INDUSTRIAL RELATIONS RESEARCH ASSOCIATION

Proceedings of the
1992 Spring Meeting

May 6 - 9, 1992

Denver, Colorado

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INDUSTRIAL RELATIONS RESEARCH ASSOCIATION

7226 Social Science Building, University of Wisconsin

1180 Observatory Drive

Madison, WI 53706-1393 USA Telephone 608/262-2762

Industrial Relations Research Association Spring Meeting

May 6-9, 1992 Denver, Colorado

PREFACE

1992 SPRING MEETING

INDUSTRIAL RELATIONS RESEARCH ASSOCIATION

The Spring Meeting of the Industrial Relations Research Association was held in Denver, Colorado, on May 6-9, 1992. The Rocky Mountain Chapter served as the host for the meeting, which was distinguished by the number, quality, and scope of the program sessions, and by the range of cultural and recreational activities available to registrants. The reception provided by the Rocky Mountain Chapter at the Mt. Vernon Country Club, located in the foothills of the Rockies, established a standard that organizers of subsequent spring meetings will want to emulate. Among the many members of the Chapter who were instrumental to the success of the meeting were Rita Byrnes Kittle, President of the Chapter and member of the Planning Committee; William F. Schoeberlein, Planning Committee Chairperson; and remaining members of the Planning Committee, including Mark Appel, James Cronin, Clint Elges, William Himmelmann, Jim Mahan, Michael Severns, Thad Tecza, Harold Hagan, Gary Goodwin, and Carol Zamperini. On behalf of the IRRA Officers and Executive Board, I extend our appreciation to the Rocky Mountain Chapter.

There were numerous highlights to the program. One example was the union-management debate involving Larry Gold, AFL-CIO General Counsel, and Rosemary Collyer, former NLRB General Counsel. Another highlight was the speech by Jerry Hunter, the current NLRB General Counsel, who reviewed recent legal developments at the Board. Allan Gilmour, President of the Ford Automotive Group, discussed union-management cooperation. Other sessions related to labor relations examined court review of arbitration awards, federal sector labor relations, and expedited systems for grievance handling.

Topics other than those related to labor relations were also examined at the meeting. These sessions included panels on civil rights amendments, the Model Termination Act, and environmental issues in employment.

Four workshops of particular interest to practitioners were repeated concurrently. Most of the presentations at the workshops (and some of the papers in other sessions) did not involve written papers and thus are not included in these *Proceedings*. We are, consequently, printing the full program in order to convey information on the plethora of valuable activities that occurred at the Spring Meeting. We hope this full disclosure will entice more members of the IRRA to attend future spring meetings of the Association.

The next Winter Meeting of the IRRA will be in Anaheim, California on January 5-7, 1993. The 1993 Spring Meeting will be held in Seattle, Washington April 29-May 1, 1993.

The IRRA is again grateful to the *Labor Law Journal* for publishing the *Proceedings* of the IRRA Spring Meeting. I also wish to thank Kay Hutchison, IRRA Administrator, and Jeanette Zimmerman, IRRA Editorial Assistant, for preparing the *Proceedings* for the publisher.

John F. Burton, Jr.

Editor-in-Chief

Empowerment of Employees—Private Sector Models in Public Education

By James Alleman

Mr. Alleman is Director of Leadership Development at U.S. West, Inc., in Englewood, Colorado.

In preparing to address "Empowerment of Employees—Private Sector Models in Public Education," my first approach was to take the title literally. I drew up a list of the most popular "private sector" models and began analyzing each in terms of its applicability to "public education." By the time I got to the third model, as you might have guessed, everything was beginning to repeat itself. I was also getting so tangled around some of the topic's inherent assumptions that I gave up and started over.

The assumptions implied in the title of our subject will be addressed first. After discussing the assumptions, I will offer a simple, pragmatic construct that accommodates most of the good empowerment models, or a kind of model for the models. Finally, I will relate all of the information to the emerging concepts of Total Quality Management, which we are hearing so much about.

Our topic makes some assumptions that need to be clarified. The topic implies that the private sector uses empowerment models. The topic implies that private sector employees are somehow more empowered than public sector employees, and it leads us to conclude that there might be some fundamental difference between the public and private sectors that makes them use different models of empowerment. Finally, the topic implies that empowerment is a desirable thing in the first place.

Private Sector Empowerment Models

First, the assumption that the private sector has empowerment models. It does. Hundreds of them. I have studied, designed, and tested these models for twenty-two years. I also know that public education has empowerment models too. And as far as I know, they are the same ones that I am familiar with in the private sector.

The cynical response is "big deal, I can get a model anywhere, but how do I know whether it will work when I try to apply it?" To paraphrase one of my favorite heroes, "It's easy to empower people, I've done it a thousand times." Most of us know we can unconsciously disempower people just as fast as we can consciously empower them. Second, and more subtle, our topic implies that when they work, empowerment models work better in the private sector than the public, and that the average private sector employee enjoys more empowerment than the average public education employee.

I do not know of any defensible research to prove or disprove that hypothesis, but I know a lot of people who have opinions. My opinion is that when you get beyond the small, entrepreneurial businesses, or for that matter, the small rural school, and compare like-size public and private entities, the differences may be as much perceived as they are real.

The Historical Model

At the small, entrepreneurial level, however, there is empirical evidence that empowerment is often a naturally occurring phenomenon. This suggests that there is something about small business that makes empowerment easier. Of course most of us do not need the research to figure out why. It's the profit motive, right? Well, kind of. Actually it is not so much the profit motive as it is the motive that small businesses have to keep track of things.

The relationship between quantification and decision making has been established in science, education and business for hundreds of years. If you count something before you make a decision, and then you count it again after you implement the decision, you tend to be able to see the effect of the decision on whatever you counted, whether it happens to be money or anything else.

At a simplistic level, you empower someone as soon as both you and they choose to trust them to make good decisions. In a small business this is pretty easy because the difference between success and failure is so obvious. There are only about three ways to evaluate the quality of decisions in small business: (1) Which decision will make the most short-term profit? (2) Which decision will insure the most profit over time? (3) Which decision will continue to make adequate profit? If you and I agree on which strategy is superordinate and if we both have access to the numbers, it really does not matter which one of us is making the decisions.

If our strategy is short-term profit, whether you're making a decision or I am, we will drive costs to the bone. We will delay or avoid spending money and take as few risks as possible. We will also tend to treat both suppliers and customers as adversaries who compete with us for our profit.

If we are willing to delay or reduce profit now, in favor of ensuring it over time, we will both look for ways to grow the business and invest in the development of people, technology, and infrastructure. We will establish relationships with suppliers based on things like quality and reliability rather than strictly price. Above all, we will treat customers and employees like precious business assets rather than merely as sources of immediate revenue or labor.

On the other hand, if the only reason we make money is to enable us to keep doing something we really enjoy, we will just check to see that each decision will not bankrupt us, then we will base the decision on whatever gives us the most satisfaction. We still measure financial impact, but as a threshold rather than as a final indicator. Most historical case studies of successful empowerment in large organizations and corporations have been somewhat of a variation on this theme, recreating the characteristics of a small business within subcomponents of the larger organization.

If the Worker Can Quantify It, You Can Probably Empower It

I am sure that you have already gotten my point. Empowerment is easy when decisions can be quickly evaluated without the need to resort to someone's opinion. As plebeian as it sounds, this is just about all there is to the mechanics of empowering other people. There is a confidence that both you and the performer would use the same information, with the same motive, to make decisions.

If you do not have this confidence, no matter how well-meaning you are, no matter how much you believe in "empowerment," you will not turn critical decisions over to others. With this confidence, while any given decision might be different from one you would make, over time everything will still be targeted at the same goal.

If you and I can quantify the results of our decisions against something agreed to be relevant, we can empower each other. While money may be the easiest to count, it certainly is not the only thing. The phenomenal success of Total Quality Management (TQM) has once again proven this. Making use of the new communication capacity of the information age, TQM has developed a process that puts tools for quantifying directly in the hands of the workers. Then it builds a structured system to communicate goals, facts, and data across functions and up and down the decision hierarchy. Bosses

do not choose what to quantify or what the numbers should be; however, workers do. Workers also have to prove the numbers they use.

When it is really working, TQM is a marvel to behold: A common system of communication gets everyone aligned toward the same goals. Then, statistical tools generate facts and data that empower everyone who chooses to participate.

This brings me to another assumption associated with our topic. This assumption is that empowerment, in and of itself, is a desirable thing. In our minds, we associate empowerment with freedom, equality, liberty, and respect for the individual. Empowerment can be all of those things, but, as I have tried to suggest already, without the added element of common purpose or goals, it can also be a cruel hoax that wastes precious human talent. No amount of empowerment by itself is an adequate substitute for vision and a worthy purpose. It is also not a substitute for leadership. Having a choice does not mean much to most of us unless we are making a decision about something that has meaning to us.

A Model for the Models

Here is a fundamental construct that I propose to you (See Fig. 1). The idea comes from The Forum Corporation, a management consulting firm out of Boston, Massachusetts. It can be diagrammed as a four part matrix. On the "X" axis is empowerment, low and high. On the "Y" axis is alignment, low and high.

For purposes of this construct, "empowerment" is defined as an environment and state of mind that predisposes individuals to make choices, take action, and assume responsibility for outcomes. "Alignment" is defined as an environment and state of mind that communicates and reinforces common values, vision, purpose, and a sense of urgency. I have lived and worked in all four quadrants of this diagram. I am certain that many of you have also. I will now look at each quadrant.

Abdication

In the lower left quadrant is the ultimate in negative bureaucracy. No vision, no goals. No way to know how well you are doing or even whether you're making a difference. Without empowerment, there is little you can do to change things. In the short term, it is frustrating. In the long term, it is dehumanizing.

Autocracy

In the upper left quadrant is the autocracy of high alignment and low empowerment. Decisions do get made but there is no way to share ownership of them or to influence them when they are wrong. With the short term we may find efficiency, loyalty, and a sense of direction. While with the long term comes groupthink, intolerance, and eventually revolution.

Heroics

In the lower right quadrant we find a seductive world where we have alternatives, but without criteria to help us choose among them, each of us determines his or her own criteria built around his or her own goals. It is Alvin Toffler's world of "overchoice." Short term, the sense of freedom can produce creativity, innovation, and wonderful acts of heroism. In the long term comes the inevitable confusion, dispersion of unfocused energy, and large amounts of effort wasted in the protection of turf and internal competition.

Aligned Empowerment

The suggestion, of course, is that the best of all worlds is in the upper right quadrant. It can be arrived at from below, when a threat to survival pulls the disparate elements of an ineffective organization into alignment. It can be a move across the top, when a new leader with a compelling vision and participatory style takes over a previously autocratic organization. Once an organi-

zation arrives at this highly desirable place, the problem becomes how to sustain it. The organization united against a common threat quickly falls into factions when the immediate threat has passed, unless something is done about goal alignment. The organization rescued from autocracy by an enlightened leader, typically does not change the values of the rest of the leadership. If they do not manage to sabotage the new leader, they quickly take back over at the next leadership change.

Conclusion

You are probably getting tired of hearing about it, but the key to sustaining empowerment is probably total quality management. Look at it this way, in order to make TQM work, an organization must have a clear picture of who its customers are and how to quantify their level of satisfaction.

TQM depends on the intelligence and motivation of people, so it develops a deep, abiding respect for innovation and new ideas. While a TQM organization may be teeming with ideas and opinions, it makes its decisions based on facts and data. "In God we trust, everyone else must bring data."

Finally, a total quality organization instills in every person and in every process the value of continual improvement. Nothing is ever expected to stay the same for very long. Each morning provides each of us an opportunity to make a small improvement in the way we did something the day before. Every cycle of every process generates information that can be applied by the workers using the process for the improvement of that process. The most satisfying form of empowerment is when we have the freedom to do something that matters to us better.

Do private sector models on the empowerment of employees fit in public education? Absolutely! The models do not just belong to the private sector. They never did. Trying to empower people without doing the planning, prioritizing, and communicating necessary to align their efforts can be a terrible waste of human talent. Therefore, before your model can truly claim success, it must be embedded in the culture well enough to outlive at least one inspirational leader or a single survival-threatened enemy.

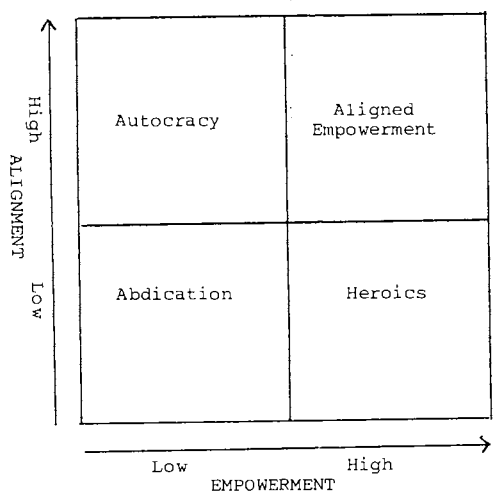

Fig. 1

[The End]

Teacher Empowerment in Education: A Response

By John Britz

Mr. Britz is with United Teachers of Los Angeles.

As a contributor to this conference, I was asked to react to the topic "Empowerment of Employees—Private Sector Models in Public Education," and specifically to a presentation given by a fellow contributor Jim Alleman of the U.S. West Marketing Resources Group (Mr. Alleman's excellent presentation is also a part of this IRRA conference-publication). However, my presentation is more of a tangential reaction to Mr. Alleman's comments, rather than an attempt to show the difference or relevance of his remarks to teacher empowerment in education.

Society has transitioned from an industrial society into an informational society. Consequently, people and the information they produce are the most important ingredient in the economic growth of that society. The advanced technologies of an information society assist in establishing a global fast track in which managers no longer have the time to create, direct, evaluate, disseminate, etc., on their own.

Education has the responsibility to prepare people to function in this society. Education, in this global fast-track world, does not have the luxury to take an entrepreneurial approach and create a new education system. It can only take an entrepreneurial approach and make the old system more responsive and sensitive to a student with new varied needs. To do this, management must be willing to empower teachers to create, direct, evaluate, and disseminate relevant education.

Teacher Empowerment

In 1989 the United Teachers of Los Angeles entered into a labor dispute with the Los Angeles Unified School District, which resulted in a strike. One of the major issues in that strike was teacher empowerment. The teachers in Los Angeles recognized the school system was not meeting the needs of their students and demanded change. Through the collective bargaining process, the union, taking heed of the cry from its membership, developed and presented a two-level empowerment proposal entitled "Shared Decision Making and School-Based Management." This model empowered all the stakeholders in education (teachers, administrators, parents, community members, and students at the secondary level). The dispute was settled and teachers had gained an opportunity to seek reform and restructuring. This opportunity was granted to approximately seven hundred schools that educate over five hundred thousand students.

Level one, shared decision making, is a structured empowerment model through which the stakeholders make decisions concerning five agenda items: (1) staff development programs; (2) student discipline guidelines and code of student conduct; (3) schedule of school activities, events, and special schedules; (4) guidelines for use of school equipment; and (5) local school budgetary matters.

Level two, school-based management, is a process by which the teachers and administration can design and propose a restructured approach to improving education. The limits are endless and controlled only by the creativity of the individuals, time, availability of funds, the needs of students, and an agreement among parents, teachers, and administration to support the proposed change.

The empowerment models are structured to provide each school with a council made up of elected stakeholders and chaired jointly by the site's union repre-

sentative and the principal (fifty percent of the council is comprised of elected certified bargaining unit members at the site; and fifty percent is comprised of the elected parent/community representatives, an elected classified representative, and at the secondary level, an elected student).

The shared decision making model addresses how decisions will be reached; agenda items covered; meeting times; election guidelines; who replaces absent council members; a formula that establishes the size of the council based on either school enrollment or the number of teachers at the site; and special consideration for early childhood education centers, adult education schools, magnet schools, special education schools, etc.

The school-based management model establishes a district-wide Central Council comprised of 24 members (fifty percent appointed by the district and fifty percent appointed by the union). Parents and community representatives may be appointed to this Council. The Council is chaired jointly by a district appointee and a union appointee. The functions and responsibilities of this Council are to study the shared decision making and school-based management models; develop training programs to assist the participants; share and disseminate information; review, evaluate, and approve proposals for restructuring or reforming education at the site; monitor shared decision making and school-based management at the local sites; and develop guidelines for how decisions are to be reached.

The implementation of the empowerment model has resulted in success at some schools and failure at others. The length or purpose of this presentation does not permit me to share examples. As a conclusion, I will share my observations, insights, and cautions as to a few ingredients that must be present if an empowerment model is to guarantee success as a means for reforming or restructuring education.

Prior to any model being selected to implement teacher empowerment, there should be an information program developed and implemented to educate the stakeholders as to what empowerment means and why support for the concept is necessary if it is to succeed. Once a decision is made to empower teachers, the school district and the union should develop a strategic plan that will reveal a reason to empower and produce data that will guide the stakeholders on their journey to educational reforms. The model should then be developed either through collective bargaining or some other process by the school district and the union, as well as outlined in an enforceable agreement. This approach formalizes the commitment of the parties to make empowerment a priority that will work.

However, there are certain ingredients that one cannot force, such as a trusting relationship; adequate funds to provide time for the stakeholders to plan, implement that plan, and be trained to do the job; and funds to give educators an opportunity to discover, experiment, and share ways to meet the needs of students. This list is not complete, but in my experience it must be addressed if any empowerment model is to be a means for establishing educational reform and restructuring.

Conclusion

Finally, I must point out the relationship and importance accountability plays in any empowerment model. Parents must be accountable for their attitudes toward and support for learning. This in turn will encourage their children to respect and participate fully in their education. Teachers must be accountable for their development of a level of competence, sensitivity to global differences, and their willingness to try new and varied approaches to meeting student needs.

The union must be held accountable for the support it gives to educators by participating fully in any empowerment model. The district must be held account-

able for their willingness to decentralize decision making, budgeting, curriculum development, and staffing, etc. In addition, the business community must set education as a priority and be held accountable for their efforts to support educational reform with dollars and resources. In summary, empowerment is nothing more than a process to be used to bring change. It will never be the sole answer.

[The End]

Downsizing: An Overview of Legal Considerations

By Bernie Siebert

Mr. Siebert is an attorney with the Denver, Colorado firm, Sherman & Howard.

Whether to downsize your work force, and the extent of downsizing, is primarily a business decision. However, employees are protected from downsizing if the downsizing interferes with rights provided to employees by federal or state laws. This paper broadly identifies the source and general extent of these laws.

Federal Laws

The National Labor Relations Act (NLRA) and the Labor Management Relations Act (LMRA),[1] are statutes that are applied to union employers generally, but they affect most private employers except for railroad and airline workers. They provide protection to employees, except for supervisory employees, independent contractors, family members, and agricultural or domestic servants:

Section 8(a)(3) of the NLRA prohibits discrimination to encourage or discourage union membership. Under this provision, it is necessary that the employer have an antiunion animus. Two examples illustrate this provision in the downsizing context. A nonunion employer violates this provision if it selects for downsizing an employee because the employee tried to organize a union. Similarly, a union employer violates this provision if it selects for downsizing an employee because the employee is the union steward or provides some other union visibility in the workplace.

Section 8(a)(4) of the NLRA prohibits discrimination because the employee filed unfair labor practice charges under the NLRA or gave testimony in a proceeding under the NLRA. While unfair labor practice charges and testimony under the NLRA usually involve unionized employees, this is not always true. A nonunion employer may also be the subject of unfair labor practice charges.

Section 8(a)(1) of the NLRA prohibits an employer from interference, restraint, or coercion of an employee's rights to engage in concerted protected activity. This section is so broad that it is always violated if Sections 8(a)(3) or (4) are violated. In addition, there are situations not covered by those sections that would still violate section 8(a)(1). Thus, there can be a violation even though there is no unlawful motive and no evidence of union activity. For example, downsizing selection motivated by two employees who complained together about wages would violate this section. Moreover, supervisors are protected under this section if action directed toward them would interfere with the rights of regular employees. For example, selecting a supervisor for downsizing because of adverse testimony at an

[1] 29 U.S.C. § 141 *et seq.*

unfair labor practice hearing violates this section.

Often a unionized employer's ability to choose whom to lay off in a downsizing is restricted by collective bargaining agreements. Seniority provisions are likely to force an employer to lay off beginning with the most recent hires. A charge that the downsizing breached the collective bargaining agreement is often resolved through the grievance procedure, which usually culminates in arbitration. Employees may sue their employer for breach of the collective bargaining agreement under § 301 of the LMRA,[2] but these suits may only be brought if the employee can also prove that the union breached its duty of fair representation.

Unionized employers may have a duty to bargain with their union about either the decision to shut down part of its business or the effects of this decision. An employer must bargain over a decision to relocate work unless 1) it can show that labor costs were either not a factor in the decision or that the union could not have offered labor cost concessions that could have changed the decision; or 2) the work done at the new location is different, the work done at the old location is to be discontinued entirely, or the relocation involves a change in the scope or direction of the business.[3]

If the employer is shutting down part of the business rather than relocating, there is a duty to bargain only about the effects of this decision.[4] Of course, an employer who partially shuts down a plant because of an antiunion motivation violates Section 8(a)(3) of the NLRA, which prohibits discrimination to discourage union membership.[5] Furthermore, failure to bargain about the effects of a closing may result in a backpay order for several months from the date of the shutdown.[6] Plant closures are also subject to the notice requirements of the federal Worker Adjustment and Retraining Notification Act (WARN),[7] discussed below.

The NLRA gives the National Labor Relations Board authority to fashion remedies. Typically, reinstatement and backpay are imposed by the administrative law judges who decide cases under the NLRA, although bargaining orders are also sometimes imposed.

The Fair Labor Standards Act (FLSA)[8] is a statute known primarily for its child labor, minimum wage, and overtime provisions. However, Section 15(a)(3)[9] prohibits discrimination for filing a complaint or otherwise instituting proceedings under the FLSA. The complaint requirement is broadly construed to also cover an unofficial assertion of rights through complaints at work.[10] Accordingly, selecting an employee for downsizing because the employee complained about wages or overtime pay violates the FLSA. The FLSA provides for backpay and reinstatement, double damages, and attorney's fees in a jury trial setting.

Generally, employers may not select employees for downsizing because they are members of protected classes. Under Title VII of the Civil Rights Act of 1964 (Title VII),[11] protected classes include race, color, religion, sex, or national origin. Race, national origin, and some religious discrimination is also prohibited by Section 1981 of the 1866 Civil Rights Act. Under the Age Discrimination in Employment Act (ADEA),[12] persons 40 and over are protected. Under the Americans With

[2] 29 U.S.C. § 185.

[3] *Dubuque Packing Co.*, 303 NLRB No. 66, 137 LRRM 1185 (1991).

[4] *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 107 LRRM 2705 (1981).

[5] *Id.*

[6] *Royal Plating*, 160 NLRB 990, 63 LRRM 1045 (1966).

[7] 29 U.S.C. § 2101.

[8] 29 U.S.C. § 201 *et seq.*

[9] 29 U.S.C. § 215.

[10] *Love v. Re/Max of America*, 738 F.2d 383, 387 (10th Cir. 1984).

[11] 42 U.S.C. § 2000e *et seq.*

[12] 29 U.S.C. § 621 *et seq.*

Disabilities Act of 1990 (ADA), individuals with a wide variety of actual or perceived handicaps are protected.

Prohibited discrimination under these statutes may take place in three forms. "Disparate treatment" is the classic situation and it occurs when the protected category, *e.g.*, race, is the basis for selection for a downsizing selection.

A special problem comes when selecting employees for downsizing because of their high salary. The courts of appeals are split on whether an employer can consider an employee's high salary when the high salary may be due in part to length of service, and hence age.[13]

"Disparate impact" refers to situations where a neutral criteria is used to select employees for downsizing, but the factor has a disproportionate impact on a protected class. For example, in downsizing situations, employers often seek to cut groups of highly paid employees. However, if the highest paid employees are those with the longest service, and hence the oldest, use of wages as a selection criteria may have a disparate impact on workers over 40, which would violate the ADEA.[14]

The third category of discrimination prohibited by these statutes is retaliation for asserting rights provided by these statutes. Thus, selecting an employee for downsizing because the employee filed an EEOC discrimination charge is prohibited.

The courts of appeals use different standards to establish a *prima facie* case in reduction-in-force cases under the ADEA. For example, in the most recent discussion of this subject, the Sixth Circuit ruled that to establish a *prima facie* case, "a plaintiff must either show that age was a factor in eliminating his position, or, where some employees are shifted to other positions, he was not given a new position, and that the decision not to place him in a new position was motivated by plaintiff's age." [15] It is insufficient to merely show that younger persons were retained in other jobs the plaintiff was qualified to perform.[16] Instead, the employee must show he/she was more qualified than a younger co-worker.[17]

However, the Tenth Circuit, which embraces Colorado, only requires "evidence that an employer fired qualified older employees but retained younger ones in similar positions." [18] The employee need not even show that he/she was "as qualified" as the retained younger employee.[19]

A recent decision under the ADEA in a downsizing context illustrates how little evidence is necessary to support a conclusion that an older employee was a victim of discrimination. *Hawley v. Dresser Industries* involved almost $400,000 in damages and was decided in March 1992.[20]

Mr. Hawley was hired in 1946 and in 1977 became president of a division of Dresser. He was demoted to vice president in 1981 by Mr. Korb, and Mr. Korb eliminated his position as part of a corporate reorganization in 1983, when Mr. Hawley was 62. Six of eight employees in similar positions throughout the company were eliminated. On the other hand, 11 of 12 (all but Mr. Hawley) executive-level personnel in positions that were eliminated under Mr. Korb were assigned new posi-

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[13] Compare *Bay v. Times Mirror Magazine Co.*, 56 FEP Cases 407 (2d Cir. 1991), employer may consider an individual employee's above-market salary; with *Metz v. Transit Mix, Inc.*, 828 F.2d 1202 (7th Cir. 1987), employer may not save costs by replacing highly paid older employee with lower paid younger employee.

[14] See *Bay v. Times Mirror Magazine Co.*, 56 FEP 407 (2d Cir. 1991) citing *Geller v. Markham*, 635 F.2d 1027 (2d Cir. 1980).

[15] *Hawley v. Dresser Industries*, ___ F.2d ___, 1992 WL 42403 (6th Cir., March 10, 1992).

[16] *Barnes v. Gencorp Inc.*, 56 FEP 1203 (6th Cir. 1990).

[17] *Id.*

[18] *Branson v. Price River Coal Co.*, 853 F.2d 768, 771 (10th Cir. 1988).

