The Decline and Irrelevance of the NLRB and What can be Done About it: Some Reflections on Privately Devised Alternatives

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It is a great pleasure to be with you here this evening in San Diego, to see so many old friends and to make new ones in the California Labor and Employment Law Section. This connection with the California Bar is a renewed one for me.

A quarter of a century ago, shortly after the formation of this Section, I chaired a committee examining what seemed to be the central issue of the early '80's i.e. the sudden emergence of wrongful discharge litigation here in California and throughout the Nation. My committee proposed comprehensive legislation, but most of it received as much attention from the California Legislature as did some of my ideas with the Republican Congress in the 1990's when I served as President Clinton's Chairman of the National Labor Relations Board.

So, my hope is that this evening I can improve upon that record somewhat though I fear that there will be a more ready consensus about what ails labor law and the National Labor Relations Board than what should be done about it. If ever there was a time for serious discussion about amendments of the National Labor Relations Act—it hasn't had a major overhaul since 1947 and 1959—that time is 2009. The erosion of the deregulation conventional wisdoms of recent decades now facilitated by this year's financial crisis should help to promote a dialogue long overdue. The fraying of the social

contract with workers and the unions warrants attention – and the decline and the relevance of the Board and the Act are an important part of this.

It is clear to me that substantial elements of the labor movement and the business community must be involved in a solution that is acceptable and works—or at least is perceived to work – and retains the core vision of a democratic workplace. Whatever the electoral outcome next Tuesday, the President and Congress must shape a balance between enhanced employee bargaining rights and opportunities on the one hand with employer concerns with flexibility and competition on the other.

I am a Democrat, supportive of both the collective bargaining process and the idea of bridging differences between employers and employees to find common ground. Whoever occupies the White House will have to reach out to both sides of the aisle - both candidates are able to do that, though I confess a preference for Senator Barack Obama's ability to surmount the partisan divide..

Tonight, there can be no doubt about the fact that the labor law system is broken and that something needs to be done. The Employee Free Choice Act which proposes recognition on the basis of union authorization cards—"card check"—as well as interest arbitration to resolve differences between the parties when they get stuck in negotiating a first collective bargaining agreement and more effective remedies to enforce the law has been supported by the Democrats and endorsed by Senator Obama.

Broadly speaking, the EFCA is an improvement over the status quo - but, in my opinion, it is only worthy of faint praise. If there is to be labor law reform in 2009 the EFCA approach must be substantially amended. After waiting a half-century for amendments, it is important to get it right this time around.

A few quick points should be made. Though the proponents of labor law reform - of which I count myself as one - sometimes seem to assume that the decline of labor will be reversed through legal initiatives, globalization, the shift from manufacturing to service which has exaggerated employer resistance to unions because of a relative inability to absorb costs through technological innovation or pass them on to the consumer, a changing workforce in which contingent employees and undocumented workers have become part of the employment relationship and union organizational lethargy which is partially responsible for the recent emergence of Change to Win, all make it clear labor law and the NLRB are only part of the picture. But they are nonetheless part of the picture and in 2009 that picture should be changed so that the NLRA's objectives of freedom of association and collective bargaining promotion can be better realized.

Why do we find ourselves where we are? The first reason is that the statute's secret ballot box process is badly flawed through its association with the decades old cottage industry of anti-union propaganda in multi-month campaigns sometimes made one sided by virtue of the captive audience and exclusion of non-employee union organizers from the workplace. My judgment is that the legislative answer remains in providing both sides with the right to communicate and also with the ballot box – a reformed ballot box - rather than EFCA's substitution of card checks for the vote.

The ballot must be expedited so as to provide for the quick votes of the kind that are so prominent in some of the Canadian provinces, i.e. within 5-10 days of the petition filing, elimination of lengthy appeals to Washington, with postponement of eligibility issues until subsequent to the vote. My Board sometimes conducted relatively quick

votes by postponing resolution of voter eligibility issues where as many as 30% of unit employees were in dispute so that a long hearing would not become a surrogate for the erosion of free choice by lengthy anti union campaigns..

Delay facilitates one-sided propaganda and the potential for delay means that employers can overreach in the negotiation of stipulated election agreements. Card checks won't solve any of this. They will themselves provide for delay because of disputes about the cards' authenticity as well as the same eligibility and unit controversies that will not go away under any system.

