in *Arbitration 1982 - Conduct of the Hearing, Proc. 35th Ann. Meeting of Nat. Acad. of Arbs*, pp. 16, 27 (J. Stern & B. Dennis eds. 1983).

[17] Id. at 28 (emphasis in the original).

[18] 29 U.S.C. 411(a)(5)(1988).

[19] See. e.g., *United Technologies Corp.*, 268 N.L.R.B. 557 (1984), 1983-84 CCH NLRB ¶ 16,027, overruling *General American Transportation Corp.*, 228 N.L.R.B. 808 (1977), 1976-77 CCH NLRB ¶ 17,962. See also Craver, "Labor Arbitration as a Continuation of the Collective Bargaining Process," 66 *Chi.-Kent L. Rev.* 571, 605-16 (1990).

and tear. The brutal realities of litigation overload may be the ultimate justification for championing that alternative. But I harbor no illusions. The brutal realities of legislative deadlock make any significant breakthroughs improbable in the immediate future, especially in enlarging individual workers' rights. But at least we should try to "raise a standard to which the wise and honest can repair." [20]

[The End]

[20] George Washington at the Constitutional Convention, Philadelphia, 1787.