[19] *Id.*

[20] ___ F.2d ___, 1992 WL 42403 (6th Cir. March 10, 1992).

tions with Dresser. Mr Hawley's pension was enhanced by over $170,000 as part of his termination.

The court held that three facts constituted sufficient evidence to support the jury's finding of willful age discrimination. First, of the two out of the eight employees in similar positions as Mr. Hawley who were not eliminated, one was younger than Mr. Hawley. Second, one of the 11 executive personnel under Mr. Korb's supervision who was not eliminated was younger than Mr. Hawley. Third, the person who replaced Mr. Hawley as president of the division in 1981 testified that based on a conversation he had with Mr. Hawley, he thought Mr. Hawley was so close to retirement that he would not mind being terminated.

This decision underscores how careful employers must be when selecting employees for downsizing. If only some employees were offered new positions, employers must be prepared to justify why all employees were not offered new positions. Similarly, if not all employees in a particular class are eliminated, employers must be prepared to defend this selection process from attack by members of every protected class.

With the passage of the 1991 Civil Rights Act, which enhanced the procedures and remedies under Title VII, all civil rights plaintiffs are now entitled to jury trials, compensatory damages for intentional discrimination, attorney's fees, expert witness fees, and sometimes either punitive damages or double damages.

Worker Adjustment and Retraining Notification Act (WARN)[21] applies to employers with at least 100 full-time employees or at least 100 employees who in total work 4,000 hours per week.[22] Section 3 of this statute requires notice to be provided to employees and government agencies 60 days before certain downsizing takes place. Notice is required if a single operating unit within an employment site is temporarily or permanently shut down so that there is an "employment loss" during a 30-day period for 50 full-time employees. This is termed a "plant closing."[23] Notice is also required for "mass layoff," which is defined as an employment loss of 30 days for at least 33 percent of the employees if an employer has at least 50 employees, or a layoff affecting at least 500 employees.[24] "Employment loss" means employment termination, layoff exceeding six months, or a reduction in hours of greater than 50 percent during each month of any six-month period.[25] Certain exceptions apply to this definition if there is a sale of all or part of the business, or if there is a work relocation and the employer offers to transfer the employee.[26]

The notice provisions do not apply to the expected end of temporary projects.[27] There is also an exemption for strikes and lockouts that are not intended to evade the notice requirements.[28]

Section 5 provides that employers who violate the notice provision may be required to pay backpay and benefits to employees for up to the entire 60-day period and civil penalties of up to $500 per day to government agencies. Prevailing parties may be entitled to attorney's fees as well.

State Laws

State courts often look to decisions of courts interpreting the federal civil rights statutes for guidance, so often the substantive laws will be similar. However, the remedies under many state statutes are inferior to those provided by the federal statutes, so employees are usually more likely to use the federal statutes. Exceptions to this trend exist where the

[21] 29 U.S.C. § 2101.
[22] § 2(a)(1).
[23] § 2(a)(2).
[24] § 2(a)(3).
[25] § 2(a)(6).
[26] § 2(b).
[27] § 4(1).
[28] § 4(2).

state statute provides greater protection. For example, in Colorado it is generally prohibited to discriminate against employees for lawful activities engaged in outside of work.[29] Thus, the employee selected for downsizing because he roots against the Denver Broncos may have a claim for discrimination under this provision.

Many states, including Colorado, have enacted labor statutes. Provisions of the Colorado Labor Peace Act[30] that interfere with or are the equivalent of the federal labor statutes are preempted.[31]

State labor codes such as Colorado's do not appear to significantly impact downsizing decisions. Possible exceptions, however, are C.R.S. § 8-2-108, which prohibits employers from preventing employees from participating in politics.

Employees affected by downsizing may sue for breach of express implied contracts if personnel policy handbooks or other representations establish that certain procedures will be followed.[32] Colorado courts usually hold that there is no implied covenant of good faith and fair dealing in the employment context, but definite expressions of "fair play" may give rise to a claim for breach of an express covenant of good faith and fair dealing.[33]

Employees selected for downsizing because they sought to exercise public rights, such as filing a claim for worker's compensation benefits, serving jury duty, refusing to commit an illegal act, or because they "blew the whistle" on employer misconduct, may have a tort claim for violation of public policy.[34]

Conclusion

The ability to downsize, like other employment actions such as termination, carry with it a responsibility to respect employees' rights. Accordingly, laws generally applicable to employment actions are applicable to downsizing as well. Moreover, because downsizing may affect large numbers of employees, extra care must be given to selection methods because potential liability is greater in terms of sheer numbers of employees, and because special statutes such as WARN may be involved.

[The End]

Employment Issues Involving Gender: Women's Issues

By Joyce D. Miller

Ms. Miller is Vice-President of Social Services, Amalgamated Clothing and Textile Workers Union, AFL-CIO.

It is my pleasure to address the IRRA Spring Conference on a topic that is very close to my heart—women's issues. Let me begin by saying that, quite frankly, I do not believe there are women's issues and men's issues. To suggest there is a distinction between the concerns of women and men leads one to evaluate the importance of these areas based on the power of each group. While there has been change, it is quite evident that the agenda

[29] C.R.S. § 24-45-402.5.

[30] C.R.S. § 8-3-101 *et seq.*

[31] *Building Const. Trades Council v. American Bldrs.*, 139 Colo. 236, 337 P.2d 953 (1959).

[32] *Continental Airlines, Inc. v. Keenan*, 731 P.2d 708 (Colo 1987).

[33] See *Redies v. Nationwide Mut. Ins. Co.*, 711 F.Supp. 570 (D. Colo. 1969), no implied covenant claim; and *Price v. Federal Express Corp.*, 660 F. Supp. 1388 (D. Colo. 1987), statements in company newspaper about fair treatment created express convenant of good faith.

[34] See *Martin Marietta Corp. v. Lorenz*, 823 P.2d 100, 109 (Colo. 1992).

is still set by men and, because of labeling, so called women's concerns are given short shrift.

The reality is that women's issues cannot be separated from the quest for quality in everyday civil society. Solutions to the problems that we discuss today are critical to a healthy, safe, and productive environment.

I first want to share a common myth in the United States. If you were to question an 18-year-old woman today about whether she thought women had equal job opportunities with men, she would probably say yes. If you asked her if she could work full time in a fulfilling job and raise children, she would probably say yes. If you asked her if she will make her own decisions and lead her life the way she wants, of course she would say yes.

Making Progress

Hopes and expectations have been raised since the women's and civil rights movements of the 1960s and 1970s. Unfortunately, as women have made steady progress toward the goals of equal opportunity, the ability to raise a family, to work in a decent job, and to achieve personal fulfillment, some serious setbacks are taking place in our country.

Women have entered the work force in greater numbers than ever before. Fifty-six million women—69 percent of whom are women between the ages of 18 to 64—make up 45 percent of all workers. Half of all African American workers and 40 percent of all Latino workers are women.

Women can be found in all areas of work, including heavy construction, firefighting, the police and military, the scientific profession, and all levels of management. Women now comprise 5 percent of all "nontraditional" blue collar jobs.

Yet women continue to be stuck at the low end of the economic spectrum. Almost 50 percent of women workers earn less than $10,000 per year. Women earn only 70 percent of what a white male earns; African American women earn 62 percent; and Latinas earn 56 percent of a white male's median wage.

While the average wage, as compared to men, has risen from 59 cents, much of that increase is due to the downward pressure on male wages.

Family Considerations

The family is alleged to be the bedrock of American society. Let us look at how this bedrock is doing. According to a study issued by the Children's Defense Fund, young families with children have seen a drop in income of 32 percent. Half of the decline is attributable to declines in wages, and to government payments for welfare and unemployment. All ethnic groups have been affected—white, African American and Latino. The study found that wages for families headed by a parent under 30 years of age dropped from $27,765 in 1973 to $18,844 in 1990. Income for families headed by persons 30 to 64 years of age fell more modestly, but still fell 6.4 percent. The average income in 1990 was $38,451.

Single-headed female households lost 27 percent of income between 1973 and 1990, as compared to young married couples whose income dropped 13 percent. What does this all mean?

The cost of living has not declined. Families are struggling to make ends meet, not succeeding, and feeling the frustration. Frustration brings increased substance abuse, more crime, violence, school failure, teen pregnancy, racial tension, envy, despair, and cynicism—a long-term economic and social disaster.

A major catalyst for women's surge into the work force was the declining family wage. A woman's wage in a two-earner family accounts for nearly half of the family's income. This pays for housing, food, education and clothing. It does not cover luxuries.

Despite women's economic importance to the family, women's wages remain low.

There are three reasons: discrimination, lack of promotion and training, and lack of unionization.

Sixty-six percent of women workers are employed in occupations that are female-dominated and historically low paid. The labor movement has recognized this shortcoming and moved to organize traditional women's jobs.

Women are responding to the efforts. We now make up over 35 percent of all union members—there are 7.5 million of us.

Unionized women workers earn 30 percent ($105 per week) more than their non-union counterparts. Women of color earn even more: African American women earn $109 more per week and Latina women earn $114. In fact, union membership is more effective in raising the wages of low-income workers than education, job training, or work experience.

Also affecting women's work is the rampant practice of sexual harassment. Reports show that almost 90 percent of women workers say that they have been harassed on their jobs, but few actually report these incidents to anyone for fear of job loss, ridicule, loss of benefits or promotion, increased harassment, or fear of not being believed.

The Thomas Supreme Court confirmation hearings demonstrated that we have a long way to go before understanding the problem. Yet unions address sexual harassment through the grievance procedure on a regular basis. We provide protection to our members to combat the problem. CLUW, I am proud to say, works closely with unions to share information on and develop techniques to combat the problem.

More than 50 percent of women with children under the age of one work; 64 percent of women with children under the age of 18 work. Seventy-three percent of mothers employed outside the home work full time. In addition to child care responsibilities, more than one million women have responsibility for caring for aging or ill parents or spouses.

Our children are our future. Our elderly deserve respect and appreciation for their contribution to society. What are we doing as a society to alleviate this suffering?

Nothing has been done during the last twelve years of anti-government leadership in the White House. The Reagan and Bush administrations obviously feel that minimum standards are not necessary in the areas of family leave, health insurance, or care for children and the elderly.

The President continues to veto federal legislation requiring firms with more than 50 employees to provide 12 weeks of *unpaid* leave for either the birth or adoption of a child, or the illness of a family member. European countries allow up to two years *with compensation* for the care of children.

The U.S. and South Africa are the only countries that do not have a national health insurance plan. The headlines are full of stories of the excessive costs of health care. Employers are even demanding national health insurance. Yet this administration insists on maintaining the *status quo*, allowing the insurance companies to continue to pursue their profits at the expense of those who are most in need.

More than 15 million women do not have health insurance from any source, representing nearly half of all the Americans who are uninsured. Half of these women are employed. Three-fourths of the people without insurance are workers with families. Women supporting themselves due to divorce or separation are twice as likely as married women to be uninsured.

And for those fortunate enough to have insurance, what does it cover? It is usually geared towards catastrophic care, while preventative medicine is often ignored. Annual pap smears, physicals, well baby exams, and childhood immunizations are exempt from coverage. Families have little choice but to wait until symptoms develop. Once this happens, expen-

sive procedures are needed to correct the problem. For those without health insurance, trips to the local emergency room become the only way to treat colds, flu, and minor illnesses that blow up into pneumonia or worse.

And what about child care? Who is taking care of the children while mothers are at work? There are 25 million children under the age of 14 in the U.S. whose parents both work. Yet only 1.3 million of these children are enrolled in licensed child care centers. Parents depend on a patchwork of child care services and help from family members.

The average annual child care cost is $3000 to $5000 per child, a staggering cost beyond the reach of many families. This cost mitigates paying child care workers living wages that would reduce turnover and increase the quality of workers.

Congress passed legislation and allocated money to the states to set up more child care settings, yet no minimal national standards were proposed. It is legal for a child care center to house 30 children with one provider.

Even in New York, a progressive state in child care matters, the required annual inspection has been scrapped because of budget cuts. That inspection insured that licensed facilities met quality standards.

Finally, what about our older Americans? Between 70 and 80 percent of the elderly who are chronically ill are living in the community and are being cared for by relatives, mostly women. What happened to our efforts to develop adult day care programs? Families must now care for infirm parents and spouses with little support. Middle class elders find themselves in a Catch 22. They do not qualify for medicaid coverage for in-home treatment, yet they cannot afford the $300 to $400 a week for uninsured home health care.

This has led to what is called "granny dumping," bringing a difficult-to-care-for parent to an emergency room and running away. A case in Idaho recently made the headlines: An elderly man with Alzheimer's disease was found on the street with an attached sign requesting assistance but with no identification. Only through the national media could the family be found and the gentleman returned.

Yet we as society cannot allow these issues to remain within the four walls of a single family unit. The impact of granny dumping, of not providing adequate quality, affordable child care, or of not providing families with appropriate leave time for family events, increases the costs to society. As I mentioned before, increased substance abuse, child/elderly abuse, and crime are all attributable to the stress felt by the American family.

Employers may act on their own to address these problems. A recent General Accounting Office study showed that companies that provide leave can temporarily replace workers for the same or lower cost, which means that extending such benefits helps produce a happier work force without adding to management's financial costs. Where government policy falls short, union contracts often make up the difference. Unions are winning a variety of provisions in union contracts, such as child care, parental leave, health care, and flexible work hours. But, it is not enough.

So-called women's issues, economic viability of the family (however it is defined), quality and affordable dependent care, national health coverage, and parental and medical leave are really the issues that must be addressed to ensure a productive future for America. They affect all of us, and the problems must be resolved if we have a future at all.

Conclusion

I have outlined the critical problems and recommended solutions. This is what women want. It is most fitting that I address you during CLUW's annual working women's awareness week. Our desires and aspirations can be summed up sim-

ply: Women want opportunity, we want to earn an honest wage for an honest day's work. Women want to be able to work with dignity. Women want to work in an environment free of sexual harassment and abuse. Women want to choose—when and *if* we bear children. Women workers want a workplace free of toxic fumes and unsafe working conditions. Women workers outside the home want time to work, raise our families, love our partners, and care for our aging parents. Women workers want change, a world free of exploitation and degradation. Women workers want respect. Women workers want to achieve. Women want what's best for everyone in our society.

[The End]

Grievance Mediation: AT&T's Experience

By Nancy C. House

Ms. House is District Manager of Labor Relations, AT&T Southern Region, Atlanta, Georgia.

AT&T's experience with grievance mediation began in 1985 when the Communications Workers of America (AT&T's largest union) first proposed the process to us. I sat as an observer in one dismissal case and did not like what I saw. In early 1988, CWA again approached us about trying the process. At that time, we had a huge backlog of arbitration cases and that backlog was growing daily. Grievance mediation represented to us a possible way to reduce the number of pending arbitration cases along with the associated monetary liabilities. Indeed, the potential for significant cost savings was of interest to both parties. At the same time, however, there was some fear that mediation would be just another step in the grievance process that would add time and cost rather than reduce them.

After considering the potential rewards along with the possible risks, we ultimately agreed to a trial of the process in the fourteen states of our Southern Region. It was then left up to my CWA Union counterparts and me to work out the details of the procedure from the ground up. The first major hurdle was drafting the rules that would govern the use of the process. Some idiot, and it may have been me, suggested that the three of us write up our own proposed sets of rules and then we would get together and combine the best of each in order to come up with the perfect set of rules. Was that ever a mistake! We had each approached the writing from different perspectives. Our styles of writing were totally different and we almost required a mediator to get us through the first meeting. Finally, we agreed to destroy our masterpieces and meet again in two weeks with clear minds and clean paper.

At our next, and incidentally last meeting to draft the rules, we focused on the broad questions that needed to be answered. How do cases get to mediation? At what point in the grievance process do we convene a mediation conference? What kinds of cases are appropriate for mediation and how do we separate them from the rest of the cases?

All of our contract interpretation cases are heard at the national levels of CWA and AT&T. Those cases were therefore excluded from our trial.[1] We were left then with only disciplinary cases and we

[1] Even now, with the mediation process being included in our national agreements, contract interpretation cases are specifically excluded from the process.

decided that any disciplinary case that has been appealed properly to arbitration is a potential case for mediation. Recognizing that successful mediation requires an openness and willingness to negotiate, and not wanting the process to become simply another step in the grievance procedure, we decided that the parties must mutually agree to a mediation conference within fifteen days of the union's appeal to arbitration. In the absence of such an agreement, the case will go directly to arbitration.

Concerning the process itself, our desire was to keep the mediation conference as informal and comfortable for all participants as possible. For these reasons, we agreed that the conference would be conducted on the union or company premises in the city where the grievant worked, and the rules of evidence used in courts of law would not apply. There should be two conference rooms in the same general area so that the mediator can move easily between the parties and so that the parties can have a private place to caucus.

Probably the most controversial issue that we had to initially resolve was who should attend the mediation conference. We finally agreed that fewer people would make compromise and open discussion easier. Attendees for the company are the grievant's supervisor and district level manager, as well as a manager from labor relations who acts as spokesperson for the company. The union spokesperson is a CWA staff representative, and other attendees for the union are limited to the local union president and the grievant.

As for the mediator's role in the process, we decided that the mediator would have no authority to compel the resolution of the grievance. To grant this authority would inhibit the open and free discussion between the parties that we were seeking. The mediator can conduct the conference in any manner that is believed to be most likely to produce a settlement. If no settlement is reached, then the mediator is required to assume the role of an arbitrator and gives the parties an immediate oral advisory opinion as to which party would likely prevail in arbitration along with the basis for that opinion.

The advisory opinion may result in more negotiations between the parties, but if no settlement is reached the grievance can then be scheduled for regular arbitration. No person serving as a mediator in any given case can serve as the regular arbitrator on that same case. In addition, nothing said or done by the mediator, or either of the parties in mediation, can be referred to in arbitration.

Several other important points are covered by our master mediation agreement. First, by agreeing to schedule a mediation conference, the company is not acknowledging that the case is properly subject to arbitration and the company reserves the right to raise the issue of arbitrability at a later time. Second, we agreed to share equally the expenses of the mediator. Each party is, of course, responsible for compensating their own people and covering their own expenses associated with the process. Finally, we agreed to contract with Professor Stephen Goldberg at the Mediation Research and Education Project at Northwestern University to conduct joint training for us.

Participants in the process must understand that the emphasis is on cooperatively resolving the grievance, not on "winning." This is not an easy concept for some participants to accept, because prior to mediation they may have been involved in adversarial grievance meetings. We learned quickly that it is the responsibility of the spokespersons for the company and union to make sure that their own people are informed about how the process works and what they can reasonably expect from it. If people understand and accept the process for what it is, then the possibility of achieving a successful resolution of the grievance is greatly enhanced.

A Typical Mediation Conference

The mediator opens the conference by explaining what mediation is, what the role of a mediator role is, and what the participants' roles will be. This reinforces what the participants have already been told by their spokespersons and helps to put everyone at ease.

Since all of the cases in our process involve discipline, the mediator asks the company to make opening remarks explaining the facts of the case. The union then follows with their opening remarks. At the conclusion of the opening presentations by the parties, the mediator should have a clear understanding of what the dispute is all about. Normally, they will then want to hear directly from the grievant. When the grievant is done, then the immediate supervisor is usually given an opportunity to say something. This gets people involved and often generates some dialogue across the table.

Once the mediator is satisfied that they have the facts and that everyone has had the opportunity to be heard, the parties are usually separated. From this point on, the mediator's job is to try to ensure that both parties address any weaknesses in their cases and that they begin to move toward some mutually agreeable form of settlement.

It is absolutely essential that all participants understand the behavior of the mediator. The mediator is not there to help you win, but to help you reach some sort of compromise settlement. The mediator's role is to facilitate communications and cooperative problem solving; to emphasize the future and not the past; and to find resolutions rather than fault. This person must look under the surface for issues to understand what is really going on that the parties do not want to discuss with each other. The mediator needs to understand the company's basic concern and also what the union must have to settle. In addition, the mediator must be a person the parties trust enough to confidentially tell their real positions.

If a settlement is reached, we write it up; go over it carefully to make sure everyone understands it and agrees with its specific terms; and then we sign off on it in the presence of both parties and the mediator. If no settlement is reached, the mediator gives us the advisory opinion that I referred to earlier. Sometimes this advisory opinion is given to both parties jointly, other times it is given to the parties separately. Whether it is done jointly or separately depends upon the attitudes and feelings displayed by the parties during the mediation conference and upon the mediator's perception of which way will be most constructive or the least destructive.

Problems We Have Experienced

Most of the problems we have experienced with our grievance mediation process can be attributed largely to "growing pains." In other words, they are things that can and are being overcome as we gain more experience.

For example, the people who attended the joint training for the union were not necessarily the people who wound up presenting the cases. Thus, the union spokespersons sometimes have not had an understanding of the process and the rules. Sometimes, they could be quickly clued in by the mediator and only a relatively few minutes of time were lost. On other occasions, however, this has materially hampered, if not entirely blocked, our ability to reach a settlement. The solution to this problem is more training of the right people, along with better preparation for the mediation conference.

I often call mediators after the conference to determine what the company representatives need to change. A couple of them have stated to me that the company presentations often "go for the throat" of the grievant and create some negative feelings in the room. The mediators suggested that the presentations should be

factual without being overly negative regarding the grievant personally. After reading through some of the presentations, I essentially agreed with that assessment and we provided our managers with additional training to specifically cover this point. Now, we try to make the process less emotional and confrontational. We have found that the grievant and the supervisor are more open and there is a greater chance for reaching a settlement if the parties tell their stories in a factual, unemotional manner, at least in joint sessions. If emotions need to be vented, that can be done with the mediator while the other side is out of the room.

Finally, both of my union counterparts who negotiated this agreement with me have retired. One replacement decided that mediation was an additional step in the grievance process for him to get something for the grievant. Consequently, the arbitration and mediation requests were 20 times higher than before. My first conversation did no good so I stopped approving any grievances for mediation. He subsequently withdrew the requests for arbitration. This game continued for about six months and then we had a meeting with his boss. He has since agreed to appeal only the cases that the union is serious about arbitrating. Since then, things have been working much better.

Strengths of the Process

As we see it, the greatest strengths of the process are:

(1) *Faster resolution of cases.*—There are no transcripts, briefs, or written opinions to wait on like there are in arbitration. Mediators usually spend one day on the process where arbitrators require additional days for research, writing, etc.

(2) *Less expensive.*—In addition to the lower cost for mediators as opposed to arbitrators (resulting from less time spent, not from any material difference in daily fees), there are also no attorney fees, no court reporter or transcript, no hotel conference facilities, and no witness expenses. Furthermore, mediators can usually handle two or more cases in a single day. I understand that the average cost for mediating a single grievance for many companies is around $350. For AT&T, the average cost is considerably higher than that since our labor managers must travel from Atlanta to wherever the grievant is located. Our figure is around $900. However, this is still much cheaper than arbitration, which for us requires an attorney from New Jersey and a labor manager from Atlanta for both preparation and hearing time.

(3) *Less contentious.*—As noted previously, the setting is informal. There are no attorney objections. The focus is on resolving rather than on winning. And finally, the parties make their own resolution rather than have a third-party decision forced upon them.

(4) *Constructive results.*—The focus is on the real problem, not just the grievance. The parties learn to resolve their own problems rather than depending upon an outsider to resolve them. The parties learn settlement skills that carry over to other aspects of their jobs and lives.

Weaknesses of the Process

The weaknesses of the process, real or perceived, could involve possibly fewer settlements at lower steps of the grievance procedure and more appeals to arbitration. Since the process is relatively cheap, either party may push "weak" cases to mediation to try and get "something." The union in particular has little incentive to drop a bad case until after the mediation phase.

Another weakness involves discipline cases that would otherwise go to arbitration. In such cases the company must always give and the union must always get in order to reach a settlement. Also, if there is no settlement and the case goes on to regular arbitration, we have simply added another step to the process, which

ultimately takes up time and costs additional money.

There may also be some pressure to settle every case regardless of the merits. This should not be. Arbitration is still available for cases that are not settled. In addition, the other side has an opportunity to see what kind of a case you really have before going to arbitration. My feeling on this is that all of the facts should have been presented in the lower steps of the grievance process anyway. It makes no sense to hold your big guns in reserve until arbitration if revealing them earlier will help result in a settlement being achieved. In any event, in mediation you present the facts. You are not required to reveal strategies that you might be planning to use in arbitration.

Our Results

While mediation is a part of our national union contracts at AT&T, it has been used very sparingly except in my region. In fact, mediation has probably been used no more than six to eight times throughout the rest of the country, while we in the Southern Region have approved the use of mediation in approximately one hundred cases. Thus, you can consider my region's results to be essentially the results of AT&T as a whole.

From October 1988 through March 1992 there were 101 grievances approved for mediation. Of that number, 12 were withdrawn by the union prior to mediation conference, and 5 were settled by company prior to the mediation conference. There was a total of 84 mediation conferences. A settlement at the mediation conference was the result in forty-nine (58.3%) cases. Seventeen (20.3%) of the cases were settled after the mediation conference. Seven (8.3%) of the cases were withdrawn after mediation conference, and 11 (13.1%) of the cases were left for arbitration.

Nine of the eleven cases have been arbitrated, with five awards in favor of the company and four in favor of the union. The advisory opinion of the mediators was ultimately shown to be correct in seven (77.8%) of the nine cases arbitrated. There are two cases still pending arbitration, and the advisory opinions in both cases are in favor of the union.

[The End]

The Model Employment Termination Act: Fairness for Employees and Employers Alike

By Theodore J. St. Antoine

Professor St. Antoine is with the University of Michigan Law School in Ann Arbor.

The Model Employment Termination Act (META),[1] which state legislatures are expected to consider in the near future, aims to prevent the unfair firing of American workers. At the same time, the Act aims to prevent devastating financial blows to American business. For both employees and employers, META offers streamlined dispute resolution procedures that would be simpler, less costly, and less time-consuming than the civil courts. The essence of the proposal is compromise—not as a matter of political expediency but as a practical, balanced accommodation of the competing worthwhile interests of employers and employees. Workers are entitled to be free from arbitrary treatment; business is entitled to be free from

[1] 9A *Labor Relations Reporter* (Washington, DC: Bureau of National Affairs) IERM 540:21 (December 1991).

unnecessary expense. META would promote both objectives.

META was approved and recommended for enactment in all the states by the National Conference of Commissioners on Uniform State Laws at its annual meeting in August 1991. By states, the final vote showed 39 jurisdictions in favor of the measure and only 11 opposed.[2] That alone attests to META's merits. The Uniform Law Commissioners (ULC) are a cross-section of influential lawyers, judges, law teachers, and legislators from around the country, with an average of about six persons in each state delegation. Bills are prepared by committees that meet two or three times a year for intensive 2-day drafting sessions. Bills are not adopted by the ULC unless they have been read line-by-line at least twice during different annual conferences. More controversial measures, like META, may take three or more readings.

The META drafting committee consisted of eleven members, with myself as "reporter" or principal draftsperson. Traditionally, drafting committees are composed of generalists, with specialized expertise being supplied by the reporter and outside advisors. The META drafting committee received highly useful assistance from representatives of the American Bar Association's Labor and Employment Law Section, the AFL-CIO, the U.S. Chamber of Commerce, the ACLU, the National Employment Lawyers Association, and numerous other groups and individuals.

Unjust dismissal is a significant practical problem. Jack Stieber, former director of the School of Labor and Industrial Relations at Michigan State University, estimates that "[s]ome 60 million U.S. employees are subject to the employment-at-will doctrine and about 5 million of them are discharged each year." [3] He further calculates that around 150,000 of these workers are discharged unfairly under the standards applicable in unionized industries. Until recently, the great mass of American working people had no recourse. Employers could dismiss their employees "at will . . . for good cause, for no cause, or even for a cause morally wrong." [4] The economic deprivation of the wrongfully discharged worker is only part of the story. Numerous studies document the increases in cardiovascular deaths, suicides, mental breakdowns, alcoholism, spouse and child abuse, and impaired social relations that follow in the wake of job loss.[5]

During the past couple of decades, the courts in 40-45 jurisdictions have employed three main theories to carve out certain exceptions to the previously prevailing doctrine of employment-at-will.[6] Those three theories include tort violations of public policy, or "abusive" or "retaliatory" discharge;[7] breach of an express or implied contract, embodied in a personnel manual or an oral assurance at the time of hiring;[8] and breach of the covenant of good faith and fair dealing.[9] For both employers and employees, however, there are serious deficiencies in these common law doctrines. They constitute a weak reed, a fragile safeguard for the worker who has been wronged. And yet in a given case they can wreak havoc on a hapless employer who runs afoul of them.

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[2] *Ibid.*

[3] Stieber, "Recent Developments in Employment-at-Will," 36 *Labor L. J.*, 557, 558 (1985).

[4] *Payne v. Western & A.R.R.*, 81 Tenn. 507, 519-20 (1884).

[5] See B. Bluestone and B. Harrison, *The Deindustrialization of America*, 63-66 (1982); and L. Ferman and J. Gordus, *The Economy and Mental Health* (1979).

[6] 9A *Labor Relations Reporter* (Washington, DC: BNA) IERM 505:41 (February 1992); H. Perritt, *Employee Dismissal Law and Practice* (2d ed. 1987).

[7] *Petermann v. Teamsters Local 396*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959), 38 LC ¶ 65,861; *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330 (1980).

[8] *Toussaint v. Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 292 NW 2d 880 (1980); *Weiner v. McGraw-Hill, Inc.*, 57 NY 2d 458, 443 NE 2d 441 (1982), 99 LC ¶ 55,401.

[9] *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E. 2d 1251 (1977).

The tort or public policy claim will be limited by its nature to rare, egregious situations. How many employers, especially if they have the benefit of knowledgeable counsel, are going to order their employees to commit perjury or engage in an illegal price-fixing scheme, and then fire them if they refuse? To avoid a contract obligation, all an employer has to do is refrain from making any commitments about future job security. Even if an employer has made such a commitment through a policy statement in an employee handbook, most states permit a unilateral revocation as long as there is adequate notice to the affected workers.[10]

The covenant of good faith and fair dealing, which is potentially the most expansive protection for employees, has been accepted by a dozen states at most. Conceptually, as New York's highest court has observed, the extension of the covenant to cover wrongful discharge would not be so much an exception to at-will employment, as a negation of the whole doctrine.[11] Most courts are not going to be so activist as to take that step. Finally, the great majority of successful plaintiffs are professionals or upper-level management personnel. Rank-and-file workers who are fired usually have too little money at stake to make their cases worthwhile for lawyers operating on a contingent fee basis.

On the other hand, for an employer that does get ensnared in a common law wrongful discharge action, the results can be extremely costly. Various studies of California lawsuits found that a plaintiff who could get to the jury won over 75 percent of the time and the average verdict ranged between $300,000 and $450,000.[12] Throughout the country, single individuals have received jury awards covering compensatory and punitive damages as high as $20 million, $4.7 million, $3.25 million, $2.57 million, $2 million, $1.5 million, $1.19 million, and $1 million.[13] Company attorneys in Chicago, Cleveland, and Detroit tell me that even the successful defense of a discharge case before a jury will cost between $100,000 and $150,000, while their counterparts on the coasts say that figure can reach $200,000. In addition, a recent RAND study indicates that the "hidden costs" incurred by American business in trying to avoid this onerous litigation, including the retention of undesirable employees, may amount to one hundred times more than the adverse judgments and other legal expenses.[14]

In sum, the central defects of the existing common law system are that employees' substantive rights are too limited and uncertain, the remedies against employers are too random and often excessive, and the decisionmaking process is too inefficient for all concerned. META attempts to address each of these problems. It guarantees the vast majority of workers certain irreducible minimum rights against wrongful discharge, but substantially reduces the potential liability of employers. It also substitutes the use of professional arbitrators in place of long, expensive court proceedings as the preferred method of enforcement. That can also mean the elimination of wayward verdicts by emotionally aroused juries.

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[10] *In re Certified Question (Bankey v. Storer Broadcasting Co.)*, 432 Mich. 438, 443 NW 2d 112 (1989), 112 LC ¶ 56,091. *Cf. Enis v. Continental Ill. Nat'l Bank & Trust Co.*, 795 F2d 39, 41 (CA-7 1986), 40 EPD ¶ 36,295.

[11] *Murphy v. American Home Prod. Corp.*, 58 NY2d 293, 304-05, 448 NE2d 86, 91 (1983).

[12] Palefsky, "Wrongful Termination Litigation: Dagwood and Goliath," 62 *Mich. B.J.* 776 (1983); "Discharge Verdicts Average $424,527 in California," 9 *Labor Relations Reporter*, 1 *Employment Rights* (Washington, DC: BNA), No. 14, at 3 (March 3, 1987); and J. Dertouzos, E. Holland and P. Ebener, *The Legal and Economic Consequences of Wrongful Termination* 24-26, 33-37 (1988).

[13] K. Lopatka and J. Martin, "Developments in the Law of Wrongful Discharge," in *ABA National Institute on Litigating Wrongful Discharge and Invasion of Privacy Claims* vii, 13-18 (1986).

[14] J. Dertouzos and L. Karoly, *Labor Market Responses to Employer Liability* (1991).

"Good Cause" Termination

For employees covered by META, the termination of employment would be prohibited unless there was "good cause." [15] Good cause could consist of either misconduct or poor performance on an individual worker's part, or the economic needs and goals of the enterprise as determined by the employer in the good-faith exercise of business judgment. The term "good cause" was chosen instead of the more common "just cause," which appears in collective bargaining agreements, in order to emphasize the economic flexibility accorded the employer, even though no difference in meaning was intended. Interpreters of the statute are directed for guidance to the arbitral precedent developed over the past half century, so the broad language has already been applied and given substance in thousands of decisions.

Examples of good cause for termination in an individual case include theft, assault, destruction of property, drug or alcohol use on the job, insubordination, excessive absenteeism, incompetence, and poor performance. An objective standard exists here, with the finder of fact making the ultimate determination. Economic decisions are primarily subjective, however, with good faith the only limitation on the employer's business judgment. Management is entirely free to determine the nature and direction of the enterprise, the size of the work force, the location of plants, and all other similar matters. About the only restriction is that an employer could not concoct a sham layoff to rid itself of an employee as to whom there was no good cause for a termination, since that would violate the good-faith requirement.

Employers are also entitled to set performance standards for positions in their establishments. Standards may be fixed at the loftiest level management desires, as long as they are not skewed to disadvantage particular individuals. In highly competitive occupations, such as professional sports or legal practice, a performance standard could call for the most proficient performer available for a given position.

META would cover most full-time employees (those working 20 or more hours a week) after one year of service with an employer.[16] An exception exists for small employers, or those employers with fewer than five employees.[17] Small establishments may engage in some of the most arbitrary treatment of workers, but it was still felt unwise to interfere with these mom-and-pop operations. Initially it was proposed to exclude high-level, policy-making executives, but management advisors objected. A trade-off for protection under the Act is the elimination of common law tort and implied contract actions based on prohibited terminations, and of course it is well-paid corporate officials who are the most likely to have the biggest claims. Workers subject to collective bargaining agreements are covered to the extent permitted by federal preemption law.[18] The inclusion of public employees is left to state option.

Displacing Common Law Suits

As indicated, a major trade-off in META is the displacement or extinguishment of most common law suits based on terminations forbidden under the Act. These suits would include implied contract claims and tort claims grounded in such theories as defamation, intentional infliction of emotional distress, and other similar theories.[19] There would be no ex-

[15] Model Employment Termination Act (META) § § 1(4), 3(a).

[16] *Id.*, § § 1(1), 3(b).

[17] *Id.*, § 1(2).

[18] Federal preemption is unlikely. See *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 US SCt 399 (1988), 108 LC ¶ 10,478A; and *Metropolitan Life Ins. Co. v. Massachusetts*, 471 US SCt 724 (1985), 102 LC ¶ 55,497.

[19] META § 2(c) and (e).

tinguishment of rights or claims under express contracts or under statutes or administrative regulations, such as those dealing with job discrimination, "whistleblowing," and occupational safety and health.

Remedies would be confined to those customary under the federal Civil Rights Act of 1964; namely, reinstatement with or without backpay and attorney's fees for a prevailing party.[20] Severance pay is allowable when reinstatement is impracticable, up to a maximum of 36 months' pay in the most egregious cases. Compensatory and punitive damages are expressly excluded.[21]

The preferred method for enforcing META is through professional arbitrators appointed by an appropriate state agency.[22] Such persons have the requisite skill, training, and experience to understand the special problems of the workplace, and they will thus probably be more acceptable to employers and employees. Their efficiency in resolving industrial disputes is also likely to reduce the time and expense of the proceedings. One departure from arbitral practice in the unionized sector is that the burden of proof under META rests on a complainant employee.[23] That accords with the usual rule in the civil courts, but since the employer generally knows best why it terminated the employee, the employer must ordinarily proceed first to present its case. Arbitral awards would be subject only to limited judicial review, primarily on the grounds of corruption, an exceeding of authority, or a prejudicial error of law.[24]

Who should bear the costs of these proposed procedures? As a matter of principle, the new public right to be free from unjust dismissal, like any other public right, ought to be enforced at public expense. But most states are financially strapped these days, and the prospect of an additional and ill-defined fiscal burden could be the last straw for a measure that is bound to generate controversy. Recognizing this, META suggests that as an alternative to the normal filing fee the states consider imposing a substantial part of the cost on the parties themselves, perhaps with a cap on the employee's share in an amount equal to one or two weeks' pre-termination pay.[25]

Among the most hotly debated aspects of META are provisions allowing employers and employees to waive or "opt out" of the prescribed statutory rights and procedures. Thus, by express written agreement, the parties may eliminate the good cause protections and substitute a mandatory severance payment of at least one month's pay for each year of employment,[26] or the parties may agree on a private arbitration procedure to resolve their dispute.[27]

Now, "freedom of contract" is a prized American prerogative, but the waiver of statutory rights in the employment context is traditionally suspect. There is such disparity of bargaining power that workers applying for a job will commonly sign any form an employer places in front of them. There are theories available by which the courts can minimize the risks here—economic duress, contracts of adhesion, and so on. Furthermore, the fairly generous severance pay schedule and other technical features of that provision may largely confine its application to higher-ranking managerial personnel. The courts should also demand that any private arbitration system must meet stringent due process requirements before it may replace the statutory procedures.

Conclusion

Adoption of META's "good cause" standard would not put this country at a

[20] *Id.*, § 7(b).
[21] *Id.*, § 7(d).
[22] *Id.*, § 6.
[23] *Id.*, § 6(e).
[24] *Id.*, § 8(c).
[25] *Id.*, § 5(e) and Comment.
[26] *Id.*, § 4(c) (30 months' pay is maximum required).
[27] *Id.*, § 4(i).

competitive disadvantage in today's global market. The contrary seems to be more true. The United States is the last major industrial democracy in the world that has not heeded the call of the International Labor Organization for generalized legal protections against the wrongful dismissal of employees.[28] Moreover, there is considerable evidence that a secure, contented work force makes for high productivity and quality output.[29] In this instance, doing the right thing may also be doing the smart thing.

[The End]

Defects in the Model Employment Termination Act

By Paul H. Tobias

Mr. Tobias is a partner with the law firm Tobias, Kraus & Torchia in Cincinnati, Ohio.

The Model Employment Termination Act (META) aims to eliminate the cruel employment "at-will" doctrine[1]. META's establishment of a "good-cause" standard governing terminations of nonunion employees is indeed a giant step forward. The focus on the defects of the present expensive, time consuming, uncertain court system is commendable. The selection of arbitration as an alternative solution to the problem deserves careful review. Providing the opportunity for a speedy, inexpensive, therapeutic hearing before an impartial tribunal, with the possibility of reinstatement, back pay, and payment of attorney's fees is, for some victims of unfair discharge, an improvement over the present system.

However, the META is badly flawed. In order to get the backing of the business community, the draftsmen of the Act added provisions that destroy the reforms it appears to foster: (1) elimination of some common law torts and contract claims; (2) elimination of punitive damages in egregious cases; (3) elimination of emotional distress damages; (4) drastic limits on prospective front pay damages; (5) ability of employer to "opt out" of the META by obtaining agreements with employees that provide liquidated damages, establish an internal ADR procedure, and establish performance standards; (6) exclusion of part-time, public, and small firm employees; (7) unreasonably short statute of limitations; (8) limited discovery; (9) liberal appeal provision; and (10) good-cause standard subject to harsh interpretation.

The aforesaid provisions weaken and undermine the stated objective of a fair procedure. In sum, the META "holds the promise to the ear, and breaks it to the heart." [2]

The META is "take-away" legislation. It takes away the right of trial by jury for those employees who now can sue for breach of contract and tort with respect to unfair terminations. Presently, most of

[28] Ass'n of Bar of City of N.Y., Com. on Labor and Empl. Law, "At-Will Employment and the Problem of Unjust Dismissal," 36 *The Record* 170, 175 (1981); "Convention Concerning Termination of Employment at the Initiative of the Employer (No. 158)," in *International Labour Conference and Recommendations*, 68th Sess. (Supp. June 22, 1982).

[29] R. Pascale & A. Athos, *The Art of Japanese Management* 131-57 (1979); Special Task Force, U.S. Dep't of Health, Education & Welfare, *Work in America* 93-110, 188-201 (1973).

[1] This paper deals with the Model Employment Termination Act drafted by the National Conference of Commissioners on Uniform State laws and approved and recommended for enactment in all the states August 1991. See 9A LRR (BNA) IERM 540:21 (December, 1991).

[2] The quote appears in a different context in Summers, *Individual* "Rights in Collective Agreements and Arbitration", *37 NYU L Rev* 352, 410 n 188 (1962).

the states give victims of the public policy tort the powerful remedies of punitive and emotional distress damages, e.g., whistleblowers fired for reporting crimes and safety violations. Similarly, when the employer's discharge undermines the salutary purpose of a state statute, the employee can recover punitive damages. The public policy tort is an instrument of social control and a deterrent to wrongful acts.

META preempts and eliminates the public policy tort. Similarly, the time honored tort of defamation disappears where the false accusations occur as part of the wrongful termination. Also, victims of the tort of "outrage," whose termination shocks the conscience of the community, also lose the right to claim intentional infliction of emotional distress and resultant compensatory and punitive damages. Presently, these victims of egregious wrongdoing are able to obtain favorable jury verdicts. Employers fear that juries will award large punitive damage awards and, therefore, often agree to reasonable out-of-court settlements. The META ends the uncertainty that presently deters employer misconduct and causes settlements. Victims of outrageous cruel terminations would receive no more damages than those who are merely treated unfairly.

Wrongful discharge usually produces severe emotional distress and mental anxiety. Yet META provides no compensatory damages. Compare the new Civil Rights Act of 1991, which provides for compensatory damages, including "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses" [3]. The new Civil Rights Act also provides victims of discrimination because of sex, race, national origin, religion, and disability with punitive damages where the employer acts with "malice or with reckless indifference" to rights. Victims of discrimination currently receive front pay. Beneficiaries of a broken employment contract of job security can often also receive prospective future damages from date of dismissal until date of expected retirement. So can union employees under a collective bargaining agreement who sue under Section 301 for unjust discharge where there is unfair representation by the Union[4]. The META's cap on front pay is three years. This is a particularly brutal blow for older terminated employees (e.g., over age 50) who generally will never be able to obtain a new job with the same pay.

Thus, the META creates a double standard. Victims of "unfair" termination (including wrongdoing, which formerly constituted public policy, defamation, and outrage violations) receive substandard remedies and no jury trial. Victims of statutory discrimination and unpreempted breach of contract and tort, receive substantial remedies and a jury trial to boot.

Some employers may be fearful that the Act will encourage dischargees, who otherwise might ignore pursuit of legal rights, to file claims for arbitration. But the Act gives employers several ways to "opt out." First of all, the Act permits employers to obtain agreements with employees providing small liquidated damage payments in the event of wrongful dismissal[5]. Second, the employer may obtain agreement from employees as to what constitutes good cause.[6] For example, an employer's rules might provide that eight days of absence per year, for any reason, is good cause for dismissal; or that the failure of a salesman to meet a certain quota is grounds for dismissal. Because of the employer's bargaining power, employees would be required to agree to unrea-

[3] Section 1977A(b)(3) of the Civil Rights Act of 1991.

[4] Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185. *Richardson v. CWA*, 443 F.2d 974 (CA8 1971).

[5] Section 4(c).

[6] Section 4(b).

sonable standards that would be binding relative to the good-cause issue.

A third method of evasion of the Act is Section 4(i), which provides that "an employer and an employee may agree to private arbitration or other alternative dispute resolution procedure for resolving the dispute or claim." The employer who establishes an internal system of arbitration or mediation may avoid the standards of the Act. There is no requirement that the private arbitration provide for a due process hearing or an outside impartial arbitrator. An employer's ADR procedure could place even more limitations on employee substantive and procedural rights than contained in the Act, e.g., requiring the employee to pay the costs, and eliminating any discovery and attorney's fees.

The META excludes millions of Americans from statutory protection. The employees of small employers and regular part-time employees are among the most mistreated and least able to afford the present court system. Yet they get no protection from the META. Public "unclassified" employees who have no civil service protection currently serve "at will" and at the whim of their employer. Except for confidential employees and policymakers, there is no good reason for their exclusion from coverage of the Act.

One of the most oppressive features of the Act is the short 180-day statute of limitations. No other category of Americans—neither consumers, victims of personal injury, businesses, home owners, family members—have such a short period of time to review liability and damages issues, obtain a lawyer, and determine whether to file a claim. The discovery provision, while seemingly fair on the surface, also has a disastrous impact on employees. The section reads: "All forms of discovery . . . are available in the discretion of the arbitrator who shall ensure there is no undue delay, expense or inconvenience." [7] Thus, there can be no mandatory discovery until the arbitrator is appointed, which may be several months after the claim is filed. Where an employer resists discovery, the burden falls on the employee to force the issue. The arbitrator, unlike the court, has no power to issue sanctions. The language discourages discovery. In the collective bargaining context, the union does not need extensive discovery because of the steps of the grievance procedure where the union learns the employer's version of the facts. The business agent, union officers, and shop stewards are familiar with the employer's past practices. The union is able to locate favorable witnesses. However, the employee's lawyer is in the dark in the nonunion workplace. Rules of ethics may limit counsel's ability to interview employee witnesses. Generally, the client has little knowledge of the employer's perspective and evidence favorable to the employer. Without discovery, success at arbitration is unlikely.

The Act provides for judicial review where there has been corruption, fraud, partiality, and misconduct, which are traditional grounds for appeal of an arbitration award in court. Under this strict standard, it is very difficult to upset an award. Therefore, both parties normally accept the award. Appeals to court are rare. The META adds "prejudicial error of law" as a ground of appeal, which in effect destroys the argument that arbitration is a speedy process. Hotly disputed cases will undoubtedly be routinely appealed, thus adding an additional year or more to the process.

The use of the terms "good cause" and "reasonable basis" rather than "just cause" used in collective bargaining agreements and by labor arbitrators will hurt employees. Employers undoubtedly will argue that discharged employees are not entitled to a *de novo* review of the issues, if the employer had a "reasonable"

[7] Section 6(c).

subjective view of the matter. Further, employers will argue that arbitrators in many cases should be barred from review of the reasonableness or harshness of the penalty.

The employees will lose most close cases. The plaintiffs' bar does not have the same clout with arbitrators as does organized labor, making arbitrators less likely to view the employee's arguments sympathetically. It is likely that lawyer-arbitrators unfamiliar with the workplace will not be "liberal" but more likely will be "conservative" in their outlook.

The lack of adequate discovery will normally be detrimental. Only in egregious cases where the outrage is clear will plaintiffs stand a chance to win. META arbitration cases will not attract the cream of the plaintiffs' bar. Most employees will have a difficult time finding competent counsel to work on a contingency fee basis, particularly when the maximum fee obtainable will be relatively modest.

Victims of statutory discrimination, where excellent remedies now prevail, will be fearful of invoking arbitration for fear of adverse collateral estoppel results. There are well-heeled employer lobbies at the state level. The traditional pro-employee interest groups (civil rights organizations and unions) have not shown much interest in the fate of "at-will" employees generally. Therefore, there will be no powerful lobbies to speak for nonunion employees. The plaintiffs' bar simply does not have the strength, numbers, and political power to combat the business community. The result will be that the META will no doubt be watered down substantially in states where the "at-will doctrine" prevails. In states like California where courts and juries tend to favor employees, the Act is "take-away" legislation pure and simple.

The political compromise imposed by META deprives thousands of employees of jury trial and substantial damage awards. In exchange, many nonunion employees gain the right to a hearing before an arbitrator and limited damages. However, the opt-out features and other restrictions of the Act make it almost impossible for the employee to win an adequate award. Thus, the Act is illusory. If the META provided a purely optional voluntary remedy, it might serve a useful purpose. However, its mandatory and preemptive features make it difficult for most employee advocates to support.[8]

The commissioners that drafted and approved META mainly consist of conservative citizens, far less "liberal" than the majority of the members of the U.S. Congress. National legislation is more likely to produce adequate remedies for victims of unfair discharge. National legislation would ensure uniformity among the states. Also, federal jurisdiction over wrongful discharge cases seems appropriate. It would enable litigants who have federal discrimination claims, "unfair" discharge claims, and closely related state common law claims to combine them in one action. A federal unfair discharge act, rather than state laws modeled after META, is a better solution to the problem. The commissioners deserve credit for focusing on the problem and attempting a solution, albeit an inadequate measure. State legislators, who seek to give victims of wrongful discharge relief, should do so by expanding and not eliminating court remedies.

[The End]

[8] ATLA (American Trial Lawyers Association) and NELA (National Employment Lawyers Association) have opposed the Act.

Remarks on the Future of Labor Relations in the Federal Sector

By Jean McKee*

Ms. McKee is the Chairman of the Federal Labor Relations Authority in Washington, DC.

I am delighted to share this session with leaders from two important organizations. After this morning's discussion of the glass ceiling, the very fact that all three organizations are led by women demonstrates the changing nature of the work force.

Allan Heuerman is representing Connie Newman. Connie has been simply extraordinary as the head of the Office of Personnel Management (OPM). I am most pleased to share a role with Connie in striving to improve labor-management relations in the federal work environment. Connie has received high marks from both unions and management for creating a positive atmosphere for labor-management relations.

Sheila Velazco leads the oldest and one of the largest labor organizations in the federal sector. Her career has led her to be a role model for all federal employees. I commend her for the continued efforts to encourage more effective communication and cooperation in the federal sector.

It has been 30 years since collective bargaining and labor organizations began their existence in the federal government, and this is a year when we have launched serious review activities of the federal labor-management relations program. I will talk more about these efforts. First, a brief bit of history.

Overview of the Rights of Federal Employees

In 1962, President Kennedy issued Executive Order 10988, which recognized the rights of federal employees to join or refrain from joining employee organizations. In 1978, as part of the Civil Service Reform Act, the rights and responsibilities of the employees, labor organizations, and agencies were elevated to a statutory level. Among other changes, both RPM and the FLRA were created. Under the statute, the FLRA has the responsibility for overseeing the federal labor-management relations program and for providing leadership in this arena. We take this charge seriously.

As those of you involved in federal labor-management relations know too well, the achievement of Congress's lofty goals in passing the statute have often seemed elusive. After all, Congress thought that collective bargaining would lead to the amicable settlement of disputes and would contribute to the effective conduct of the public business.

The question facing us all is why we have this opinion of labor-management relations in the federal government. I have served in the capacity of Chairman of the FLRA since 1988. The members of the FLRA, the new General Counsel, and myself, are all committed to improving the services that we provide to agencies and labor organizations.

For too long we have had to focus on the next case and not on the next 5 years. We do not want it to be what Yogi Berra once said, "the future ain't what it used to be." So we are all looking to the future. How can labor-management relations in the federal government work more effectively? We need to find out what is working. We need to find out what is not working. We need to examine *all* of the barriers to more cooperative labor-management relations. We need to challenge

* This article was derived from a speech Ms. McKee delivered at the IRRA Spring Conference held in Denver, Colorado.

ourselves to look at our own policies and practices. And we need to see whether they further a more productive and healthy workplace for federal workers.

I recognize that the OPM review is just beginning and, hopefully, we will gain a great deal of knowledge about what are the real issues facing all of us. However, we all have been at this venture for some time. I believe we do know what some of the problems are. Of course, based on our particular vantage point or role, we may disagree as to the problems and the solutions. As I see it, three avenues of potential improvement and reform exist. Each of these avenues is within the control of distinct forces. These forces include the statute, the FLRA, and the parties themselves. I will briefly discuss each of these avenues of change. At the onset, I need to say that I firmly believe that we each need to look at what we can do to improve relations between labor organizations and agencies.

The Statute

In terms of the statute, like many pieces of legislation, it is a frequently discussed source of problems and changes, and the Federal Service-Labor Management Relations Statute was a compromise between quite distinct and diverse interests and objectives. Some would say that the statute itself is a chief barrier to the achievement of its purposes, particularly as it relates to the amicable settlement of disputes.

Statutory problems often discussed include the following points: (1) the most significant issues affecting federal workers are removed from the subjects of collective bargaining; (2) agency head review discourages local agreements; (3) the processes for resolving negotiability and collective bargaining disputes take too long and are too cumbersome; and (4) the Statute requires federal labor organizations to represent members of the bargaining unit, even though they are not dues paying members of the organization, which can create financial problems for the union.

However, legislative change takes time. For a number of years I worked for Senator Javits and I know the legislative process well. I certainly believe positive legislative change is possible. However, I also believe that if there are problems with the federal labor-management relations program, we should be looking elsewhere for more immediate change. Then we will also know what barriers to healthy relationships really need legislative change.

The FLRA

As Chairman of the FLRA, I now want to look at what we can do to better serve the parties. The FLRA is frequently mentioned as a major source of problems for labor-management relations in the federal sector. I will not hide or deny that in its early years the FLRA went through some rough times. It was criticized for its actions and inactions. I might add that I firmly believe that the FLRA has been an all too frequent scapegoat. When the FLRA is viewed as *the* major problem, the parties do not have to focus on what they themselves are doing.

As recently as 1990, I was the only member of the Authority for a year and 29 days. Just before this unfortunate time, the Authority had reached its goal of deciding all cases within 6 months of filing. As soon as we met our timeliness goal, we lost a quorum of members and no decisions were issued and disputes went unresolved. Agencies were frustrated. Unions were frustrated. I was frustrated. Since 1990, when the two members came to the Authority, we have made tremendous progress. We have been able to reduce the huge backlog of cases pending. The number of cases before the Authority now stands at approximately 200.

While we may have a handle on the number of decisions to be rendered by the members, I am most troubled by the dramatic and constantly rising increase in

the number of unfair labor practice charges filed with the Office of the General Counsel. This year we are projecting that over 8,400 charges will be filed. This number reflects an increase of 1,100 charges over the number filed in 1991, which represents an 18-percent increase. The General Counsel's staff has been doing an heroic job and has increased its work productivity by 14 percent. But even so, the new filings are outdistancing resolution.

I wonder what is going on in the federal workplace that so many charges are filed. I can only believe that labor and management are not resolving their disputes locally, but rather they are escalating the disputes for the FLRA to resolve as the local "mediator," "cop," or "prosecutor." The employees in the regional offices settle or resolve almost 81 percent of these charges, but not without a tremendous amount of work. In many cases, settlements are not arrived at until all sides have expended vast amounts of resources.

In addition, a tremendous amount of reorganization and downsizing is occurring in the federal government, especially in the Department of Defense. When such activities occur, questions arise for unions. Do the preexisting certifications fit the new situation? In the first 6 months of this year, the number of representation petitions filed has increased by 28 percent over the number filed last year.

In this environment, the FLRA members, the General Counsel, and I all believe that we must re-examine the policies, regulations, practices, and programs of the FLRA. We will be looking to enhance the services the FLRA provides to the parties and the public. If changes are within our control and can help to achieve a more effective and efficient labor-management relations, we are committed to trying new ways of operating. If we do not change our direction, we will end up where we were headed.

As an example, we are now distributing a quarterly summary of FLRA decisions. The next item on our agenda is to reactivate our review of FLRA regulations and policies for unfair labor practice and representation cases. We are planning to have this review completed for the members and the new General Counsel this summer.

Another frequent target of criticism is the time involved in having a negotiability dispute resolved by the Authority. Over the years some of you may have heard me discuss the number of proposals involved in all too many of the negotiability disputes. Some cases have 30 or 40 proposals at issue. When I consider these cases, I wonder what is actually going on between the parties. Why have they not been able to resolve the underlying collective bargaining issues? Instead of being resolved by those who know the workplace best, the conditions of employment for workers are left to the FLRA to decide.

I want to reiterate that the FLRA does not create or generate the number of disputes before it. What we decide is what the parties present. Nevertheless, I am committed to reexamining the way in which we process and handle negotiability disputes. If different methods are possible under the statute and the parties will be better served, we will consider changes.

As to the parties, while I believe that there is much that unions and agencies could initiate on their own, many of the cases before the FLRA are not legal disputes. Many are the result of lack of knowledge of one's rights and responsibilities. Others are the result of simple inability or unwillingness to resolve problems and to communicate on a face-to-face basis. Why does an FLRA agent have to become involved before a union steward and management can talk about a problem? Changing these situations should not require any action by the FLRA or the Congress.

The Parties Involved

However, since I first became Chairman, I have been committed to providing the parties, both the public and neutrals, with more information about rights and responsibilities under the statute. In the last year for instance, the FLRA has formalized and expanded training and consultation for the parties.

I have long hoped that such efforts will enhance the parties' abilities and interests in resolving disputes and issues locally. However, until last year, such ventures took a back seat to the more traditional prosecutorial and adjudicatory roles of the FLRA. During the last year, both the General Counsel and the Authority began to formalize what I call nontraditional but extremely helpful and appropriate assistance to the parties. I have been extremely pleased, but somewhat surprised at the tremendous response to these programs.

With the new General Counsel, we will be looking at ways to expand and formalize these programs. For the General Counsel's Office, the special outreach programs began in Denver. Regional Attorney Joe Swerdzewski saw a need to expand the parties' knowledge of their rights and responsibilities, to open up communication, and increase trust between the parties, because there are fewer barriers to problem solving when these conditions exist. He developed a program that has been delivered around the country this year with great success and generated increasing demands.

Last year, when the tremendous backlog of cases was under control, I also decided the time was right to formalize another approach to enhancing labor-management cooperation. From the vantage point of the Office of the Chairman, I wanted to create a program that helped the parties work on improving their relationship in a systematic way. To this end, we have created a labor-management cooperation program that brings information to parties about new ways of working more cooperatively. We also assist parties in exploring options for changing existing relationships. To carry out this program, I brought on board a former mediator with the Federal Mediation and Conciliation Service, Christina Merchant.

Conclusion

This is where we are headed, with a goal for more immediate change. But we cannot get there alone. To make the labor-management program more and more effective, we need the support and active participation of agencies and unions. We need to work together, and the time is now. As Winston Churchill once said, "things do not get better by being left alone." We all know, unfortunately, that they all too often only deteriorate. I hope I can count on you. I pledge that you can count on us.

[**The End**]

The Future of Labor Relations in the Federal Sector

By Barry E. Shapiro*

Mr. Shapiro is Chief of the Labor Management Relations Division, Personnel Systems and Oversight Group, U.S. Office of Personnel Management.

In 1972 Pantheon Books published Studs Terkel's *Working,* which gave the country an understanding of what people did all day at work and how they felt about what they did. Ten years later, in *In Search of Excellence,* Tom Peters and Robert Waterman shared lessons from America's best-run companies. Quotations from the two books are instructive. A project coordinator for the federal government who was interviewed for *Working* said: "The employees should help make policy, since they're the closest to what's going on . . . A lot of times workers can make better decisions about production than managers." [1]

The President of Local 1112 of the United Auto Workers said: "The almighty dollar is not the only thing in my estimation. There's more to it—how I'm treated. What I have to say about what I do, how I do it. It's more important than the almighty dollar." [2]

In 1982 Peters and Waterman noted that: "The excellent companies treat the rank and file as the root source of quality and productivity gain. They do not foster we/they labor attitudes or regard capital investment as the fundamental source of efficiency improvement." [3]

Note the striking similarity of premise—organizations that involve employees are successful organizations.

The federal government has adopted the rhetoric of this premise, but has not fully made it a reality. In this paper I will first explore where the federal government has been and where it is with respect to labor-management relations, and then suggest how and where the government must go to build successful organizations through effective labor-management relations.

Labor Relations in the Federal Government—Where Have We Been?

Although collective bargaining for federal employees is a relatively recent development, federal employee unions have been around for a long time, well back into the 19th century, especially in the Post Office and naval shipyards. Until 1912, however, federal employees and their unions were forbidden by executive order[4] from directly petitioning Congress for wage increases or other improvements in working conditions. In that year, Congress enacted the Lloyd-LaFollette Act,[5] which reversed this rule and permitted postal employees to petition Congress individually or collectively. The statute was later broadened to include other federal employees and unions.

In 1935, the National Labor Relations Act [6] established a framework for labor-management relations in the United

* The views presented in the article are the views of the author and not necessarily those of the Office of Personnel Management.

[1] Studs Terkel, *Working: People Talk About What They Do All Day and How They Feel About What They Do,* Pantheon Books, 1972, p. 345.

[2] *Ibid.,* pp. 189-90.

[3] Thomas J. Peters and Robert H. Waterman, Jr., *In Search of Excellence: Lessons From America's Best-Run Companies,* p. 14.

[4] President Theodore Roosevelt, "Attempts of Employees to Influence Legislation in Their Own Favor," January 31, 1902.

[5] Sec. 6 of the Post Office Department appropriation for fiscal year 1913, 37 Stat. 555, August 24, 1912.

[6] 49 Stat. 449ff., July 5, 1935.

States but did not cover federal employees. Among the arguments made against covering employees by this collective bargaining law was a concern about the impact on the general and economic welfare of the nation. There was also concern that public sector collective bargaining might introduce complex questions about separation of powers.

By the 1960s, unions had begun to emerge as a force in the federal sector, and in 1962 President Kennedy issued Executive Order 10988, "Employee Management Cooperation in the Federal Service." [7] The very title of this order spoke to its purpose.

Let me quote from some of the Order's introductory passages: "[The] participation of employees in the formulation and implementation of personnel policies affecting them contributes to effective conduct of public business. [T]he efficient administration of the government and the well-being of employees require that orderly and constructive relationships be maintained between employee organizations and management officials."

By 1969 union representation in the federal service had expanded to over 2,300 bargaining units covering 1.4 million employees in 35 agencies (including the Post Office)—52 percent of the total civilian workforce. To keep pace with these developments, President Nixon issued Executive Order 11491.[8]

This new order retained most of the basic rights, principles, and objectives of the earlier order. Executive Order 11491 also created several central mechanisms for overseeing and administering the labor-management relations program: the Federal Labor Relations Council and the Federal Service Impasses Panel. The Order also gave some special responsibilities to the Assistant Secretary of Labor for Labor-Management Relations. The Order provided for exclusive recognition only and for advisory arbitration.

The federal government's current labor-management relations program was enacted in 1978 when President Carter signed the landmark Civil Service Reform Act.[9] Title VII of that Act, usually referred to as the Federal Service Labor-Management Relations Statute (FSLMRS or Statute), enacted most of the features of the existing executive order program into law. The statute transformed the Federal Labor Relations Council into the independent Federal Labor Relations Authority (FLRA), and created the Office of the General Counsel within the FLRA. The Federal Service Impasses Panel was continued as an independent body within the FLRA.

The new statute established a requirement for negotiated grievance procedures and provided that the resolution of grievances would end with binding arbitration (with the possibility of review of the arbitrator's decision by the FLRA for conformity with law).

Where Are We Today?

We've just passed the 30th anniversary of Executive Order 10988. Clearly, there has been considerable growth in the official status of unions in the federal sector over this period. How should we assess this development?

In many respects, the developments over the last three decades have been healthy and positive. On the other hand, there is a widespread belief that many of the objectives of the FSLMRS have not been achieved.

On the positive side, the creation of independent third-party dispute resolution mechanisms has increased employee belief in the possibility of a fair resolution of grievances. We have also seen a significant growth in cooperative labor-manage-

[7] January 17, 1962.

[8] "Labor-Management Relations in the Federal Service," October 29, 1969.

[9] *Civil Service Reform Act of 1978*, Pub. L. 95-454, October 13, 1978.

ment relationships. These are not as widespread as we'd like, but they're growing in number and show great promise.

On the other hand, many believe that the collective bargaining processes are too legalistic and too adversarial and have a tendency to become bogged down in disputes, many of them minor. There has, in fact, been an unfortunate and disturbing increase in certain types of disputes over the last few years. The number of unfair labor practice charges filed with the General Counsel of the FLRA has risen from 5,205 in fiscal year 1986 to 7,325 in fiscal year 1991, an increase of 40 percent. In fiscal year 1986, 143 negotiation impasses were referred to the FSIP; 293 impasses were referred in fiscal year 1991—an increase of more than 100 percent! [10]

And, on either the positive or the negative side, depending on your point of view, collective bargaining has affected a growing number of personnel areas, such as alternative work schedules, work and family, employee health services, and demonstration projects. This, in turn, has at least the potential of giving employees a greater sense of participation in the decisions that affect important parts of their lives. Unions may say the bargaining arena is still not large enough, while some managers say it's too large. It is clearly touching more areas than ever before.

Where Do We Go From Here?

Why is a cooperative labor-management relationship so important now, maybe more important than at any time in the past?

The management of federal programs is under ever-increasing pressures to effectively use new technology in the workplace, meet the challenge of work force diversity, address work and family issues, face private sector competition, take advantage of total quality management and similar initiatives that place a premium on employee involvement, and cope with limited resources combined with an insatiable public demand for government services. The bottom line is that we have to learn to manage better, and we can not manage better without dealing more effectively with our employees. Most significant contributions are made by tapping the knowledge, energy, and experience of employees who are most familiar with the work.

Labor-management cooperation can enhance agency effectiveness and efficiency, improve bilateral dealings, decrease employment related disputes, and improve working conditions.

If agencies are going to make the best possible use of their employees, they will have to establish effective relationships with their elected representatives—unions. Today, about 60 percent of non-postal federal employees are represented by unions (this is about 75 percent of those eligible to be represented).[11]

The labor-management relationship is, in some ways, even more unbreakable than a marriage. It sometimes starts with a shotgun wedding, and neither party can really get divorced, just widowed.

Just what do we mean when we say "labor-management cooperation?" Are we all in agreement that it is a good idea? Let me start with what it does not mean. It does not mean unions give up their right, or management its obligation, to engage in collective bargaining over working conditions (within the limits of what is negotiable in the federal service). It does not mean a specific set of rules, procedures, or organizational arrangements, although any or all of these may be developed by the parties in support of their cooperative effort.

[10] *Twelfth Annual Report of the Federal Labor Relations Authority and the Federal Service Impasses Panel, Fiscal Year 1990*; additional information from the FLRA and the FSIP.

[11] U.S. Office of Personnel Management, *Union Recognition in the Federal Government*, January 1991.

The Office of Personnel Management (OPM) provided a definition of labor-management cooperation in a 1988 policy issuance.[12] We said labor-management cooperation is "an approach of legally nonbinding discussions and informal understandings or agreements between management and union representatives concerning matters of mutual interest." It is different from, but complementary to, collective bargaining; it is not intended to exclude or discourage a general cooperative approach that might characterize labor and management's entire relationship, formal and informal.

In the final analysis labor-management cooperation really is not anything more, or less, than a good-faith effort by a group of adults who are thrown together in a common enterprise to work together effectively. Stated this way, labor-management cooperation seems simple and reasonable, even obvious. While there are many examples of successful cooperative labor-management relationships in the federal service, this clearly is not yet the norm.

What do we have to do to make it the norm? We need to focus our attention away from our differences on various issues and toward areas of common interest, away from prosecuting legal positions and toward finding solutions to problems.

We need to do more to train the entire workforce, but especially supervisors and managers in how to avoid and solve problems rather than just adjudicate disputes.

We need to improve communications and working relationships between political appointees and the career civil service. Too often, labor-management disputes are the result of political appointees not understanding or not listening to explanations of existing laws and regulations, and career employees not understanding or not wanting to understand the policy initiatives of the administration.

We need to reduce organizational layering and hierarchy to encourage more collegial and cooperative working relationships.

It is also time to take a careful and comprehensive look at the program and assess whether, and to what extent, changes in the statute may be needed to provide a stronger framework for cooperative relationships.

OPM Activities and Efforts

What are some of the things OPM is doing to promote more cooperative relationships between labor and management in the federal service?

Information: One thing people need is information about what labor-management cooperation really means in practice. OPM has published a variety of materials on this topic, including a survey of labor-management cooperation provisions in current contracts[13] (30 percent of contracts, covering over 60 percent of organized federal employees, contain such provisions); a guide to resources[14]; and a soon-to-be-published compendium of labor-management cooperation activities across the government. Not all of these activities have been smashing successes, and not all of the successful activities can easily be transferred to other settings, but the examples are valuable illustrations of how cooperative relationships can and do work in the federal government.

We have also tried to showcase cooperative relationships through presentations at meetings of the Interagency Advisory Group and our annual Symposium on Employee and Labor Relations.

Training: OPM, along with the FLRA and the Federal Mediation and Concilia-

[12] FPM Letter 711-163, *Labor-Management Cooperation: Policy Guidance*, October 24, 1988.

[13] *A Survey of Labor-Management Cooperation Provisions in Federal Labor Agreements*, September 1990.

[14] *Federal Labor-Management Cooperation: A Guide to Resources*, April 1990.

tion Service (FMCS), offers training courses in labor-management relations. In recent years, our courses have focused on building cooperative relationships, win-win bargaining, solving problems rather than prosecuting legal positions. We are also building the development of problem-solving techniques into our Human Resources Development Policy Matrix, our blueprint for the policy actions needed to strengthen human resources development in the federal government.

Union Involvement in Policy Making: We have involved unions in the development of personnel policies at the national level on several occasions over the last three years:

In 1989 several union presidents, along with associations of federal managers and supervisors, agency personnel directors, public interest groups, business people, and others, served on the Pay Reform Task Force created by OPM Director Constance Berry Newman to advise OPM on the overall shape of a new pay system for federal employees.

In 1991 several union presidents and key agency executives worked together on the Pay-for-Performance Labor-Management Committee, to advise OPM on the design of systems for strengthening the link between performance and pay. The committee's report [15] exhibits a surprising consensus on a number of key issues.

Several union presidents, along with agency officials, have been serving since last year on a law enforcement task force created by Director Newman to advise OPM on the design of new classification and pay systems for the government's law enforcement personnel.

Building on this experience, Director Newman created the Federal Labor Advisory Group on March 5, 1992, to advise OPM on development of personnel policies that affect the working conditions of federal employees. This group is made up of the presidents of the five largest federal employees unions, a representative of the Public Employees Department of the AFL-CIO, and is chaired by the Director.

The group will meet from time to time and will provide an opportunity for continuing, direct interaction and communication between OPM and unions on a variety of policy issues. In creating the advisory group, Director Newman said, "Unions represent 60 percent of federal employees, and they make many valuable contributions to the development of workplace rules and policies. Responsible employers should give consideration to input from employees before, not after, policies are established." [16]

Review of Federal Labor-Management Relations Program

The first topic being addressed by the Federal Labor Advisory Group is a review of the federal labor-management relations program. The review will examine the overall efficiency and effectiveness of the labor-management relations program. The precise dimensions of this review are yet to be determined. We expect to involve agencies, "neutrals" (FLRA and FMCS), and other interested persons.

There is widespread consensus that the current program needs to be reviewed in its entirety. A 1991 report by the General Accounting Office (GAO) was even entitled *Federal Labor Relations: A Program in Need of Reform.*[17] Neither GAO, nor any of the other groups that have studied the program over the past few years have developed clear proposals for changing the current program, much less a consensus for such change.

While we need to be open to the possibility of changes in the current structure of the program, we should also acknowl-

[15] *Strengthening the Link Between Pay and Performance,* November 1991.

[16] OPM News Release, "OPM Establishes Labor Advisory Panel," March 5, 1992.

[17] Report GGD-91-101, July 1991.

edge that the program has not been a static one; significant changes have taken place during the relatively brief life of the current statutory program. There has been an evolutionary development of case law and experience. Case-by-case decisions of the FLRA and the courts have produced an incremental but substantial expansion of the scope of bargaining and are continuing to do so. OPM efforts to expand management flexibility through deregulation has opened the door to bargaining over additional matters.

In the final analysis, of course, the labor-management relationship exists at the individual worksite. The responsibility for sound worksite relationships is shared by labor and management. OPM and the agencies have a responsibility to ensure that supervisors and managers have the necessary skills for managing employees, recognizing and dealing with problems at an early stage, and fulfilling collective bargaining obligations. OPM is committed to ensuring that agencies and unions will have the wherewithal to achieve this goal.

[The End]

Union-Management Cooperation

By Allan D. Gilmour

Mr. Gilmour is Executive Vice-President at Ford Motor Company and President of the Ford Automotive Group.

There is the notion that we are seeing a downturn in this country's interest in collective bargaining and industrial relations. Certainly lots of labor-management confrontations have gotten play on prime-time news and front pages across the country over the past several years. Meanwhile, we have watched many fads, fashions, and formulas in human resource management and union-management relations come and go, also with a fair amount of hoopla and, perhaps, more than their share of coverage.

Yet those of us working in industries with organized workers know that how we deal with our people and their representatives remains an essential part of doing business. And doing that job well remains a key ingredient of success for all involved.

With that preamble, my remarks on union-management cooperation will not do two things:

First, I will not say that what was done in the past was bad. Managements and unions pretty much did what you would expect. In a fairly well-understood competitive environment, the bargaining strategy was to keep the standard of living increasing and keep productivity moving. The tactics focused on making sure everyone moved along a similar curve.

Second, I will not say that the future demands some specific and radical new approach to managing how people work together and what this means for collective bargaining. The truth is, in each enterprise the participants have to look at where they have been, think about where they are headed, and work out a system acceptable to the management, the union, and the employees. The most thoughtful and practical people involved will also want to see what others are doing, how their counterparts in similar enterprises are approaching similar issues and processes. And if there is something new going on, they will want to know a lot about it.

One thing my remarks will do is focus on something new. But in order to provide

the setting, I would like to spend a few minutes on the past.

One thing we learned from the experience of the 1980s is that if we want our businesses to thrive in the new century rushing at us, we can not rely on just the formulas of our past. What worked then will be good enough, because the environment will be different, and so will the people and their expectations.

Nor can we hope that someone will prescribe an original new scheme tailored to our needs. Despite a decade of turmoil (what the eighties were to collective bargaining) no one has fashioned the one right answer that will work for all our companies and all our unions and all our employees. In each enterprise, we have got to update our relationships to fit the new realities.

The Competitive Environment

One "new" reality has dominated the industrial landscape for some time. That "fairly well-understood competitive environment" I mentioned has been replaced by dramatically more competitive markets for goods, and services and a host of new competitors around the world. We do not have to document this anymore, it is a given. Even our politicians are on to it! This means, among other things, the probability that we will never again see such highly concentrated domestic industries that were so fundamental to the U.S. economy during the middle of this century, industries such as steel, autos, tires, meat packing, air travel, and machine tools.

In order to protect our corporate entities from the down-side effects of this kind of competition, in order to keep the jobs those firms provide, maintain the standard of living we have all enjoyed, and increase the prosperity of the nation, we will have to forge new ways to conduct the human relations and labor relations parts of our businesses. Not to do so may doom some companies and some industries to failure.

Sometimes in talking about these issues and concerns, we forget to remind ourselves and our audiences that almost no company, union, or job in America is immune from global competition. Although the links may not always be apparent, all of our jobs are part of an intricate chain of connections. If the economic foundation and the tax base crumble, not even government jobs can be secure. It may be possible to hold off the pressure for a while, particularly during periods of economic growth, but any noncompetitiveness will lead eventually to disruption, chaos, and, for many throughout the chain, economic extinction.

Nevertheless, while the environment for union-management relations is challenging—even threatening—it is not hopeless. We should be concerned, but we need not despair.

Creating the kinds of collective bargaining we need for the new environment of the nineties and beyond will not be easy. The "new paradigms"—a favorite buzzword these days—are particularly difficult to adopt when the same people remain in the picture, bound to their institutions and tied to past relationships.

But there is something new under the sun, and in my remarks, just as I promised. It is the Collective Bargaining Forum, one of the groups working to make the transition to new approaches and new relations more comprehensible to both labor and management.

Some of you may be aware of the Forum and its activities. Perhaps you know that it is a group of national union presidents and senior corporate officers, of which I am a member. The Forum's objective is to seek ways to improve the climate and the conduct of labor-management relations in the United States.

The participants operate from the fundamental but, to some, contrary conviction that our nation can do both, be a more successful competitor and maintain

a rising standard of living in an increasingly competitive global economy. Further, we believe this goal can be achieved in a way that is consistent with our values as a republic of free people, people who have built institutions and a way of life on respect for the rights and dignity of the individual.

At the outset, the Collective Bargaining Forum began to address the issues by focusing on three interrelated topics: (1) the role of unions in a democratic society, (2) mutual responsibilities of management and labor in fostering the competitiveness of American enterprises, and (3) mutual responsibilities in promoting employment security for American workers.

Working together, the Forum members were able to build consensus on a promising approach to dealing with these issues. Some of our work was made public in April 1988 by the U.S. Department of Labor's Bureau of Labor-Management Relations in a booklet entitled *New Directions for Labor and Management.*

In this effort, the Forum defined competitiveness as the sum of three parts. The three parts represent the ability of the United States to produce, provide, and promote in a world economy: (1) *produce* domestically those goods and services that will yield a competitive return on capital; (2) *provide* jobs for the American work force; and (3) *promote* a rising standard of living for the American people.

Looking at competitiveness in this way imposes some assumptions that are not so familiar in labor-management relation. For example, the idea that competitiveness cannot be achieved without attention to the quantity and quality of American jobs within our borders and trade across our borders. Forum members know all about home jobs. They want good-paying domestic jobs, the kind that have been disappearing. Forum members also know about the domestic jobs that are created by exports, and exports, as we are fond of telling other countries, can not be a one-way street.

Another assumption is the idea that rising productivity, understood in its broadest dimensions, is critical to competitiveness, and that improving industrial and human relations will be a major factor in productivity growth for the future.

The Forum's definition of competitiveness also makes it clear that both labor and management have to accept concepts not commonly agreed upon in the past: a competitive return on capital and high-quality employment opportunities as a factor in productivity, as well as in the standard of living. Also, recognition that only a mutual commitment to making enterprises successful will produce the needed results.

Making these elements an essential part of building a relationship has enormous consequences for the future. It says that the confrontational approach is essentially obsolete, rendered inappropriate by today's mutual requirement for better productivity and a more successful battle against foreign competition.

Specifically, the Forum states that management should accept the validity of unions (a concept not universally accepted these days), and that there is value in enlarging the role of workers and their unions in certain decisions of the enterprise. The Forum also states that management should elevate employment security to the policy level, treating it with as much importance as other basic business strategies, such as capital deployment, lines of business, and market selection.

Unions too must take a broader view of their responsibilities and determine where their best interests lie. The Forum holds that labor has an obligation to work with management "to improve the economic performance of American enterprises and to help firms adapt to changes in technology, market conditions, and worker values and expectations."

In discussing the procedural issues involved in putting its principles into practice, the Collective Bargaining Forum looked at drafting guidelines for companies and unions that want to move toward more constructive labor-management relationships. Last year a second monograph entitled *Labor-Management Commitment: A Compact for Change* was issued, addressing this topic.

As a model, the *Compact* highlights seven new obligations and responsibilities or "rules of the game" for certain fundamental aspects of the bargaining relationship. They are:

(1) American unions and management must accept their joint responsibility to work together to improve the economic performance of U.S.-based enterprises in ways that serve the interests of consumers, stockholders, workers, and society. Translation: Unions and management have an obligation to each other and to the public to work jointly, so that enterprises can offer products and services with quality standards matching or surpassing those of all competitors. Supporting such a joint effort will require developing and promoting teamwork and employee involvement not only in the workplace, but also in the determination and administration of personnel policies and in appropriate strategic decision making.

(2) Unions can not commit to aid the competitive economic performance of companies unless management accepts and supports the legitimate role of unions within the enterprise and throughout society as a whole.

(3) Employment security must be taken into account when reconciling the tensions between competitiveness and human values. To implement this idea, management must be committed to promoting employment security and continuity as a major corporate value. Managements and unions must find ways to give meaning to employment security, translating it into economically supportable specifics that make sense, and including transitional assistance for employees affected by changes in the economic foundation for their jobs.

(4) Full employee participation on a sustained basis is critical to competing in a changing world. Both union and management must commit to worker participation in the shop and office—and often beyond—to provide continuous improvement in safety performance, product and service quality, employment security, productivity, work environment, and other goals the parties may set.

(5) Conflicting goals must be resolved without destroying or jeopardizing the bonds between union and management. Even a highly cooperative relationship contains elements of conflict. But it is in the interests of both parties to resolve differences fairly and amicably, without resort to strikes, lockouts, or replacement hiring. No tactics or strategies employed by either party should be inconsistent with maintaining an ongoing and cooperative relationship.

(6) Managements and unions should explore ways to increase joint efforts with a sense of immediacy. To this end, the Forum recommends joint study of the experiences of unions and managements that have developed successful innovative relationships.

(7) Where cooperative efforts to deal with workplace problems are not enough to secure competitiveness, it may serve the mutual interests of the parties to work together in developing joint positions that can be used in seeking the participation of executive and legislative branches of government, both federal and state.

In the Forum's view, applying these seven principles to any working relationship offers promise for the future. In practice, only the parties themselves can determine how their relationship will operate. But one thing is certain, if both parties adhere to the spirit of the understandings that form the *Compact,* they

will improve their capacity for mutual success.

I believe this overall approach of forming a partnership involving management, union, and employees was key to Ford's success in the eighties. It has served us well in bad times too. Our bottom line last year would have been an even deeper shade of red without the efforts our people put forth and the support of their unions. And when the economy truly turns around, I think you will see some good results.

As you can surmise, reaching consensus on these concepts and principles was no easy matter for the Collective Bargaining Forum. It took us many discussions and a lot of debate over a long period of time. Each member would probably recall the outcome a little differently, or with different emphasis. I believe all would agree, however, that we focused on what was central and critical, the forging of relationships suited to the times, and the needs of unions and companies.

Forum members include: the Communication Workers, the Auto Workers, the Paperworkers, the Bricklayers, the Clothing and Textile Workers, the Steelworkers; and on the industry side, Xerox, American Airlines, Ford, Kaiser Foundation, Scott Paper, Alcoa, CSX, and Ameritech. I do not suggest that we speak for everyone, but we do want to speak *to* everyone. We also want to learn about how the concepts work, and how *you* shape and implement them. You are the leaders who are on the cutting edge of the work needed to create new relationships.

Conclusion

Traditionally, as you know all too well, managements and unions could deal with each other at arm's length and the choices were clear—it was either one way or the other. But world competition makes for harder work and more complex relationships in every aspect of business.

The *Compact,* with its seven rules, may sound too good or too hard. There are no comfortable choices. We no longer live in an either/or world, it is both/and, or not/unless. So I will not send you forth with a recipe or a blueprint. And if I had a fail-safe template, I would probably keep it secret and turn consultant. The Forum points out a direction, not a destination. And the *Compact* is more of a bible than a catechism, more a constitution than a collection of case law.

Which is more important, cooperation or productivity? Yes. Which is more important, the short term or the long term? The answer is yes. Which is more important, job security or improving the standard of living? The answer is yes. Which is most important, consumers, workers, owners, or managers? Again, the answer is yes. Which is more important, internal organizational concerns or external issues? The answer is a resounding yes!

If there could be a single solution, we would find it in our capacity to balance all of the imperatives of our relationships in a way that provides success for our enterprises, our employees, and our customers. So there is a way, there is an answer. All of us help fashion that answer for our organizations.

[The End]

Regional Employment Implications of a Free Trade Agreement

By Niles Hansen

The author is the Leroy G. Denman, Jr., Regents Professor of Economics at the University of Texas at Austin.

The United States and Canada have agreed in principle to pursue free trade, although many details of the agreement are yet to be determined. The inclusion of Mexico in a North American Free Trade Agreement (FTA) is often discussed in the present tense, but whether or to what extent this will be the case is still an open question. This article considers likely regional employment implications of a FTA for the United States, assuming that Mexico will be included.

It is not possible to predict all of the regional employment outcomes that would result from Mexico's inclusion in a FTA, but some of the more evident implications are indicated. In addition, an attempt is made to provide a more general understanding of the regional sources of national competitiveness in the international marketplace, and to suggest public policy implications in the context of employment problems and opportunities. It is argued that the FTA would enhance overall employment opportunities in the United States although the benefits would be broadly diffused. However, certain regionally concentrated segments of the labor force would be adversely affected and the negative consequences would be relatively obvious. Instead of opposing a FTA that is generally beneficial, public policy should concentrate on assisting those workers who would be adversely affected in the national interest.

FTA: Pro and Con

In the United States, opposition to a FTA comes primarily from organized labor and from environmental groups. Organized labor fears that the FTA would result in employment dislocation, depressed wages, and movement of production to Mexico, where wages are low and working conditions often do not meet U.S. standards. Environmental groups fear that enterprises that pollute heavily will have an incentive to move to Mexico, where enforcement of environmental laws has been lax, and the subsequent enforcement of U.S. environmental laws will become weaker in order to retain polluting firms in the United States.

Proponents of a FTA argue that it would result in numerous benefits for the United States. These include greater certainty and predictability for U.S. investors in the Mexican economy; development of relatively poor U.S. regions on the border with Mexico; enhancement of U.S. competitive advantage in a world of emerging trading blocs; greater access to the large and growing Mexican market; increased imports by Mexico of U.S. products, accompanied by increased employment in U.S. industry and agriculture; lower prices for U.S. consumers of Mexican products; and a lessening of illegal immigration from Mexico as employment opportunities increase in that country.

A number of economic analyses of the potential effects of a FTA indicate that while the United States and Mexico would both be net beneficiaries, Mexico would stand to gain the most, because the impacts in the United States would be relatively small given the size of the U.S. economy. Nevertheless, the U.S. gains would be far from negligible. As a result of trade liberalization that has already taken place in Mexico in recent years, U.S. exports to Mexico rose from $12.4 billion in 1986 to $28.4 billion in 1990, generating an estimated 264,000 addi-

tional jobs in the United States.[1] Given that Mexico's average duty on U.S. goods is 10 percent, whereas that of the United States on Mexican goods is only 4 percent, the United States still has much to gain from further liberalization of trade. However, the regional impacts will vary, and in some cases they may be negative with respect to employment.

Regional Employment Impacts: Illustrative Cases

Although it is not possible at present to know with any quantitative precision what the regional and local labor market impacts of a FTA would be, many of the general positive and negative consequences can be anticipated with reasonable confidence.

For example, at the state level it has been argued that because Texas accounts for one-third of U.S. exports to Mexico and almost half of the total pass through the state, "Almost everyone agrees that Texas will be the primary beneficiary." [2] The Texas Comptroller of Public Accounts has estimated that employment in the state in 1989 that was directly or indirectly related to exports to Mexico amounted to 377,000 workers. The agency also found that those sectors of the Texas economy that would benefit most from a FTA would be the same sectors that would benefit most nationally. They include electronics, industrial machinery, computers, transportation equipment, and business services. Sectors that would experience adverse employment consequences would include fruit and vegetable farming, food processing, textiles and apparel, steel, and leather.[3] Although border development is often mentioned as a likely positive result of a FTA, these findings suggest that larger cities away from the border would gain employment, whereas the border area, which has relatively high concentrations of employment in threatened sectors, would lose jobs.

Employment in retail trade is also likely to decline in numerous small U.S. cities on the Mexican border as a result of a FTA. Once Mexican retailers can freely import tax-free merchandise, Mexicans who now shop on the U.S. side of the border can make their retail purchases at home. Moreover, K-Mart, Wal-Mart, and similar stores that presently cater to Mexican shoppers from U.S. sites adjacent to the border may well move to the Mexican side. On the other hand, to the extent that a FTA increases Mexican incomes, there will be increased sales of higher-ticket items in such larger cities as Houston, San Antonio, Tucson, and San Diego, because of the high income elasticity of demand for such items on the part of wealthier Mexicans.

It is widely believed that manufacturing expansion in Mexico leads to the creation of complementary manufacturing activities across the border in the United States. This has been especially the case with respect to the rapid expansion of assembly plants *(maquiladoras)* along the Mexican side of the border. Thus, in 1988 the Texas Comptroller of Public Accounts reported that "the border continued a strong trend spurred by twin-plant expansions in Mexico. Twin plants involve factories in Mexico that assemble parts made in Texas." [4] Also, in 1989 it was again asserted that "growth in increasingly capital-intensive twin plants, such as automotive suppliers, will boost related manufacturing and support services located on the Texas side of the border." [5] The fact of the matter, however, is that major twin plants have not appeared to any significant extent on the Texas side of

[1] *Mexico Business Monthly*, June 1991, p. 2.

[2] Chandler Stolp, "The Texas Economy: Making North American Free Trade Work," *Texas Business Review*, December 1991, p. 2.

[3] *Texas Consortium Report on Free Trade: Final Report* (Austin TX: Texas Department of Commerce, 1991), p. 130.

[4] "Regional Economies Diversify," *Fiscal Notes*, November 1988, p. 6.

[5] "The Border," *Fiscal Notes*, February 1989, p. 3.

the border; inputs to Mexican assembly plants have typically come from areas far beyond the border.[6]

Although a substantial number of *maquiladoras* would like to have local Texas suppliers, border area manufacturing firms in Texas have not been capable of handling large volume contracts with tight tolerance and delivery time requirements. To overcome their handicaps, Texas border firms will need to deal not only with shortages of skilled production workers, but also with deficiencies in such areas as cost analysis, financial analysis, procurement, and marketing.[7]

Meanwhile, more distant U.S. areas will continue to benefit from linkages with Mexico's manufacturing expansion. For example, although Michigan residents tend to be hostile to a FTA, the state's exports to Mexico rose by 43 percent between 1987 and 1991, to over $1.4 billion. The increase created over 10,000 new jobs in Michigan.[8]

In agriculture, the U.S. grain belt would be likely to expand exports and related employment under a FTA, but producers of fresh fruits and vegetables would face stiff competition from low-cost Mexican producers.[9] Florida growers, who produce over half of the nation's supply of winter produce, have been particularly hostile to a FTA.[10] While producers in California, Arizona, and the lower Rio Grande Valley in Texas would be hard hit, many would compensate by expanding into Mexico rather than by diversifying their U.S. operations. In fact, for some years producers in California and Texas have been initiating contract arrangements or joint production ventures with Mexican growers. However, even if many U.S. producers can readily adapt to the new international environment, the fact remains that poor, unskilled farm laborers are likely to bear the brunt of the geographic reorganization of production. These disadvantaged persons and their families are particularly concentrated in the agriculturally oriented areas of Texas and California.

A substantial number of workers in textiles and apparel would also be harmed by a FTA. Shifts of production to Mexico would especially reduce employment opportunities of apparel assembly workers in the Texas borderlands and in southern centers of production. On the other hand, the costs of protectionism are also great. It has been estimated that trade barriers taken as a whole cost U.S. consumers $80 billion a year, or more than $1200 per family. Restrictions on clothing and textile imports alone cost U.S. consumers $1 for each cent of increased earnings of U.S. workers in these sectors.[11] Thus, a FTA would benefit U.S. consumers in general, even though some workers would be hurt. In addition, a FTA would result in a shift of textile and apparel production from Asia and other overseas locations to Mexico, which should benefit U.S. suppliers because of the proximity of Mexico.

Contrary effects of a FTA on U.S. employment can be seen in microcosm in North Carolina, where strong advocacy as well as strong opposition exist side by side. The congressman from the textile center of Greensboro opposes a FTA, but his counterpart from an adjacent district, which includes Raleigh and Chapel Hill, favors the pact because his district includes IBM, AT&T, and numerous other businesses that stand to gain if trade barriers were reduced. In much of the industrial South, espousal of free trade

[6] David J. Molina and Steven L. Cobb, "The Impact of Maquiladora Investment on the Size Distribution of Income Along the U.S.-Mexico Border: The Case of Texas," *Journal of Borderlands Studies*, Fall 1989, pp. 100-18.

[7] Michael Patrick, "Maquiladoras and South Texas Border Economic Development," *Journal of Borderlands Studies*, Spring 1989, pp. 95-96.

[8] *Mexico Business Monthly*, November 1991, p. 3.

[9] Paul Ganster, "The U.S.-Mexican Free Trade Agreement: A View from the Border," *Boundary Bulletin*, July 1991, p. 3.

[10] *Mexico Business Monthly*, April 1991. p. 5.

[11] James Bovard, "Fair Trade is Unfair," *Newsweek*, 9 December 1991, p. 13.

recognizes consumers' interests in lower prices, but even greater emphasis is placed on the need to gain greater access to foreign markets and to lure foreign investment and technology. In the Charlotte area, for example, 340 foreign firms generate a great deal of local employment.[12]

While it is useful to anticipate sectoral and regional employment consequences of a FTA, the emphasis given to relative labor costs in the FTA debate has diverted attention from other critical aspects of U.S. competitiveness in international markets. A more general understanding of this issue requires consideration of the changing organization of production, which in turn frequently has an important regional dimension.

Productivity, Regional Development, and U.S. Competitiveness

The threat that cheap Mexican labor represents to some segments of the U.S. labor force is a legitimate concern, but a more fundamental long-term issue is one of increasing international competitiveness. Moreover, this is not simply a question of jobs. What is required is higher productivity employment, which is the source of higher real incomes for workers.

If cheap labor were the most important factor of production, U.S. employers would be moving primarily to Haiti and similar places where labor is even less expensive than in Mexico. Similarly, most U.S. trade is with relatively high-wage countries, in some cases more expensive than in the United States. Indeed, European experience indicates that even such traditional goods as textiles, apparel, and furniture can be produced very efficiently with expensive labor if other favorable conditions are present, especially flexible production systems.[13]

Fordist mass production of standardized outputs using single-purpose equipment has increasingly been replaced by newer production systems more attuned to greater demands for quality and variety, shorter product cycles, and the rising pressures of international competition. These systems rely upon flexible machine tools, programmable multi-task production equipment, just-in-time inventory deliveries, and greater worker responsibility for work organization and quality control. Moreover, with flexible specialization firms have an incentive to adopt a "strategic cluster" of innovations because of the complementarities among research, design, engineering, production, management, marketing, and organization.

Increasingly flexible equipment and workers also create potentialities for small and medium-size enterprises (SMEs) or cooperative networks of SMEs to produce efficiently without central control. Considerable international evidence indicates that both plant size and firm size in manufacturing have been declining because of vertical disintegration and the emergence of technologies that have improved the quality and productivity of SMEs in relation to traditional standardized mass production activities.[14]

Abundant empirical findings from Western Europe suggest that sustained economic development is primarily a local or regional, rather than a national, phenomenon. It results from a milieu characterized by information richness and entrepreneurial vitality. This in turn implies a dynamic and innovative regional SME sector because regions dominated by branch plants or large enterprises usually lack vigorous information networks.[15]

[12] Keith Bradsher, "Free Trade: No Longer Just a Case of North Versus South," *New York Times*, 23 June 1991, p. E5.

[13] Niles Hansen, "Factories in Danish Fields: How High-Wage, Flexible Production Has Succeeded in Peripheral Jutland," *International Regional Science Review*, 1991, pp. 109-32.

[14] Bo Carlsson, "The Evolution of Manufacturing Technology and Its Impact on Industrial Structure," *Small Business Economics*, 1989, pp. 21-37.

[15] G.P. Sweeney, *Innovation, Entrepreneurs and Regional Development* (New York: St. Martin's Press, 1987).

Porter maintains that the nation may not be a relevant unit of economic analysis since the conditions that underlie national competitiveness are so often localized within a nation, though at different locations for different industries.[16] Krugman similarly argues that if one wants to understand differences in national growth rates one should start by examining differences in regional growth.[17] These observations are consistent with the Japanese International Trade Institute's conclusion that the basic answer to the trade problems of the United States lies not only in greater industrial growth, but also in better balanced regional development.[18]

Conclusions

The prospect of a FTA has generated fears that there will be a mass exodus of U.S. firms to Mexico in order to take advantage of the cheap labor available there. In the information age, however, international competitiveness depends on a host of factors in addition to labor costs. These factors include the quality of the labor force, well developed social and economic infrastructure, sophisticated business services, fluid information diffusion, a steady stream of process and product innovations, and flexible production organization. In all of these respects, the United States has clear advantages over Mexico. It should thus not be surprising that while trade with Mexico has been liberalized substantially in recent years, the United States has a trade surplus with Mexico. This in turn implies that there has been a net gain in U.S. jobs. Moreover, the proximity of Mexico creates more future opportunities for U.S. suppliers than would be the case if production took place in distant locations.

In some regions and sectors U.S. workers have been adversely affected, but this should not preclude a FTA. Workers who have been harmed should be assisted, although this is not an easy matter in an economy with relatively high unemployment. However, there is little prospect that a FTA would be approved in an election year under such circumstances. A general economic recovery in 1993 would greatly improve the prospects for a FTA. It should also be more feasible to implement effective worker assistance programs, but long-run opportunities for high-wage employment depend upon regional development, business, labor, and government cooperation. This would ultimately enhance the competitive advantages that the United States has in relation to Mexico. This approach would also seem preferable to following the path taken by the French candlemakers who petitioned the king to block out the sun so that their employment opportunities would be improved.

[The End]

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[16] Michael E. Porter, *The Competitive Advantage of Nations* (New York: The Free Press, 1990).

[17] Paul Krugman, *Geography and Trade* (Cambridge: MIT Press, 1991), p. 3.

[18] Leonard Silk, "Japanese Stress Regions in U.S.," *New York Times*, 20 February 1987, p. 30.

North American Free Trade Agreement: Implications for Mexican-American Workers

By Richard Santos*

Mr. Santos is an Associate Professor of Economics at the University of New Mexico in Albuquerque.

According to a widely used college textbook in economics, "international trade is a means by which nations can specialize, increase the productivity of their resources, and thereby realize a larger total output than otherwise." [1] Why is there considerable debate over the impact of the proposed North American Free Trade Agreement (NAFTA) between the United States and Mexico? The debate arises because some groups are more likely than others to be "winners" or "losers" under the proposed agreement. Examples of projected losers are states like New York and industrial sectors such as construction and apparel. Projected winners are states like Texas and industrial sectors such as machinery and equipment and agriculture (except horticultural products).[2] Included in the debate of winners and losers is how certain workers, and specifically how Hispanics, will fare under NAFTA.

The unfavorable economic status of Hispanic workers and the concentration of Mexican-Americans in the Southwest warrant this type of debate.[3] Opponents of NAFTA argue that the agreement will produce job losses among Hispanics and supporters counter that greater trade along the U.S-Mexico border will benefit Hispanic businesses and workers.[4] Supporters and opponents of NAFTA, however, must both recognize that Hispanics are a diverse population comprised of Mexican origin, Puerto Ricans, Cubans, and other Hispanics. On an economic basis, Mexican-Americans and Puerto Ricans are more closely aligned with blacks and Cubans are aligned with whites.[5]

As a result of this diversity, the discussion of NAFTA will be restricted to the effects on Mexican-Americans. Several reasons make the study of NAFTA and Mexican-Americans worthwhile. Among the estimated 21 million Hispanics in the United States, Mexican-Americans represent the majority group (63 percent). Their socioeconomic characteristics reveal a unique vulnerability to the changing industrial nature of a global economy, with a median age of 24 years, a modal education among those 25 years and older of less than four years of high school, and a rate of unemployment nearly 1.5 times higher than that of the general population.[6]

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[1] C. McConnell and S. Brue, *Micro-Economics,* 11th ed. (New York: McGraw Hill, Inc., 1990), p. 476.

[2] For a review of the NAFTA impact studies, see S. Cook and S. Phillip, eds., *Winners and Losers: Readjustment Mechanisms in a North American Free Trade Agreement* (Santa Fe, New Mexico: North American Institute, July 1991), pp. 75-78; United States International Trade Commission, *The Likely Impact on the United States of a Free Trade Agreement with Mexico,* United States International Trade Commission (Washington, D.C: USITC Publication 2353, February 1991), pp.x-xiii; and C. Stolp, "The Texas Economy: Making North American Free Trade Work," *Texas Business Review,* University of Texas at Austin: Bureau of Business Research, December 1991.

[3] H. Cisneros, "Mexico Free-Trade Talk Should Address Hispanic Needs," *San Antonio Light,* April 7, 1991.

[4] For a review of the Hispanic debate, see "U.S.-Mexico Trade," *Vista The Hispanic Magazine* (Coral Gables, Florida: April 5, 1992).

[5] For the employment of Hispanics, see G. DeFreitas, *Inequality at Work* (New York: Oxford University, 1991).

[6] U.S. Bureau of the Census, *The Hispanic Population in the U.S.* (Washington, D.C: USGPO, March 1991), *Current*

Method of Analysis and Data Source

In contrast to a labor market demand analysis that projects employment gains or losses attributed to NAFTA for Mexican-Americans, a supply side or human resource perspective is used to analyze the effects of the proposed agreement. According to the Commission of the Skilled Work Force, a well-educated and trained work force is the best way to compete in a global economy.[7] Empirical evidence bolsters the theoretical premise of a human resource framework, which states that about 42 percent of the annual economic growth in the United States between 1929 to 1982 has been attributed to educational investments.[8] NAFTA's impact on employment will consequently depend on how well the nation invests in its workers and aids their productivity.

For this supply or human resource assessment, Mexican-American employment by type of industry will be identified, and within these selected industries how "prepared" are these workers as measured by age, education, collective bargaining protection, and other economic resources to adjust to either employment gains or losses as a result of NAFTA. If job losses are produced by NAFTA, how prepared are workers to move to different industries and occupations? By the same token, how prepared are workers to capitalize on employment gains and other opportunities arising from NAFTA?

The March 1988 Current Population Survey Public Tape (CPS) provides the required data to undertake a supply or human resource assessment of Mexican-American workers. The CPS is an excellent data source because (1) it serves as the national benchmark for employment and unemployment estimates; (2) it provides information to analyze supply characteristics such as age and education of workers by industry; and (3) it oversamples an additional 2,500 Hispanic households for the March survey.[9] Civilians age 16 to 65 years who were employed in the survey week comprised the universe under the study. For the supply assessment, three groups of workers are compared, and the respective sample size are as follows: 40,263 non-Hispanic whites, 3,914 non-Hispanic blacks, and 2,867 self-identified Mexican-Americans of any race.

The above sample of workers excluded those employed by the government or the self-employed, because less than 10 percent of Mexican-Americans worked for the government and only 3 percent were self-employed. Interestingly, the small percentage of self-employed among Mexican-Americans somewhat discounts the entrepreneur opportunity argument that has been used to support NAFTA in the Hispanic community.[10]

Supply Characteristics of Mexican-American Workers

During the March 1988 CPS survey week, the following industries provided 10 percent or more of private sector employment for Mexican-American men age 16-65 years: construction (13 percent), manufacturing (29 percent combined for durable goods and non-durable goods), and retail trade (19 percent). For Mexican-American women, 10 percent or more of the private sector employment was provided by manufacturing (26 percent combined for durable and non-durable), retail trade (24 percent), professional service (16 percent), and personal services (11

(Footnote Continued)

Population Reports, Series P-20, No. 455, 1991, p. 2, Tables 1 and 2.

[7] *America's Choice: High Skills or Low Wages!* Report of the Commission on the Skills of the American Workforce (Rochester, New York: National Center on Education and Economy), June 1990, pp. 3-5.

[8] E. Devereux, et al., *Economic Growth and Investment in Higher Education* (University of Texas at Austin: Bureau of Business Research, 1987), p. 11.

[9] For a technical description of the CPS, refer to *Current Population Survey, March 1988 Tape Technical Documentation*, Data User Services Division (Washington, D.C: U.S. Bureau of the Census, 1988).

[10] *Vista The Hispanic Magazine*, April 5, 1992.

percent). In the supply analysis, manufacturing and retail trade are highlighted for Mexican-American men and women because these sectors generated half of their total employment. These industries are also most likely to be affected by NAFTA.[11] For men, construction is added to the analysis because NAFTA is projected to adversely affect employment in this sector.[12]

Table 1 presents an array of characteristics (by race) for employed men in all industries, and highlights those working in construction, manufacturing, and retail trade. Annual earnings and private health insurance coverage are two indicators that merit further note. Annual earnings are for 1987 and industry is based on the type of employment during the March 1988 CPS survey week. In this analysis, the assumption is that the earnings are derived from the industry. In addition, few Mexican-Americans in the CPS were asked about collective bargaining coverage or union membership, but the entire sample was asked about private health insurance. In a 1987 national survey, 93 percent of all union members had private employment-related insurance as compared to 74 percent of nonunion workers. Private insurance coverage will thus serve as a proxy to gauge collective bargaining influence within an industry.[13]

On average, Mexican-American men are young (33 years), have less schooling (10.2 years), have low earnings (62% of whites workers' earnings), experience the lowest coverage of private health insurance (55%), and incur the highest incidence of poverty (16%). Table 1 also shows that manufacturing yielded the highest average earnings for men in 1987, irrespective of race. Minority men nevertheless earned about 62 to 68 percent of white earnings in manufacturing and about 70 percent of white earnings in construction and retail trade.

In manufacturing, Mexican-Americans were nearly twice as likely as whites to work in occupations like machine operators, assemblers, and inspectors, and over twice as likely to work in service occupations (e.g., food preparation and building cleaning) and in the retail industry. Especially discouraging is the incidence of household poverty as classified by the U.S. Census Bureau among employed Mexican-American men across the selected industries. This poverty rate ranges from 10 percent in durable manufacturing to about 20 percent in construction and retail.

Other differences within an industry are also striking. On average, less than 10 years of schooling were reported for Mexican-Americans in non-durable manufacturing and construction, compared to high school completion or above for whites, and near high school completion for blacks. Private health insurance coverage for Mexican-American men ranged from 42 percent in retail trade and construction to 67 percent in manufacturing durable goods. In these industries, insurance coverage for whites ranged between 80 and 93 percent. For blacks, insurance coverage was intermediate to those of whites and Mexican-Americans.

Table 2 outlines characteristics of employed women (by race) in all industries, manufacturing, and retail trade. As in the case for men, the highest average annual earnings in 1987 for women in the highlighted industries were reported in durable manufacturing, but different from men in that retail trade provided the lowest earnings. The earnings ratio (Mexican-American to white) in the selected industries ranged from 61 percent in manufac-

[11] United States International Trade Commission, *The Likely Impact on the U.S. of a Free Trade Agreement with Mexico*, pp. x-xv and pp. 5-6 to 5-7.

[12] P. S. Cook, eds., *Winners and Losers: Readjustment Mechanisms in a North America Free Trade Agreement*, pp. 76-77.

[13] P. Short et al., *A Profile of Uninsured Americans* (Rockville, Maryland: Department of Health and Human Service, Publication No. PHS 89-3443, September 1989), Table 5.

turing non-durable to 84 percent in retail trade, and the ratio for blacks varied from 87 percent to 95 percent in these two industries. In manufacturing, the vast majority (71 percent in non-durable and 51 percent in durable) of Mexican-Americans held jobs as machine operators, assemblers, and inspectors, a rate nearly double that of whites. Among blacks employed in manufacturing, the proportion employed as operators, assemblers, and inspectors exceeded the rate of Mexican-Americans in the durable sector but fell below the rate in the nondurable sector.

Although Mexican-American women were on average younger than other women, the differences in manufacturing were less so. More striking is the educational difference of each race across the selected industries. Whites and blacks averaged 12 or more years of schooling, as compared to less than high school completion for Mexican-Americans. Average years of schooling for Mexican-American women ranged from 8 years in non-durable manufacturing to 11 years in retail trade. Incidence of poverty for employed Mexican-American women ranged from 15 percent in durable manufacturing to 22 percent in retail trade. Similar poverty rates were noted for blacks but the incidence of poverty for whites by industry ranged from 3 to 9 percent. Similar to men, Mexican-American women trailed other workers in the extent of private health insurance, but the coverage in all industries for women (62 percent) was higher than the rate for men (55 percent). The gender variation in insurance coverage among Mexican-Americans could be accounted for by the acute difference in durable manufacturing. Eighty-one percent of the women are insured, compared to 67 percent of men.

A final note on an industry (agriculture), likely to be affected by NAFTA but not highlighted in the tables, because it provided less than 10 percent of Mexican-American employment (8 percent for men and 3 percent for women).[14] For other workers, agriculture generated less than 2 percent of their employment. Although few Mexican-American men are employed in agriculture, the implications of NAFTA in this industry are of relatively greater importance to this group. A cursory assessment of selected supply characteristics of employed Mexican-American men in agriculture supports this perspective. The average Mexican-American agricultural worker has an average of 8 years of education, an average age of 33 years, an incidence of poverty of 29 percent, and 66 percent are without private health insurance.

Conclusions

Under the proposed U.S.-Mexico trade agreement, the subject of who will be winners and losers in our economy can be debated. What is not debatable is the employment status of Mexican-Americans and their vulnerability to a changing global economy. In fact, a supply-side assessment of these workers suggests that it is a work force ill prepared for the impact of NAFTA. If employment opportunities increase as a result of free trade, the prospects of economic gains through greater productivity for Mexican-Americans are not encouraging. Greater educational gains among workers are needed to compete in a global economy. Low earnings, a high incidence of poverty among employed workers, inadequate education, and the lack of private health insurance coverage are testimonial to the vulnerability of Mexican-American workers to the consequences of a free trade agreement. If the NAFTA on the other hand produces job losses for Mexican-Americans, the prospects of retraining and relocating to other sectors is likewise not encouraging because of their low education. Indeed, a greater incidence of poverty among Mexican-Americans is possible if the consequences of the NAFTA are negative.

[14] Cited at note 11 above, pp. 4-3 to 4-8.

To insure the employment competition of Mexican-Americans in a global economy, greater investments in education and training by the public and private sector will be required. To be sure, a supply-side approach to the positive and negative consequences of a free trade agreement is no panacea.[15] Other strategies will have to complement investments in human resources. In particular, the opportunities for job protection through collective bargaining should be increased along the U.S.-Mexico border. Nevertheless, the relatively young age of Mexican-American workers and their increasing number in the work force suggest that human resource investments serve as the cornerstone of any free trade agreement.

TABLE 1

Characteristics of Employed Men by Selected Industry and Race

ALL INDUSTRIES	MEXICAN	BLACK	WHITE
Percent Employed*	100	100	100
Percent in Modal Occupation**			
(Precision Production, Crafts and Repairs)	23	17	22
Mean Age	32.9	35.4	36.5
Mean Highest Grade Attended	10.2	12.3	13.3
Mean Annual Earnings (1987)	15,716	16,790	25,219
Ratio of White Earnings	62.3	66.6	
Percent Covered by Private Health Insurance	55	73	88
Percent below Poverty	16	11	3
CONSTRUCTION			
Percent Employed*	13	9	10
Percent in Modal Occupation**			
(Precision Production, Craft and Repairs)	58	56	62
Mean Age	32.7	36.5	35.3
Mean Highest Grade Attended	9.7	11.1	12.3
Mean Annual Earnings (1987)	15,781	14,328	22,836
Ratio of White Earnings	69.1	67.7	
Percent Covered by Private Health Insurance	42	59	78
Percent Below Poverty	22	15	4
MANUFACTURING—DURABLE GOODS			
Percent Employed*	17	17	19
Percent in Modal Occupation**			
(Machine Operators, Assemblers & Inspectors)	45	35	25
Mean Age	34.7	37.4	38.7
Mean Highest Grade Attended	10.0	12.1	13.0
Mean Annual Earnings (1987)	17,999	19,490	28,484
Ratio of White Earnings	63.2	68.4	
Percent Covered by Private Health Insurance	67	84	93
Percent below Poverty	10	11	3

[15] For a discussion of the limitations of the supply-side approach, refer to L. Mishel, and R. Tiexeira, *The Myth of the Coming Labor Shortage* (Washington, D.C: Economic Policy Institute, 1991).

MANUFACTURING—NONDURABLE GOODS			
Percent Employed*	12	13	11
Percent in Modal Occupation**			
(Machine Operators, Assemblers & Inspectors)	43	38	25
Mean Age	33.9	36.1	38.2
Mean Highest Grade Attended	9.2	11.9	13.0
Mean Annual Earnings (1987)	16,708	17,347	27,124
Ratio of White Earnings	61.6	64	
Percent Covered by Private Health Insurance	60	82	92
Percent below Poverty	14	7	2
RETAIL TRADE			
Percent Employed*	19	17	17
Percent in Modal Occupation**			
(Service Occupation)	40	28	17
Mean Age	29.2	29.6	31.5
Mean Highest Grade Attended	10.6	12.0	12.9
Mean Annual Earnings (1987)	12,738	12,263	17,798
Ratio of White Earnings	71.6	68.9	
Percent Covered by Private Health Insurance	52	69	83
Percent below Poverty	17	12	5

* Employment as a percentage of all private sector industries.

** Modal occupation for employed Mexican-Americans within the selected industry.

Universe: Persons age 16-65 employed in the private sector. March 1988 survey week, unweighted sample.

Source: March 1988 Current Population Survey, microdata public use file.

TABLE 2

Characteristics of Employed Women by Selected Industry and Race

ALL INDUSTRIES	MEXICAN	BLACK	WHITE
Percent Employed*	100	100	100
Percent in Modal Occupation**			
(Administrative Support)	24	24	31
Mean Age	32.8	35.6	35.5
Mean Highest Grade Attended	10.8	12.5	13.1
Mean Annual Earnings (1987)	10,056	12,492	13,735
Ratio of White Earnings	73.2	91	
Percent Covered by Private Health Insurance	62	72	87
Percent below Poverty	18	17	5
MANUFACTURING—DURABLE			
Percent Employed*	12	8	8
Percent in Modal Occupation**			
(Machine Operators, Assemblers & Inspectors	51	58	31
Mean Age	35.4	35.9	37.4
Mean Highest Grade Attended	10.0	12.3	12.7
Mean Annual Earnings (1987)	13,574	15,845	17,734
Ratio of White Earnings	76.5	89.3	
Percent Covered by Private Health Insurance	81	86	93
Percent below Poverty	15	11	3
MANUFACTURING—NONDURABLE			
Percent Employed*	14	13	8
Percent in Modal Occupation**			
(Machine Operators, Assemblers & Inspectors)	71	59	38
Mean Age	35.0	36.1	37.7
Mean Highest Grade Attended	8.4	12.0	12.5
Mean Annual Earnings (1987)	9,194	13,093	15,124
Ratio of White Earnings	60.8	86.6	
Percent Covered by Private Health Insurance	55	80	92
Percent below Poverty	16	12	4
RETAIL TRADE			
Percent Employed*	24	17	24
Percent in Modal Occupation**			
(Sales)	50	50	46
Mean Age	28.9	30.9	32.5
Mean Highest Grade Attended	11.4	12.3	12.5
Mean Annual Earnings (1987)	7,602	8,572	9,039
Ratio of White Earnings	84.1	94.8	
Percent Covered by Private Health Insurance	56	61	80
Percent below Poverty	22	24	9

* Employment as a percentage of all private sector industries.

** Modal occupation for employed Mexican-Americans within the selected industry.

Universe: Persons age 16-65 employed in the private sector. March 1988 survey week, unweighted sample.

Source: March 1988 Current Population Survey, microdata public use file.

[The End]

NAFTA's Ties to Political Authoritarianism in Mexico

By Julie A. Erfani

Ms. Erfani is an Assistant Professor of Political Science at Arizona State University West in Phoenix.

Mexico's last presidential election of July 6, 1988, proved to be a major political embarrassment for Mexico's authoritarian political regime. Opposition presidential candidate Cuauhtemoc Cardenas, the son of Mexico's most socially progressive post-revolutionary president, charged that the Institutionalized Revolutionary Party (PRI) candidate Carlos Salinas de Gortari stole the election through massive electoral fraud. In response to this and other political pressures from opposition parties denouncing Salinas and the PRI,[1] PRI president-elect Salinas announced a democratization of the Mexican political order on July 7, 1988. On the day after he was presumably "elected" to the presidency of Mexico, Salinas urged his party to accept that the era of the PRI as the "virtually only party" in Mexico had come to an end. Presumably, his intent was to convert the PRI into a bonafide political party, and for the first time in its sixty-year history the party would have to compete in truly contested elections against other parties in a competitive party system.[2] As of this writing, nearly four years later in May 1992, no such process of democratization has taken place.

The authenticity of Salinas's commitment to such democratization appears ever more dubious as time passes in his single, six-year presidential term. For one thing, his announced democratization proposed that the PRI become a "dominant" as opposed to a single party. While the Salinas administration has permitted other parties to win some state, local, and federal congressional elections, the word "dominant" left vague whether his government would conceivably permit a party other than the PRI to win the national presidency in the next scheduled presidential election in July 1994.

Over the course of the past sixty-three years, since creation of the official party in 1929, there have been twelve presidential successions, all of which have produced official party presidents. To this date, Salinas's willingness to accept the possibility that he might not control the thirteenth presidential succession is by no means clear. Although his July 1988 announcement of political democratization seemed to imply that PRI candidates would have to compete in freely contested presidential elections in 1994, thus far Salinas has done little to guarantee that Mexico's next presidential succession will deviate from past tradition. Without fail, for six decades outgoing official-party presidents have designated their own successors whose ensuing election was a foregone conclusion guaranteed by government provision of PRI patronage and government-sanctioned electoral fraud.

I will argue that because of Salinas's overwhelming commitment to the successful completion of a North American Free Trade Agreement (NAFTA), he will not deliver on his July 1988 promises of political democratization.

Implementing NAFTA

By anyone's account, NAFTA's successful implementation relies, among other

[1] See Alan Reding, "Mexico at a Crossroads: The 1988 Election and Beyond," 5 *World Policy Journal*, no. 4 (Fall 1988), pp. 615-649.

[2] Lorenzo Meyer, "Democratization of the PRI: Mission Impossible?" in W. Cornelius et al, *Mexico's Alternative Political Futures* (San Diego: Center for U.S.-Mexican Studies, 1989).

things, upon the next president of Mexico from 1994 to 2000 favoring and implementing the agreement. Cuauhtemoc Cardenas's opposition Revolutionary Democratic Party (PRD) rejects NAFTA. Thus, it would be naive to expect that Salinas prefers that the crucial, history-transforming presidential succession of 1994 be determined, for the first time in the PRI's 63-year history, by the highly uncertain processes of electoral democracy.

There are multiple reasons for expecting that NAFTA's successful implementation relies upon the perpetuation of authoritarianism in Mexican national government as well as within official and government-leaning labor unions.[3] At the most fundamental level, NAFTA's potential perpetuation of authoritarianism in Mexico is rooted in the emphasis the United States places upon maintenance of the *border* as a boundary perpetuating the socioeconomic differences between "First World" and "Third World" peoples.

The basic idea is that goods, services, and investment should flow freely across the U.S.-Mexico border, but Mexican people should not. The border as an obstacle to the free movement of Mexican labor to the United States provides one of the key incentives for U.S. negotiators and firms to pursue NAFTA in the first place. After all, U.S. manufacturers' access to large numbers of low-paid workers with minimal job benefits and minimal, government-enforced social guarantees on the Mexican side of the border is one of the most attractive features of the proposed agreement from a U.S. perspective.

U.S. manufacturers' long-term vested interests in access to cheap, non-militant, and minimally compensated Mexican labor clearly oppose the democratization of Mexican national politics, which would probably entail the democratization of pro-government labor unions. Indeed, existing maquiladora industry experiences demonstrate how U.S.-owned manufacturing plants inside the Mexican border have flourished under PRI regimes and their political manipulation and restriction of Mexican labor.[4] Given that maquiladoras on the border will undoubtedly proliferate under NAFTA, it is important to note that such foreign-owned manufacturing was originally predicated on the existing Mexican authoritarian status quo.

When the maquila program began in the 1960s, this authoritarian status quo consisted of a political and economic order favoring large-scale corporate investors[5] and an authoritarian regime capable of maintaining a politically constrained labor force.[6] Now thirty years later, these essential components of political authoritarianism in Mexico still exist.

Although U.S. manufacturers are not the only proponents of the NAFTA, the economically neo-liberal Salinas and the Bush administration clearly condone the U.S. manufacturers' pursuit of cheap Mexican labor confined within Mexico's borders. Both administrations also condone U.S. manufacturers' interests in the maintenance of Mexico's politically authoritarian status quo. Thus far, the Bush administration has demonstrated no inter-

[3] The official PRI government labor union is the Confederation of Mexican Workers (CTM). The PRI government-leaning unions include the Federation of Sindicates of Workers in Service of the State (FSTSE), the Revolutionary Mexican Workers' Confederation (CROM), the Regional Confederation of Workers and Peasants (CROC), the National Sindicate of Education Workers (SNTE), the National Sindicate of Railroad Workers of the Mexican Republic, and the National Sindicate of Mining and Metallurgical Workers of the Mexican Republic. Besides these government-leaning unions, there are many independent unions with a variety of political/ideological tendencies.

[4] See Kevin J. Middlebrook, "The Sounds of Silence: Organised Labour's Response to Economic Crisis in Mexico," *The Journal of Latin American Studies* 21 (May 1989), pp. 195-220. Also, see Kevin J. Middlebrook, "Union Democratization in the Mexican Automobile Industry: A Reappraisal," *Latin American Research Review* 24, no. 2 (1989), pp. 81-88.

[5] See Julie A. Erfani, *Mexico: The Myth of State Sovereignty and the Reversal of Revolutionary Rhetoric* (Boulder: Lynne Rienner Publishers, forthcoming).

[6] See Middlebrook, "The Sounds of Silence," pp. 197-209.

est in the democratization of Mexican national politics. In fact, official Bush administration discourse essentially pretends that Mexican authoritarianism does not exist.

In the course of the NAFTA negotiations, the executive branch of the U.S. government has failed to negotiate a free trade agreement contingent upon Mexico's successful completion of political democratization as promised by president-elect Salinas in 1988. This lack of U.S. pressure for Mexican democratization stands in stark contrast to the external political requirements of democratization placed upon Francoist Spain when it applied to the European Community in 1976.

In the EC negotiations, as poorer Southern European countries emerging from dictatorships, Spain and Portugal had to democratize as they joined with richer European Community countries in an economic relationship dedicated to the erosion of borders as barriers to the movement of peoples and goods. The NAFTA negotiations, however, posit preferential trade between rich North American countries and Mexico on the proviso that U.S., Canadian, and Mexican borders remain barriers dedicated to the separation of rich, democratic North America from poor, authoritarian Mexico.

NAFTA's successful implementation is tied to Mexico's authoritarian regime because the regime holds the promise that an anti-NAFTA president will not be elected in 1994, and because the regime has a proven success record of repressing independent labor unions and manipulating official labor unions to keep workers' wages and benefits low.[7] In effect, therefore, many U.S. economic incentives to pursue NAFTA are tied to the continuation of Mexican authoritarianism as a political mechanism to help maintain the vast wage differentials existing between Mexico and the United States. It thus comes as no surprise that Bush administration officials have been deadly silent about Mexican President Salinas reneging on promises of democratization and silent as well on the high likelihood that Mexico's crucial upcoming presidential succession will be decided once again by the outgoing president according to the authoritarian tradition of the past sixty years.

Evidence that Salinas intends to choose his own successor in 1994 or remain in the presidency himself is growing. First, and most fundamentally, after three-and-one-half years in the presidency, he has failed to democratize the internal decision-making processes for candidate selection within his own party. Although a "new," internally democratic PRI was supposedly born at the party's 14th Assembly held in September 1990, even long-time, high-ranking ex-PRI officials maintain that the party's candidates for the last mid-term congressional elections in August 1991 were still chosen by Salinas.

Ex-secretary general of the PRI's National Executive Council, Rodolfo Gonzalez Guevarra, left the party in protest in September 1990 after nearly fifty years of membership precisely because the 14th PRI Assembly failed to open up the PRI's candidate selection process to the democratic choice of the PRI's rank-and-file members.[8] Thus, the party's status as a mere appendage of the government has remained essentially unaltered with PRI candidate selection still dictated by the president according to the practice of the past six decades.

Within the broader electoral arena, Mexico's new Federal Electoral Institute (IFE) created in 1990 is still controlled by the Mexican President and his party as was the old Federal Electoral Commis-

[7] See Kevin Middlebrook, "The Sounds of Silence," pp. 195-220.

[8] Elias Chavez, "El 'nuevo' PRI, entrampado entre sus viejos vicios y al asalto de la modernidad," *Proceso* 768 (July 22, 1991): 14-15.

sion.[9] Thus, PRI-orchestrated electoral fraud is still just as feasible in 1994 as it clearly was in the presidential election of 1988. In fact, the electoral irregularities practiced by the IFE before and during the mid-term elections of August 1991 attest to the continued lack of clean and fair elections Mexico.[10] Furthermore, Salinas's suppression of democracy within his own party and within the broader electoral arena is complemented by his repeated repression of opposition parties and political critics of the regime.

Within the wider Mexican political arena, the Salinas administration has a history of refusal to recognize the anti-NAFTA PRD's electoral victories at various local, state, and federal levels. The Salinas administration has also actively singled out and harassed individual political critics of NAFTA and of President Salinas, such as noted intellectual Jorge Castaneda, and political analyst and pollster, Miguel Basanez.[11]

Lack of intra-party PRI democracy and the absence of general societal democracy are further compounded by continued authoritarianism within Mexico's official labor unions. Within Mexico's largest labor union, which is also the government party's (PRI's) labor sector, there is little sign of democratic change. In fact, on February 24, 1992, the Confederation of Mexican Workers, the CTM, once again "re-elected" 92-year-old Fidel Velazquez as secretary general for yet another 6-year term. Through elite-negotiated alliances with PRI governments, Velazquez has manipulated the CTM since the 1940s. For fifty years Velasquez and his labor bosses have effectively constrained the wage and benefit demands of rank-and-file CTM members in exchange for CTM elites' guaranteed access to public offices and government-sponsored patronage.[12]

Even as workers' standards of living declined dramatically throughout the economically stagnant, debt-ridden decade of the 1980s, Velasquez kept CTM workers virtually silent.[13] Now, although there are signs of increasing strain between Velasquez and Salinas, CTM officials still tow the government line in support of NAFTA. Perhaps the CTM labor bosses share with Salinas a common interest in assuring that a NAFTA-inspired maquiladora expansion on the border would involve CTM unionization of new plants rather than independent union formation of a more militant strain. The convergence of interest between CTM bosses and the Salinas administration is, however, even more fundamental than this. If the PRI were to lose control of the presidency in 1994, the privileged patronage positions of CTM bosses would, of course, be undermined as CTM ties to national government dissolved. This is one obvious reason why CTM bosses tend to side with Salinas on NAFTA and oppose democratization of the PRI and of the entire electoral process.

Conclusion

As per authoritarian PRI custom, the outgoing PRI president characteristically selects his successor in the year preceding the national "election." For the coming 1994 succession, this selection process, known as the *dedazo*, will occur in 1993 when we can expect Salinas to reveal his choice for PRI presidential candidate. Judging from the Bush administration's interests in delaying a NAFTA vote in Congress until after the November 1992

[9] See Pascal Beltran del Rio y Homero Campa, "Inevitable: sello de ilegalidad a las elecciones del 18 de agosto," *Proceso* 767 (July 15, 1991): 21-26. See also Pascal Beltran del Rio, "Elecciones en puerta: las irregularidades se multiplican," *Proceso* 768 (July 22, 1991), pp. 16-17.

[10] *Ibid.*

[11] "Intento de desvirtuar la denuncia de Jorge Castaneda de amenazas policiales," *Proceso* 745 (February 11, 1991), pp. 26-28. See also, Jorge Castaneda, "Intolerancia aguda," *Proceso* 745 (February 11, 1991), pp. 32-34.

[12] See Kevin J. Middlebrook, "The Sounds of Silence," pp. 195-220.

[13] *Ibid.*

elections in the U.S., we will probably not see an agreement signed until early 1993.

Since 1993 is also the year in which the Mexican presidential succession process gets firmly underway, it will be a crucial turning point year in which Salinas will begin to reveal whether he is willing to risk following through with democratization and a clean, freely contested presidential election. Given the high political/economic stakes involved with NAFTA, it is difficult to imagine that Salinas will favor and enforce intra-PRI democracy in the selection of the Party's candidate in 1993 and then also ensure a clean presidential election in July 1994.

Recently, some PRI officials have circulated rumors about Salinas running for another, consecutive presidential term in 1994. From most appearances, the administration appears to be testing the waters for potentially negative reactions to such an anomalous prospect. The Mexican Revolution that founded the current Mexican regime began with a call for "effective suffrage and no reelection" as an assault on the continuous dictatorial rule of Porfirio Diaz. As a result, Salinas's reelection would require a constitutional amendment to alter the post-revolutionary Mexican constitution's prohibition of consecutive presidential terms. Officially, Salinas himself has denied consideration of such a proposal.

Given the PRI's dominance of the legislature, presidential proposals for constitutional amendments are not difficult to get approved. This was recently demonstrated by the success of Salinas's November 1991 proposed amendment to permit the sale of *ejido* lands, which have been non-transferable since the early post-revolutionary years. If Salinas were to run again after such a politically drastic amendment of the constitution, it is difficult to imagine that he would enforce a clean presidential election that might possibly result in his own personal electoral loss

In any event, 1993 and 1994 are the final two years of the (first?) Salinas administration and the first two years of a potential North American Free Trade Agreement. These crucial years will be the real test of President Salinas's democratic propensities. Given that NAFTA's very adoption by Mexico, not to mention its full implementation, may well depend upon existing Mexican authoritarianism, Salinas is most unlikely to fulfill his 1988 promises of democratization. Consequently, by entering into a preferential trade agreement with Mexico in 1993, the United States will endorse Salinas's political authoritarianism and be party to an agreement devised by a president lacking any real electoral mandate from the Mexican people. In this era of worldwide democratization, with NAFTA the United States will find its key foreign economic policy and interests directly tied to the political preservation of one of the world's few remaining authoritarian regimes with a lifespan exceeding that of even the former Soviet Union.

[The End]

Why a Bad NAFTA Is Worse Than No NAFTA

By Sheldon Friedman*

Mr. Friedman is an economist with the AFL-CIO Department of Economic Research in Washington, DC.

In January 1992, while in the midst of negotiations with 33 primarily U.S.-owned maquiladora employers and two days before a strike deadline, Mexican trade union leader Agapito Gonzales was arrested in the dead of night. The charge against him was tax evasion. His real crime, however, was his unusual effectiveness (by maquiladora standards) in raising the wages of some of the lowest-paid industrial workers in the world.[1]

With the collapse in value of oil exports, Mexico desperately needs foreign exchange from manufacturing exports to pay foreign debts. Citibank and some of Mexico's biggest creditors are not in the best financial health, and Mexico owes them large sums of money that must be re-paid. From the standpoint of generating exports, an abundant low-wage work force has replaced oil as Mexico's most important natural resource.

The effectiveness of Gonzales did not sit well with the employers who had taken their case directly to President Salinas. Low wages, further reduced by devaluation of the peso, are an integral part of his administration's strategy to attract foreign investment to Mexico, along with the proposed North American Free Trade Agreement (NAFTA) agreement itself. In this respect, the Salinas government and its predecessor have succeeded admirably. Measured in U.S. dollars, real wages of Mexican workers, none too high to begin with, have plunged 64% since 1982. In that year, workers received nearly 40% of Mexico's GDP; their share fell to just 24% last year.[2]

How did the Bush administration, that great defender of workers' rights, react to the arrest of Agapito Gonzales? The protest, if there was any, was too muted to be heard. NAFTA negotiations did not miss a beat. On the contrary, President Bush announced with great fanfare that the timetable for completing a tentative agreement had been accelerated. What about Agapito Gonzales? Although a court threw out the government's original charge against him, he remains under detention, more than four months after his arrest. The workers at the 33 plants in negotiations at the time of his arrest settled for wage increases well below Mexico's recent rate of inflation. A sharp contrast to the substantial real wage gains won several weeks earlier after short strikes lead by Gonzales at 25 other maquila plants.

Regulatory Differences

Low wages, often only one tenth of U.S. wage levels, are not the only benefit accruing to multinational corporations that transfer operations to Mexico. Additional savings can also be realized by avoiding the cost of complying with U.S. health, safety, and environmental regulations. The U.S.-Mexico border runs astride the longest boundary on the planet between a

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[1] See "Rep. Pease Says Mexican Arrest Raises Trade Issue," Feb. 7, 1992; "Mexican Border Group Pushes New Wage Plan," Feb. 6, 1992; and "UAW Protests Mexico's Arrest of Labor Leader," Feb. 5, 1992, by Tim Shorrock, *Journal of Commerce*. Also see "Maquilas Want to Redo Contract," Feb. 3, 1992; "Labor Leader Nabbed, Flown to Mexico City," Feb. 2, 1992; "Maquiladoras Reach Agreement with Labor Unions," Jan. 30, 1992; and "Thousands of Maquila Workers Walk Off Job," Jan. 28, 1992, by Philip True, *Brownsville Herald*. See Michael Byrne, "Mexican Disregard for Worker Rights Exposes Fallacy in 'Free Trade' Talks," *AFL-CIO News*, Feb. 17, 1992. In addition, see "U.S. Employer Interference in Mexican Law Enforcement," Statement by the *AFL-CIO Executive Council* Feb. 18, 1992.

[2] "Mexico's Road to Nowhere," *Dollars & Sense*, p. 14, April 1992.

first- and third-world nation. In addition, this is an area where three-fourths of all maquila plants are located, and it is generally regarded as an environmental disaster.[3] Air and water pollution, hazardous wastes, and pesticides are among the area's many festering environmental problems.

The problem is not so much that Mexico lacks regulations. The country is not void of regulation even though at least three important areas subjected to regulation in the U.S. go unregulated in Mexico. These areas include underground storage tanks, land disposal of hazardous wastes, and clean-up of abandoned hazardous waste sites. The greater problem, which is typical for an impoverished developing country, is Mexico's lack of resources to enforce its environmental regulations.

SEDUE, Mexico's EPA, had a 1991 budget of $38 million. EPA's 1991 budget was $5 billion, 132 times larger. To make matters worse, public input into the process of environmental standard-setting and enforcement is virtually nonexistent in Mexico. In the absence of U.S. trade sanctions, which could be used to support their efforts, Mexican workers and even the Mexican government are in an extremely weak position to face down environmental blackmail and force foreign corporations to adhere to health, safety, and environmental standards.

In addition to their adverse impact on the environment, weak standards and lax enforcement in Mexico have cost U.S. workers their jobs. The wood furniture industry in the Los Angeles area is an example of the problem. By 1988, more than 150 U.S.-owned furniture plants were operating in Mexico's border area under the maquiladora program. Most if not all of them had relocated from the U.S. in search of low wages and less costly environmental and safety regulations.[4] When California adopted tougher standards to control emissions of paint and solvents, up to 10% of the wood furniture manufacturers still remaining in the Los Angeles area in 1989 fled to Mexico rather than comply. As a result, there was an elimination of approximately 2,500 additional jobs.

Marlin Fitzwater may think the recent civil disturbances in Los Angeles were caused by failed social programs of the 1960s. Might it not have more to do with the lack of economic opportunity resulting in part from the unrestricted hemorrhage from Los Angeles and America's other cities of decently paid manufacturing jobs?

How does this grim reality square with the high-priced econometric studies commissioned by the Bush administration and other NAFTA supporters who predict that NAFTA will stimulate an increase in the number and quality of U.S. jobs? A short answer is that those optimistic predictions probably are wrong. Most if not all of the optimistic forecasts are predicated on the remarkable assumption that NAFTA will not result in the further shift of corporate investment from the U.S. to Mexico. More realistic studies, not paid for by the Bush administration or other NAFTA supporters, conclude that the NAFTA will cost the U.S. as many as 500,000 jobs.[5]

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[3] *Leslie Kochan*, "The Maquiladoras and Toxics: The Hidden Costs of Production South of the Border," *AFL-CIO Publication #186-PO690-5.* Also see Michael Satchell, "Poisoning the Border," *U.S. News & World Report*, May 6, 1991.

[4] "Exploiting Both Sides: U.S.-Mexico Free Trade," *AFL-CIO Publication 0-220-0391-5*, February 1991. Also see Rudy Oswald, "The Industrial Impacts of the U.S.-Mexico Free Trade Agreement," *Statement of AFL-CIO*, p. 9, April 12, 1991.

[5] Timothy Koechlin et al. "Estimates of the Impact of the Free Trade Agreement on Direct U.S. Investment in Mexico," *Summary of Testimony to the U.S. Trade Representative Public Hearings on NAFTA*, September 11, 1991. Also see James Cypher, "Labor Market Implications of the Mexico-US Free Trade Agreement." A paper presented to a joint session of the Industrial Relations Research Association and the North American Economics and Finance Association at the Allied Social Science Association Meetings, New Orleans, January 4, 1992. In addition, see Jeff Faux and Richard Rothstein, "Fast Track, Fast Shuffle the Economic Consequences of the Administration's Proposed Trade Agreement with Mexico," *Economic Policy Institute Briefing Paper*, April 1991.

In a word, NAFTA will accelerate the maquilization of Mexico. Since 1982, the number of maquiladora plants and workers has more than tripled. By the end of 1991, more than 2,000 maquilas were employing nearly 500,000 Mexican workers. Over the last eight years, the number of maquilas and maquila workers has increased 16% per year. More than half of all maquiladora employment is concentrated in the auto parts and electronics industries. Although precise figures are not available, most if not all of the growth in maquilas represents the relocation of plants and the shift of jobs from the U.S.[6]

Under the program that was initiated in 1965, equipment and parts can be imported duty-free into Mexico provided the products into which they are manufactured or assembled are exported from Mexico. The U.S. then permits goods finished in Mexico and exported from there to the U.S. to be charged duty only on the low-wage value added in Mexico.

Displaced Workers

Who will NAFTA hurt in the U.S.? For the most part, it will be blue collar workers with a high school education or less, disproportionately Hispanics or other minorities.[7] These are the same workers who have already been victims over the last decade or more of plant closings, permanent layoffs, and real earnings declines. For these workers and their families, NAFTA will become one more cause of great hardship and suffering as they cope with economic dislocation beyond their control and triggered by U.S. government policy.

U.S. workers displaced by NAFTA or other causes have one of the weakest safety nets in the industrialized world. They have no national health insurance, inadequate unemployment benefits, limited help with training or job search assistance, and no public job creation programs. The proportion of our GDP devoted to public labor market programs of all kinds, unemployment insurance, job training, job search assistance, and job creation combined is less than one-third as high as Canada's and only one-fourth as high as Western Europe's (.6% of GDP for the U.S., versus 2% for Canada and 2.5% for Western Europe).[8]

Trade Adjustment Assistance (TAA), the only U.S. program that comes close to meeting international standards in terms of duration of assistance and provision of training for dislocated workers, requires major improvements in benefits, eligibility rules, and funding in order to provide meaningful help for workers who will be injured as a result of NAFTA.[9] Instead of proposing or supporting these badly needed changes in TAA, the Bush administration seeks total elimination of the TAA program.

More than one year after promising to help workers who would lose their jobs as a result of NAFTA, a promise made when they were seeking support in Congress for the extension of so-called "fast track" negotiating authority, the Bush administra-

[6] For a partial list of plants and jobs that have relocated to Mexico, see "Jobs Exported to Mexico," *AFL-CIO News*, April 29, 1991. Also see "The Industrial Impacts of the U.S.-Mexico Free Trade Agreement," *Statement of Rudy Oswald, AFL-CIO*, p. 6, April 12, 1991.

[7] Based on figures in the *Handbook of Labor Statistics*, Bulletin 2340, "Employment and Earnings," January 1991, and *Displaced Workers: 1985-89*, Bulletin 2382, Hispanic workers were almost 30% more likely than non-Hispanics to suffer dislocation in the form of permanent job loss between 1985 and 1989. They fit the profile of workers most at risk from NAFTA almost perfectly. In recent years, relocations to Mexico by companies such as Farah and Green Giant have had a grossly disproportionate impact on Hispanic workers in the U.S.

[8] Howard Rosen, "U.S. Assistance for Trade-Related Workers: A Need for Better Coordination and Reform," *Worker Adjustment Assistance Programs*, Table 3, p. 118, Serial 102-56 Hearing Before the Subcommittee on Trade, House Ways and Means Committee, U.S. House of Representatives, August 1, 1991.

[9] Sheldon Friedman, "Trade Adjustment Assistance Time for Action, Not False Promises," *AFL-CIO Reviews the Issues*, Report No. 53, September 1991. Also see "Summary of Recommendations of the AFL-CIO to Improve the Effectiveness of the Trade Adjustment Assistance (TAA) Program," February 20, 1992.

tion has not seen fit to offer a NAFTA worker adjustment proposal.

The Integration of the Mexican and American Economies

Closer integration between the U.S. and Mexican economies is likely, with or without a NAFTA. What is neither inevitable nor desirable is economic integration based on an international division of labor in which Mexico supplies cheap labor and lax enforcement of health, safety, and environmental standards, the U.S. supplies the consumer market, multinational corporations derive the profit, and U.S. workers lose their jobs. That, for the most part, has been the road travelled so far. Based on what is known about the negotiating objectives of Bush and Salinas, and the contents of the leaked NAFTA draft, the agreement that may soon be initialed by the respective governments will carry us further and faster down that well-travelled road.[10]

For Mexican workers, the benefits are doubtful. Any attempt to raise their abysmal wages will lead to complaints by multinational employers, and, if history is any guide, a repressive Mexican government reaction. The Mexican and border environments will continue to be despoiled by corporate polluters; Mexican workers will continue to be subjected to toxic exposures illegal in the U.S. It is also likely that control over oil and other natural resources, which under Article 27 of the Mexican constitution have been reserved for the Mexican people since the turbulent 1930s, will be ceded slowly but surely to the big U.S. oil companies. The number of jobs that will be destroyed in small business and agriculture raises serious doubts about whether NAFTA will lead to net job creation even in Mexico.

For U.S. workers, the consequences of NAFTA will be job loss, downward pressure on wages and benefits, and downward pressure on health, safety, and environmental standards. Hispanic workers in the U.S. will be disproportionately represented among the ranks of those most adversely affected.

These outcomes are not inevitable. It is possible to conceive of a more positive model of economic integration. In such a model, harmonization of workers' rights and labor, health, safety, and environmental standards would be upward, not down. One has only to look to the European community, where economic integration has been accompanied by a social charter, in order to provide a framework for upward harmonization and guard against the kind of "social dumping" that NAFTA will exacerbate.[11]

Conclusion

In the North American context, upward harmonization would require, among other things, an agreement that includes provisions for invoking trade sanctions to prevent unfair competition from imports deriving a competitive advantage based upon violations of workers' rights, or labor, health, safety and environmental standards. These provisions are essential not only to protect U.S. workers and the environment, but also to support the efforts of workers and others to raise labor standards and protect the environment in Mexico. The Bush administration, of course, has completely rejected this approach.

An equitable NAFTA would also require comprehensive improvements in the Trade Adjustment Assistance program, and to help U.S. workers who will be NAFTA's victims. As noted earlier, the Bush administration instead proposes to

[10] John Audley et al., "Too High a Price for Free Trade: Citizens' Analysis of the February 21 Draft of the North American Free Trade Agreement," April 6, 1992. Also see John Audley, "A Critique of the February 21, 1992 draft of the North American Free Trade Agreement," *Sierra Club Center for Environmental Innovation*. April 1992.

[11] Greg Woodhead, "Workers Rights: EC92," *AFL-CIO Reviews the Issues, Report No. 54*, Sept. 1991, and "European Worker Benefits," *AFL-CIO Reviews the Issues, Report No. 55*, Sept. 1991. Also see Peter Morici, "A Social Charter for a North American Free Trade Area?" undated mimeo.

eliminate the TAA program. Debt relief for Mexico would also be needed to assure an equitable NAFTA, which takes us on a more positive road to economic integration.

Most of all, we need a democratic negotiating process that assures a seat at the NAFTA table for workers, farmers, environmentalists, and others on both sides of the border who will be affected by the agreements, not just for the economic elites and multinational corporations who stand to profit from it. Because the NAFTA agreement (which the Bush administration may soon present) is virtually certain to ignore almost completely the interests of workers, farmers, and environmentalists on both sides of the border, the Congress should reject it decisively. Based on everything that is known about it, a NAFTA that bad will be much worse than no NAFTA at all.

[The End]

Court Review of Arbitration

By David E. Feller

Mr. Feller is a Professor at the University of California at Berkeley School of Law.

When confronted with the task of delivering a paper on court review of arbitration, my first thought was that there was really nothing new to be added to what has already been written on the subject. The basic standard governing the scope of judicial review of arbitration decisions had been set in 1960 by the Supreme Court of the United States in the third of the Steelworkers Trilogy, *Steelworkers vs. Enterprise Wheel and Car Corporation.*[1]

The standard set forth in *Enterprise* was most recently reemphasized in 1987 in *Paperworkers v. Misco.*[2] As there stated, a court's conviction that an arbitrator "committed serious error does not suffice to overturn his decision . . . as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority."[3] That seemed to leave no question. As long as the arbitrator framed his award in terms that were purportedly based on his reading of the agreement, his award was essentially unreviewable.

This result was firmly grounded not on the Federal Arbitration Act but on Section 301 of the Taft Hartley Act. Section 301 made collective bargaining agreements enforceable in the federal courts and led to the decision in *Lincoln Mills*[4] that the courts were to develop a federal common law to govern the interpretation of collective bargaining agreements. The dismay that holding engendered, not only from the dissenting judges but also from the academic community,[5] was grounded in the fear that the courts would become intricately involved in the interpretation of labor agreements. But the Steelworkers Trilogy then calmed those fears by essentially making the only important federal law governing collective bargaining agreements, the law respecting arbitration. This is especially true since more than 90% of collective bargaining agreements provide for the arbitration of disputes and for the proper interpretation and application of those agreements.

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[1] 363 US SCt 593 (1960), 40 LC ¶ 66,630.

[2] 484 US SCt 29, 38 (1987), 107 LC ¶ 10,165.

[3] *Ibid.*

[4] *Textile Workers v. Lincoln Mills,* 353 USSCt 448 (1957), 32 LC ¶ 70,733.

[5] See Aaron, "On First Looking into Lincoln Mills," *Arbitration and the Law, Proceedings of the Twelfth Annual Meeting,* National Academy of Arbitrators (McKelvey, ed., 1959).

The decision to argue that the enforceability of an agreement to arbitrate and that an arbitrators' decision rested on Section 301 of the Labor Management Relations Act of 1947, rather than upon the Federal Arbitration Act, was based on two considerations. First, there was the still unsettled question as to whether the exclusion in Section 1 of the Act, dealing with "contracts of employment of seamen railroad employees or any other class of workers engaged in foreign or interstate commerce," excluded grievance arbitration under a collective bargaining agreement. Second, and more important, was the fact that as of the time *Lincoln Mills* was argued, the federal courts (as well as the state courts in which arbitration agreements were made enforceable by statute, although directed by statute to enforce agreements to arbitrate) remained hostile to it.

Agreements to arbitrate would not be enforced in the federal courts unless the party seeking arbitration could "produce evidence which tends to establish his claim" before a court would compel arbitration.[6] In New York, *Cutler-Hammer*[7] held that "if the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration." At the time, hostility towards arbitration was exemplified by the Supreme Court of the United States in *Wilko v. Swan*,[8] where the Court held that an agreement to arbitrate statutory claims was unenforceable.

The argument in *Lincoln Mills* and the predicate for the Steelworkers Trilogy was that grievance arbitration was different. Unlike other arbitration, it was not a substitute for litigation but a substitute for the strike, and *Wilko* and similar cases were irrelevant. The argument was successful and both enforcement of the agreement to arbitrate and the limited scope of review of arbitration decisions were firmly grounded, not on the Federal Arbitration Act, but on the provisions of Section 301.

Since then, the context in which the choice was made between Section 301 and the Federal Arbitration Act has undergone an enormous change. The litigation explosion of recent years has imposed an enormous strain on both state and federal courts. As a consequence, the attitude of those courts toward the enforceability of agreements to arbitrate decisions in other than the labor context has completely reversed course. *Wilko v. Swan* has been overruled. Agreements to arbitrate all disputes have now been held to require arbitration, rather than suit, for claims of violation of the anti-trust laws, the RICO statutes, the Security and Exchange Acts, and most recently, in *Gilmer v. Interstate/Johnson Lane Corp.*[9], the Age Discrimination in Employment Act. Further, the FAA has now been held to create a federal substantive law, binding on the states.[10] The much disputed *Lincoln Mills* holding that Section 301 created a federal substantive law governing collective bargaining agreements turns out to be totally unnecessary for the result. As the Court said in *Rodriguez D. Quijas v. Shearson/American Express*,[11] "the old judicial hostility to arbitration" has been steadily eroded over the years and the "outmoded presumption of disfavoring arbitration proceedings" has now been set aside.

Whether this newly developed overriding preference in nonlabor areas for arbitration under the FAA (rather than

[6] *Engineers Association v. Sperry Gyroscope Co.*, 251 F2d 133 (CA-2 1957), 33 LC ¶ 71,178; cert. denied 356 US SCt 932 (1958).

[7] 271 App. Div. 917, 67 NYS 2d 317 (1947), aff'd 297 NY 519.

[8] 346 US SCt 427 (1953).

[9] 11 US SCt. 1647 (1991), 56 EPD ¶ 40,704. The Court was able to avoid decision on the question of whether the exclusion in Section 1 of the FAA barred the applicability of the FAA to the claim because it had not been litigated below and because the arbitration provision was not contained in a contract of employment but rather in plaintiff's securities registration application.

[10] *Southland Corp. v. Keating*, 465 US SCt 1 (1984).

[11] 490 US SCt 477.

litigation) will also apply to judicial review of arbitrators' decisions is yet to be determined. The FAA was designed for commercial arbitration. The grounds for setting aside an arbitrator's award under it are extremely limited, and apply principally to corruption or misconduct by the arbitrator or action in excess of the arbitrator's authority. It is clear that a commercial arbitration award cannot be upset on the ground that it is simply wrong, either as a matter of fact or law or even on the basis that it is irrational. This essentially follows from the fact that in commercial arbitration there is normally not an opinion, simply a result. A result that is ordinarily stated in terms of a denial of relief or an award specified in dollars and cents.[12]

In labor arbitration, unlike commercial arbitration, what Mr. Justice Douglas said in *Enterprise Wheel and Car* is simply not true. In that case he stated: "Arbitrators have no obligation to the court to give their reasons for an award. To require opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions." [13] This was, of course, nonsense as applied to grievance arbitration. An arbitrator under a collective bargaining agreement who simply issued an award saying "grievance denied" or "the grievant shall be reinstated with back pay" and gave no reasons for his conclusion would never again be appointed as an arbitrator.

A labor arbitrator's decision not only resolves the particular dispute but also provides guidance for the parties in their continuing relationship under the collective bargaining agreement. It is therefore the universal assumption of labor arbitrators that, unless specifically directed not to do so (as in salary arbitration in major league baseball), they must set out the reasons for the conclusions contained in their awards.

How the new judicial receptivity to arbitration will play out in the review of arbitration claims for statutory violation, as in *Gilmer*, remains to be seen. It may be that the same forces that have induced the change in the attitudes of the federal courts, as to the arbitrability of statutory claims, will also carry over to the review of the arbitrator's awards in those situations. It may be, on the other hand, that the actual practice of the courts in reviewing grievance arbitration awards under Section 301 will be applied to the review of statutory claims under the FAA. The Supreme Court, it should be noted, cited *Warrior & Gulf*, one of the Steelworker Trilogy cases, in support of its new found receptivity to the arbitration of statutory claims.[14]

These thoughts lead me directly to consideration of to what extent courts, under Section 301, do in fact review and sometimes reverse the awards of arbitrators under collective bargaining agreements. I will not attempt to review all of the cases. I will concentrate instead on two specific areas that have been the subject of the most recent controversy. These areas have to do with awards that are alleged to be unenforceable because they violate public policy, and also awards that apply a just cause standard to discharges for conduct in violation of a rule specifying such conduct is a ground for discharge.

Contrary to Public Policy

The first of these areas, the setting aside of awards on the ground that the award is contrary to public policy, was the issue presented but not really decided in *Misco*. To summarize briefly, and consequently inadequately, *Misco* involved an employee who was discharged by his employer on the ground that he smoked

[12] See American Arbitration Association, Office of the General Counsel, *Arbitration and the Law 1989-1990*, 44 (1990); and G. Goldberg, *A Lawyer's Guide to Commercial Arbitration* 57 (2d ed. 1983).

[13] Cited at note 1 above, at 598.

[14] *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth*, 473 US SCt 614, 626 (1985).

marijuana in a car on the company parking lot during a work break. The arbitrator found that the company had not proved satisfactorily that the employee had committed the offense. The Fifth Circuit set aside the award on the ground that reinstatement was contrary to public policy against the operation of dangerous machinery by persons under the influence of drugs or alcohol. The Supreme Court granted certiorari, presumably to resolve the conflict within the federal circuits as to the power of the courts to refuse to enforce awards on public policy grounds.

The Court never really resolved that issue because the premise for the public policy question, i.e., that the grievant in fact had consumed marijuana, or even had it on his person, was contrary to the arbitrator's finding. In so holding, the Court simply underlined the rule of *Enterprise Wheel & Car.* The question of whether an award ordering reinstatement should have been set aside on public policy grounds if the arbitrator had concluded that the grievant had committed the charged act was not necessary to the decision and was not, as Mr. Justice Blackman emphasized in a concurrence, in fact decided.

The Court did add some generalized verbiage to the effect that there was no broad judicial power to set aside arbitration awards as being against public policy, and it reiterated its previous statement in *W. R. Grace & Co. v. Rubberworkers,*[15] which held that an award could be set aside on public policy grounds only if there was a "well defined and dominant" policy ... to be ascertained by reference to the laws and legal precedents and not from general consideration of supposed public interest."

What has happened since *Misco* is unenlightening. The question not yet resolved is whether the applicable public policy, if well defined by legislation or judicial precedent, is one that would forbid reinstatement by the employer under the circumstances given or whether it is one that forbids the enforcement of an arbitration award ordering reinstatement even though reinstatement is within the legal discretionary power of the employer.

The former is the view of the Third, Seventh, Ninth, Tenth, and D.C. Circuits.[16] The latter is the view of the First, Second, Fifth, Eighth and Eleventh Circuits.[17] The contrast is best shown by two cases, one pre- and one post-*Misco,* involving pilots who violated the explicit federal regulation against drinking within the 24-hour period prior to operating an aircraft. The regulation requires the lifting of the license of any pilot who transgresses that rule but also provides for the issuance of a special license if the pilot demonstrates that he has been rehabilitated and remains free of alcohol usage.

The D.C. Circuit, pre-*Misco,* enforced an arbitrator's decision ordering reinstatement of a pilot who had violated both the regulation and the company's rule conditioned upon the pilot regaining his license from the FAA.[18] The Eleventh Circuit, faced with a similar ruling, refused to enforce the award on the ground that there was a strong public policy against

[15] 461 US SCt 757, 766.

[16] *U.S. Postal Service v. Letter Carriers,* 839 F2d 146 (CA-3 1989); *E.I. Dupont de Nemours & Co. v. Grasselli Independent Employees Ass'n,* 790 F2d 611 (CA-7 1986), 104 LC ¶ 11,918, cert. denied 479 US SCt 853 (1986), 105 LC ¶ 12,001; *Chrysler Motors v. Allied Industrial Workers* (CA-7 1992), 121 LC ¶ 10,085; *Stead Motors v. Automotive Machinists Lodge 1173,* 886 F2d 1200 (CA-9 1989), cert. denied 110 US SCt 2205 (1990); *Communications Workers v. Southeastern Electric Cooperative,* 882 F2d 467 (CA-10 1989); *Northwest Airlines, Inc. v. Air Line Pilots Ass'n,* 808 F2d 76 (CA-DC 1987), 106 LC ¶ 12,235, cert. denied, 486 US SCt 1014 (1988), 108 LC ¶ 10,475.

[17] *U.S. Postal Service v. American Postal Workers Union,* 736 F2d 822 (CA-1 1984); *Newsday, Inc. v. Long Island Typographical Union,* 915 F2d 840 (CA-2 1990), 54 EPD ¶ 40,307; *Amalgamated Meat Cutters v. Great Western Food Co.,* 712 F2d 122 (CA-5 1983); *Iowa Electric Light & Power Co. v. Local 204,* 834 F2d 1424 (CA-8 1987), 107 LC ¶ 10,211; *Delta Air Lines, Inc. v. Air Line Pilots Ass'n,* 861 F2d 665 (CA-11 1988), 110 LC ¶ 10,852, cert. denied 493 US SCt 871 (1990).

[18] Cited at note 13 above.

drunken pilots operating aircraft.[19] Certiorari was denied in both cases.

Most of the cases are described amusingly and clearly by Judge Easterbrook of the Seventh Circuit in a paper delivered to the National Academy of Arbitrators in 1991.[20] For those who are interested in the subject I recommend his paper to you. His essential thesis is that if under a given collective bargaining regime, higher management would have the legal right to reverse an initial decision to discharge because of conduct violating public policy, then an arbitrator's award to the same effect, if based on the contract, should be enforced. To put the matter in other words, unless the action that the arbitrator orders the employer to take would violate some law, the award should be enforced if based upon the contract. I agree with Judge Easterbrook and will not use the short time allotted to me to restate the argument in support of his view.

Applying a Just Cause Standard

What has not been canvassed elsewhere is the other major area in which the courts of appeal are divided in determining whether to set aside or enforce arbitrators' awards. The distinction between the two areas is best illustrated by the successive decisions of the First Circuit in *S.D. Warren Co. v. United Paperworkers' International Union, Local 1069*.[21]

Warren, like *Misco*, involved marijuana. Concerned about the drug problem at its plant, the employer engaged an undercover agent who solicited employees to provide him with it. Twelve employees who responded to the solicitation were discharged for violation of a plant rule (set out as an appendix to the collective bargaining agreement), which stated among other things that possession, use, or sale on mill property of marijuana would be considered cause for discharge. The arbitrator found that three of the discharged employees had violated the rule but their discharge was not for "proper cause" as required by the contract because of the circumstances under which they were pressured to obtain and supply the drug to the agent. The discharges were reduced to suspensions ranging from four to nine months.

In its first decision, the First Circuit set aside the award on the ground that it was contrary to public policy and did not draw its essence from the collective bargaining agreement because of the specific listing in the rule of sale or possession of marijuana as one of 14 grounds for discharge. On petition for certiorari, the Supreme Court of the United States vacated the judgment and remanded to the court of appeals for consideration in the light of *Misco*. On remand, the court eliminated the public policy basis for its decision but nevertheless set aside the award on the ground that the rule plainly stated that a violation was "cause for discharge." This language, the court said, was unambiguous.

The arbitrator had found the contract ambiguous as to whether the listing in the rule of specific offenses that might be ground for discharge overrode the contract provision requiring "proper cause" for discharge. She noted that the company's practice was not to automatically discharge for commission of the offenses listed in the rule but to make a judgment as to whether discharge was appropriate. She concluded, therefore, that the "proper cause" requirement still be obtained. To this reasoning, the court of appeals responded that the management's rights clause of the agreement gave the company the unilateral authority to determine in each case whether discharge

[19] Cited at note 14 above.

[20] "Arbitration, Contract and Public Policy," in *Arbitration 1991, The Changing Face of Arbitration in Theory and Practice, Proceedings of the 44th Annual Meeting, National Academy of Arbitrators* (Gruenberg, ed.) (1992).

[21] 815 F2d 178 (CA-1 1987), 106 LC ¶ 12,308; vacated, 484 US SCt 983 (1987), 107 LC ¶ 10,230; on remand, 845 F2d 3 (CA-1 1988), 108 LC ¶ 10,450.

would follow from violation of the rule and that the contract therefore unambiguously eliminated any consideration by the arbitrator as to whether there was proper cause.

There can be little doubt that the decision of the First Circuit in *Warren II* was contrary to the standards announced in *Enterprise* and *Misco*. It certainly is not ineluctably clear that a collective bargaining agreement listing fourteen specific types of conduct that could lead to discharge, including smoking, willful disobedience, neglect of duty, dishonesty, and waste of company time and/or material, as well as drug possession, was intended to eliminate the requirement that commission of the listed offenses constitute "proper cause" for discharge in the particular factual context of a given case.

The arbitrator's decision that the provision of the plant rule did not obviate the necessity to show proper cause is emphasized by the fact that there was not one but two disciplinary rules in the Warren contract. The first rule, which included drug possession, was followed by a second rule, which also listed offenses but provided that commission of those offenses would be cause for discharge only after appropriate warning. It was certainly permissible, indeed I would argue the arbitrator was almost compelled, to conclude that the purpose of the first rule was to specify those offenses for which prior warning was not required, thus avoiding the possibility that an arbitrator would apply the usual standard of progressive discipline and set aside a discharge for commission of an offense listed in the first rule on the ground that no prior warning had been given.

What is significant is that the question presented in *Warren II* has been decided by at least six other courts of appeal, four of which have refused to set aside arbitrators' awards reinstating employees because of the absence of just or proper cause, despite the listing of the conduct involved as a cause for discharge in an agreed upon rule.[22] On the other hand, two of the circuits have set aside awards in almost identical circumstances.[23] This should not be surprising. Rules listing causes for immediate discharge are frequently contained in collective bargaining agreements or in rules that are negotiated between employers and unions.

Indeed, even in the absence of negotiated rules, it is the common understanding of arbitrators that employers have the right to promulgate reasonable rules and one of the most common types of rules is a rule specifying that certain types of offenses may justify discharge without prior warning or previous disciplinary action, thus removing those offenses from the usual rule requiring warning and progressive discipline before discharge.[24]

Of course the interpretation of every contract is governed by inferences that can be drawn from the specific language of that contract[25] and, in a particular case, negotiating history may be adduced to show that the parties intended (by listing specific conduct that may be cause for discharge) to remove from arbitral consid-

[22] *Arco-Polymers, Inc. v. Local 8-74*, 671 F2d 752 (CA-3 1982), 93 LC ¶ 13,282; *F.W. Woolworth Co. v. Miscellaneous Warehousemen*, 629 F2d 1204 (CA-7 1980), 89 LC ¶ 12,280; *Waverly Mineral Products Co. v. Steelworkers*, 633 F2d 682 (CA-5 1980), 90 LC ¶ 12,471; *Kewanee Machinery v. Teamsters Local 21*, 593 F2d 314 (CA-8 1979), 85 LC ¶ 11,136. Also see *Mobil Oil Corp. v. Independent Oil Workers*, 679 F2d 299 (CA-3 1982).

[23] *Firemen and Oilers Local 935-B v. Nestle Co.*, 630 F2d 474 (CA-6 1980), 89 LC ¶ 12,328; *Mistletoe Express v. Motor Expressmen's Union*, 566 F2d 692 (CA-10 1977), 83 LC ¶ 10,303. The Sixth Circuit's position may have changed since *Misco. Eberhard Foods v. Handy*, 836 F2d 890 (CA-6 1989), 111 LC ¶ 10,981.

[24] See Zack, Grievance Arbitration 61 (1989).

[25] Although the 5th Circuit affirmed the arbitrator's award in a *Warren* situation (see footnote 22), the additional provision that the arbitrator should have no authority to modify discipline in such a case led to the opposite result. See *I.A.M. Lodge 2504 v. Intercontinental Mfg. Co.*, 812 F2d 219 (1987). The absence of a "just cause" limitation and the presence of a right to strike over a discharge grievance also will lead to a different result. *Local 705 v. Schneider Tank Lines*, 139 LRRM 2699 (CA-7 1992).

eration the question of whether the conduct in the particular case could constitute just cause for discharge. In the absence of any such contextual or negotiating history evidence, it is nonsense to say that an arbitrator may not rationally conclude that the listing of specific offenses as a cause for possible discharge does not eliminate the requirement that the employer show that in the particular circumstances discharge was for just or proper cause if the agreement says that the employer's right to discharge is limited to cases in which such cause appears.

The Supreme Court refused to grant certiorari to review the second *Warren* decision, even though there was a clear conflict amongst the circuits on the question of the contractual interpretation involved, or, more precisely, a clear conflict as to whether an arbitrator might rationally conclude that a listing of offenses permitting discharge did not override a contractual requirement for just or proper cause.

This refusal illustrates what I believe is central to any discussion of court review of arbitration awards: The Supreme Court is in no position to enforce adherence by the courts of appeal to the rules governing review of arbitrators' awards. The Court only takes cases in which general principles are involved. Just because a decision is wrong is not a ground for review. So long as a court adheres to a ritualistic recitation of the standards governing review, it can use any one of a number of dodges to second guess the arbitrator. So long as there is the slightest loophole in the standards announced by the Supreme Court, a court that strongly disagrees with the result in a particular case will find a way to set it aside.

The loophole in *Misco* lies in its reiteration of Justice Douglas's slip of the tongue in *Enterprise Wheel and Car.* In order to emphasize the holding in that case (that the arbitrator must base his award on his reading of the contract, not what he believes should have been provided in the contract), Justice Douglas stated that an arbitrator "does not sit to dispense his own brand of industrial justice . . . [H]is award is legitimate only so long as it draws its essence from the collective bargaining agreement." A court may conclude that the arbitrator's reasoning does not comport with its reading of the agreement and therefore does not draw its "essence" from it.

The "essence" test is elastic enough to be stretched from a loophole to a barn door. As the Sixth Circuit saw it in a pre-*Misco* decision, "there may be a departure from the essence of the agreement if (1) an award conflicts with the express terms of the collective bargaining agreement, (2) an award imposes additional requirements that are not expressly provided in the agreement, (3) an award is without rational support or cannot be rationally derived from the terms of the agreement, and (4) an award is based on general considerations of fairness and equity instead of the precise terms of the agreement." [26]

Added to this recital of the reasons why an award does not draw its essence from the agreement should be the Eighth Circuit's post-*Misco* statement that "[w]here an arbitrator fails to discuss a probative contract term and at the same time offers no clear basis for how he construed the contract to reach his decision without such consideration, there arises a strong possibility that the award was not based on the contract." [27]

Conclusion

When one reads the decisions of these circuits, as well as others, the only conclusion that can be drawn is that the result in any particular case is unpredictable, and, whatever the result, it will not be

[26] *Dobbs, Inc. v. Local 614, International Brotherhood of Teamsters,* 813 F2d 85, 86 (CA-6 1987), 106 LC ¶ 12,254.

[27] *George A. Hormel Co. v. United Food and Commercial Workers Local 9,* 879 F2d 567 (CA-8 1989), 112 LC ¶ 11,336.

reviewed by the Supreme Court. Canvassing the cases, even those after *Misco*, to find a guiding principle is to chase a will-o'-the-wisp. In some cases, such as in *Warren II*, an arbitrator's decision is set aside, which is without doubt one that the arbitrator was authorized to make by the contract. In others, even in the same circuit that decided *Warren II*, an award is sustained, citing *Misco*, which is not only contrary to an explicit contract provision but also seems to have no rational basis.[28]

This unpredictability undermines the utility of grievance arbitration as a method for obtaining quick and final determination of questions arising under a collective bargaining agreement. The volume of litigation seeking to upset arbitrators' awards shows no sign of abating. At the time of the argument of the Steelworkers Trilogy, it could be and was asserted flatly that there was no case in the basic steel industry in which either the union or a company had sought to contest arbitrability or to upset an arbitrator's award. This is no longer true. See *Bethlehem Steel Corp. v. Steelworkers.*[29] Nor is resort to the courts to set aside unfavorable arbitration awards exclusively the province of employers. Increasingly, unions are bringing suit to set aside arbitration awards they regard as departing from the "essence" of the collective bargaining agreement.[30]

I suggest that the explanation for these developments is that the premise upon which *Lincoln Mills* and the Trilogy rested (i.e., that grievance arbitration was a substitute for the strike, rather than for litigation), while true, has a counterpart. As the abilities of unions to strike effectively has waned, the proposition that it is necessary to give quick and certain finality to arbitration decisions in order to avoid the possibility that the strike will be substituted for arbitration has lost all vitality.

There was a day, not many years ago, when unions such as the Steelworkers seriously entertained proposals to junk arbitration as a method for resolving grievances in favor of a right to strike. The Teamsters union went so far (in the National Master Freight Agreement) to override any local supplements that provided for arbitration rather than economic action as the terminal point for the grievance procedure. Today, on the contrary, the right to strike over grievances has become such an impotent weapon that unions that negotiated this right have successfully chosen to seek resolution of unresolved grievances by litigation.[31]

The result is not a happy one for arbitrators or, I submit, for the health of the uniquely American system of private self-government embodied in the grievance arbitration system. That result, however, is but a symptom of the overall decline in collective bargaining and union strength in the entire American economy.

[The End]

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[28] *Air Line Pilots Association v. Aviation Associates, Inc.*, 955 F2d 90 (CA-1 1992), 120 LC ¶ 11,095. See also *Jones Dairy Farm v. Local No. P-1236, UFCW*, 760 F2d 173 (CA-7 1985), 102 LC ¶ 11,470; sustaining an arbitrator's award undisputably based on an error of law.

[29] 138 LRRM 2091 (D.Md. 1991).

[30] See *Chicago Typographical Union v. Chicago Sun-Times, Inc.*, 935 F2d 1501 (CA-7 1991), 119 LC ¶ 10,815; and *Local 1199, Hospital and Health Care Employees Union v. Brooks Drug Co.*, 956 F2d 22 (CA-2 1992), 120 LC ¶ 11,112.

[31] *Groves v. Ring Screw Works*, 111 US SCt 498 (1990), 117 LC ¶ 10,426.

Public Law and Arbitration

By Walter C. Brauer III

Mr. Brauer is with the law firm of Brauer, Buescher, Valentine, Goldhammer & Kelman in Denver, Colorado.

The principal paper argues that courts of appeals are essentially free to overturn whatever they do not agree with because of the limited bases for review by the Supreme Court. It may be suggested, alternatively, that a large part of the fault for this situation lies with the Supreme Court itself. The most recent decision to demonstrate this point was *Litton Financial Printing.*[1]

Litton is a case that addresses the appropriate remedy for an unfair labor practice of an employer found to have effected unilateral changes without prior good-faith bargaining. One question was whether the Board, in addition to requiring that the union's charges be processed as grievances, also require arbitration under an expired contract. The Supreme Court articulated the correct test: "... if a dispute arises under the contract here in question, it is subject to arbitration even in the post contract period."[2] Insofar as arbitrability is concerned, the only question is whether the union's assertion of "arising under" is rational. The Court, however, says that it will apply normal principles of contract interpretation to determine if this disputed right survives expiration. That issue is a quintessential substantive issue for the arbitrator. It is no wonder that a court of appeals feels free in applying its own judgment when the Supreme Court is so unfaithful to its own standards.

That aside, the real issue is the tension created by public law issues that coexist with traditional contract issues in the arbitration setting. One aspect of that question is the public policy concept of *Paperworkers v. Misco.*[3] In terms of the dichotomy among the circuits, it is predicted that the Supreme Court will opt for the side advocated by Professor Feller. I predict that because of the radically changed judicial attitude toward arbitration. Much could be written to explain the shift in judicial attitude. Suffice it to say here, that courts will hold industrial (and commercial) actors to their bargain because it was their own bargain, including the arbitrator who occasionally stumbles in reasoning or result, unless the law affirmatively forbids a result.

As a policymaker, it is easy to come to a result that almost denies review. As a practitioner who shares a client's deeply held belief that an arbitration decision is fundamentally flawed, it may not be so clear that virtually no challenge should be available. On some occasions, one's view is just so strongly held that you simply must try to correct the result. I do not believe that this is Billy Martin arguing with the umpire. More importantly, I have never seen a labor organization attempt to remove arbitration from the collective agreement and I have never seen an employer do so for that reason. The parties' belief in the system abides, even as they occasionally challenge a decision.

More to the point of public law, there is another important aspect of the relationship between public law and arbitration, and this includes the doctrines of claim preclusion and deferral based upon a prior arbitration award. In a series of cases in the area of labor law, the Supreme Court has held that there is neither deferral nor claims preclusion.[4]

[1] *Litton Financial Printing Dev. v. NLRB,* ___ U.S. ___, 137 LRRM 2441 (1991).

[2] *Id.* at 2447.

[3] 484 U.S. 29 (1983).

[4] *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 7 FEP 81 (1974) (arbitration and Title VII race discrimination);

The Supreme Court relies on a number of policy arguments to allow multiple litigation: (1) the employee was not a party to the collective bargaining agreement under which the arbitration was held; (2) congressional intent was to allow independent, parallel remedies; (3) arbitration is a part of a "majoritarian process," which might compromise individual rights whereas these statutes focus on individual rights; (4) the arbitrator's role is to effect the intent of the parties, not to enforce legislation; (5) arbitrators have no advantage over judges in statutory interpretation and may not be well suited to that task; (6) certain procedural safeguards of courts (rules of evidence, discovery, compulsory process, etc.) are limited or unavailable in arbitration; and (7) a union may, in good faith and without breaching its duty of fair representation, fail to pursue a claim vigorously. In sum, "... Congress intended the statutes at issue in those cases to be judicially enforceable and that arbitration could not provide an adequate substitute for judicial proceedings in adjudicating claims under those statutes." [5]

These arguments, in the main, seem result driven and weak because they are based upon an incomplete reading of collective bargaining agreements, an incomplete understanding of the advocacy process in arbitration, and an incomplete understanding of the operation of a grievance procedure. Further, the careful selection of an arbitrator, which the parties do to an extent far greater than the Court appreciates, obviates additional concerns. The seventh reason is one that every practicing attorney faces from time to time when counsel's idea of how best to persuade a decision maker is different than that of the client. It does not rise to the level of a policy reason for rejecting arbitration. Some of these rebuttal concepts are recognized in *Gateway Coal Co. v. UMW*.[6]

While all of this seems quite well established, the Supreme Court, in a series of three nonlabor cases, has issued rulings that give preclusive effect to arbitration and absolutely deny access to a federal court to enforce a federal statute.[7]

In *Gilmer v. Interstate/Johnson Lane Corp.*,[8] the Supreme Court held that an individual who agreed to arbitrate all disputes as a part of an application to become a stockbroker can be required to arbitrate his statutory claims of age discrimination.[9] The arguments from *Gardner-Denver* and its progeny, all involving the employment context, were rejected and the arguments from the commercial arbitration cases extended to age discrimination. It is, simply put, intellectually impossibile to reconcile *Gardner-Denver* and *Gilmer*.

It can be argued that both *Gilmer* and the entire line of labor arbitration cases are wrong. The core contention for such a proposition is that the agreements individuals sign are adhesion contracts based upon an economic power imbalance between employer and employee. Collective bargaining became national policy in the Wagner Act because it allowed for the establishment of a relationship of relatively equal strength.[10] The *Gilmer* opinion avoids this notion by claiming that it

(Footnote Continued)

Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 24 WH 1284 (1981) (arbitration and F.L.S.A. claims); and *McDonald v. City of West Branch*, 466 U.S. 284, 115 LRRM 3646 (1984) (arbitration and civil rights litigation under 42 U.S.C. § 1983); *Atchison, Topeka, Etc. R.R. Co. v. Buell*, 480 U.S. 557, 124 LRRM 2953 (1987) (arbitration and F.E.L.A. tort claims).

[5] *Ibid., McDonald*, at 3648.

[6] 414 U.S. 368 (1974).

[7] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (claims of anti-trust violations); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (securities law and RICO claims); and *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (claims of securities law violations).

[8] ___ U.S. ___, 55 FEP 1116 (1991).

[9] 29 U.S.C. § 621 *et seq.*

[10] 29 U.S.C. § 151 ("The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employees who are organized in the corporate or other forms of ownership . . .")

is an insufficient basis for not ordering arbitration. A bargain that a court will enforce should be volitional. Mr. Gilmer had no more choice about a pre-employment agreement to arbitrate than any citizen has about whether to buy water from the local municipality. If the Court's statement is to be followed, then necessarily *Gardner-Denver* and its progeny must be reversed because substantive rights and arbitration procedures are negotiated by equals. If I am correct that the employment relationship of the individual (except perhaps Michael Jackson and Frank Sinatra) is adhesive in nature, then the existence of a collective bargaining relationship means that arbitration can be given preclusive effort if the collective agreement proscribes discrimination. Accordingly, the *Gardner-Denver* line of cases should have required arbitration whereas the individual, such as Mr. Gilmer, should have access to a court.

The tension between those lines of cases cannot abide. Whether a public law forum or arbitration is to prevail must be rethought using more appropriate principles consistently applied.

[The End]

Court Review of Arbitration: Some Practical Observations

By Carl Eiberger*

Mr. Eiberger is with the law firm of Eiberger, Stacy, Smith & Martin in Denver, Colorado.

Both parties should want the arbitration process to work with only a very narrow scope of review. The courts will vacate an award if, and only if, the award does not draw its essence from the collective bargaining agreement. *In Litvak Packing v. Local 7*, the court stated: "Our review of arbiter awards is among the narrowest known to the law." [1]

In *CWA v. Southeastern Electric Corp.*,[2] the court said the public policy of preventing assault and sexual oppression of women does not preclude enforcement of an arbitration award reinstating a 19-year telephone lineman who sexually assaulted a customer in her home. The court said that it took a view of the *Misco*[3] public policy exception and that the arbitrator had considered all facts, including the fact that this was the first problem in 19 years of an otherwise good record, and also that the employee had apologized. The reinstatement was affirmed, with the court stating that the arbitrator's reasoned judgment should be given great weight especially in formulating remedies (citing *Misco* and quoting from *Steelworkers v. Enterprise Wheel.*) [4]

An arbitration award is not open to judicial review on its merits.[5] It can only be upset under exceptional circumstances.[6] Courts should presume the parties agree that everything in law and fact for the decision are included in the authority of the arbitrator.[7] Courts should

(Footnote Continued)

Cf., NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180, 65 LRRM 2449, 2450-51 (1967).

* Paul Hodapp of this firm is thanked for the analysis of the cases, and his review of court reasons for reversing arbitration awards.

[1] 886 F.2d 275 (10th Cir. 1989).

[2] 882 F.2d 467 (10th Cir. 1989).

[3] *Misco v. United Paperworkers*, 484 U.S. 29 (1987).

[4] 363 U.S. 593 (1960).

[5] *Sterling Colo. Beef v. United Food Workers*, 767 P.2d 718 (10th Cir. 1985).

[6] *Fizer v. Safeway Stores*, 586 F.2d 182 (10th Cir. 1978).

[7] *Continental Materials Corp. v. Gaddis*, 306 F.2d 952 (10th Cir. 1962).

use caution when asked to vacate an arbitration award.[8]

The purpose of upholding arbitration awards is to settle disputes quickly at lower cost. To preserve this, the courts should realize an arbitrator is in the best position to make these judgments. His judgment should be deferred to, absent abuse of power.[9] In *Jenkins v. Prudential-Bache*, the Tenth Circuit, relying on *Misco v. United Paperworkers,*[10] which reaffirmed some of these principles, said that even if the arbitrator misreads the contract, the court cannot vacate it.[11]

In *Mistletoe Express v. Expressman,*[12] the Tenth Circuit gave three tests to vacate an award. It must be upheld unless it is contrary to the express language of the contract, so unfounded in reason or fact, or so unconnected to the words and purpose of the agreement that it manifests an infidelity to the arbitrator's obligation, or it does not draw its essence from the agreement. Even judges reputed to be very liberal quote and follow these rules to a tee in affirming arbitration awards.[13]

A court may not overturn an arbitrator's decision, even when error is committed or where the reviewing court would interpret the evidence in a contrary manner or even when the decision might appear dubious to the reviewing court as long as the arbitrator is within the four corners of the contract to find his decision.[14] The Federal Arbitration Act does not apply to cases that arise under labor agreements.[15]

Perhaps a method of lessening cases appealed to the courts would be to impose court costs on the loser, or as under Colorado statutes where the litigation is basically groundless, frivolous and/or vexatious.[16] A party can get attorney's fees in a Section 301 action if a party's opponent has acted in bad faith, vexatiously, wantonly or for oppressive reasons.[17]

Some Reasons for Court Reversal of Arbitration Awards

Categories found by a review of court cases for setting aside arbitration awards include:

1. The award is the result of fraud, dishonesty or bias. Some factors the courts look to in determining a reasonable impression of partiality include: a financial or other interest of the arbitrator in the outcome of the arbitration; or a very direct or "timing" relationship of the arbitrator to the subject matter of the arbitration.

2. Corruption, fraud or undue influence in obtaining the award.

3. The arbitrator's hearing procedures are so aberrant as to deprive a party of a fair hearing. This could involve the arbitrator as an advocate in his/her inquiries, exclusion of evidence, etc.

4. The plain language of the contract is ignored.

5. Lack of jurisdiction over the dispute (the parties have to protect themselves by raising this in the arbitration process or waive this objection).

6. Error of law.

7. Public Policy.

8. Arbitrator's "personal sense of industrial justice." Easy to say, hard to prove.

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[8] *Ormsbee Dev. Co. v. Grace,* 668 F.2d 1140 (10th Cir.).

[9] *United Steelworkers v. Ideal Cement,* 762 F.2d 837 (10th Cir. 1985).

[10] Cited at note 3 above.

[11] 847 F.2d 631.

[12] 566 F.2d 692 (10th Cir. 1977).

[13] *See PSCV v. IBEW,* 709 F.2d 212 (1989).

[14] *NCR Corp. v. Machinists,* 906 F.2d 1499 (10th Cir. 1990) and see ten cases to the same strong view in the court's footnote on page 1503.

[15] *UCFW, Local 7 v. Safeway,* 132 LRRM 30, 90 (10th Cir. 1989).

[16] Section 13-17-102 C.R.S.

[17] *Fabricut v. Tulsa General Drivers,* 597 F. 2d 227 (10th Cir. 1979).

Review of Some of Professor Feller's Cases Regarding Public Policy

On the public policy issue, a better statement of the rule could be that arbitration awards reinstating an employee may be set aside on public policy grounds only where the employee violated public policies while performing duties integral to their employment and where the reinstatement would jeopardize the public safety, because the arbitrator made no finding that the grievant could be rehabilitated or is not likely to engage in wrongful conduct.

Also, several of the decisions cited by Professor Feller in his paper may be analyzed differently. He suggests that there is a sharp distinction between the four courts that have refused to set aside arbitrator's awards reinstating employees because of the absence of just cause or proper cause, despite the listing of causes for discharge in an agreed upon rule, and the two jurisdictions that have set aside awards in "almost identical circumstances."

A reading of the cases indicates that circumstances are not almost identical because the language in the collective bargaining agreements differs. In *Arco Polymers*, the language of the agreement is that the employee who violates the rule is *subject to discharge*. In *F.W. Woolworth*, the contract says that sufficient absenteeism is a *cause for discharge*, but the contract language is facially ambiguous as to whether it applies to failure to give notice of absence. In *Waverly Mineral Products*, the language is "shall be discharged," but there is also a no-discrimination clause and the arbitrator found that the no-discrimination clause represented a limitation on management's discharge right. In *Kawanee Machinery* there is a management's rights clause, and again the language is "will be subject to dismissal." Similar "subject to dismissal" language is in the agreement in *Eberhard Foods v. Handy*.[18] By contrast, in *Firemen and Oilers, Local 935-B*, the language is that the listed violations "shall constitute cause for dismissal." And, in the Tenth Circuit case of *Mistletoe Express*, the language is that "an employee may be discharged for just cause among which just causes are the following." In *Warren II*, cited by Professor Feller, the language is that "violations of the following rules are considered causes" for discharge.

These cases can be interpreted as saying that where a collective bargaining agreement defines cause or just cause in terms of an applicable specific offense, and there is no inconsistent contract term, then an arbitration award that reinstates an employee will be vacated. By contrast, where the language of the agreement is "subject to discharge," then that language does not clearly and unambiguously establish management's right to discharge, and thus the arbitrator will look at other factors to see if an employee who is *subject* to discharge will in fact be discharged in a particular case.

[The End]

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[18] 868 F.2d 890 (6th Cir. 1989).

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