More meaningful reform also lies in making lawful union and employer negotiated "conditional" recognition agreements where workers and employers are able to know the bargain that the union is likely to obtain before they vote simultaneously on the union and a proposed contract. Why shouldn't both workers and employers know the economic facts of life at the campaign's onset? This might diminish acrimonious propaganda from both sides and employer anti-union behavior.

The second area of concern is that, even if a union is successful in obtaining certification through a quick election, it is vital that a collective bargaining agreement be concluded if at all possible. Representation withers away without contracts.

Respected MIT scholar Tom Kochan tells us that a contract is negotiated in only 20% of the cases after a NLRB certification. That is why EFCA is right to provide for interest arbitration for first contracts. But again, the bill must be amended so as to both eliminate any automatic resort to arbitration after a designated number of days as EFCA presently provides and to provide that an employer's ability to pay rather than an industry wide pattern be the dominant consideration in arbitration. Without these measures,

unions will simply turn the tables that have been turned against them and sit back without bargaining in good faith—a result which will be just as counterproductive as our inability to address employer surface bargaining and one which will undermine the collective bargaining process itself. Arbitration must be both rare and sensitive to management competition needs.

A third factor is one which cuts through everything under discussion thus far and is the most obvious and much discussed for nearly four decades. This is the ability of employers to delay administrative procedures, in order to discourage unionization, a phenomenon which has properly focused attention on remedies beyond the mere slap on the wrist inherent in a cease and desist order and the license fee that a back pay award minus interim earnings constitute for employer misconduct designed to prevent unions. The only tool available today is an injunction against unfair labor practices – an approach which my Board used more than any other during the 73 year history of the NLRA.

Inextricably related to this is the inability or unwillingness of the Board itself to act responsively and responsibly in processing cases without delay. The phenomenon, not new by any means or peculiar to the Bush II Board, got the attention of my boss in the 1960's—President Kennedy's Chairman Frank McCulloch. It became so difficult during the acrimoniously divided government of the 1990's that I had to identify or "out" non-producing Board members to Congress so that important cases would issue before I departed Washington a decade ago.

But at least then we were issuing approximately 1,000 cases a year. During the past few years the problem has grown worse —even before the Board became quorum-less as delays have grown, with now about 20% of the caseload that we were handling in

the ‘90’s! The Board has continuously refused to impose time limits upon itself though providing them for others like Administrative Law Judges and Regional Directors. While it is obviously best for the agency to do the job itself, the record of inaction convinces me that Congress should impose those time limits directly through statute!

I think that these developments are attributable to another factor, the way in which we appoint members of the NLRB. Until the 1980’s when politics and labor-management relations were less polarized, appointments were different. Colby Professor G. Calvin Mackenzie summed up the past and present well when he wrote:

> “What is most distressing ultimately is the transcendent loss of purpose in the appointment process. The American model did not always work perfectly, but it was informed by a grand notion. The business of the people would be managed by leaders drawn from the people. Cincinnatus, in-and-outers, non-career managers—with every election would come a new sweep of the country for high energy and new ideas and fresh visions. The president’s team would assume its place and impose the people’s wishes on the great agencies of government. Not infrequently, it actually worked that way.
> “But these days, the model fails on nearly all counts. Most appointees do not come from the countryside, brimming with new energy and ideas. Much more often they come from congressional staffs or think tanks or interest groups—not from across the country but from across the street: interchangeable public elites, engaged in an insider’s game.”

The difficulty in the ‘90’s and thereafter is that the Washington group frequently has no place to return to other than Washington itself and that where production of controversial cases runs afoul of that goal, delay is exacerbated so as to avoid offending someone powerful enough to interfere with reappointment. When I was Chairman I suggested two amendments to the Act which I still think make sense: (1) appointment for a longer period of time such as eight years so as to benefit from Board member experience and developed expertise and (2) a prohibition against reappointment so that its

prospect would not be a distraction from case production and that immediate political pressure would be diminished. I would like to see geographical as well as racial and sexual diversity in the appointment process, including more NLRB career regional officials, with real hands-on practical experience as well as the knowledge of the law.

And very much tied to all of this is another part of reform - i.e. the use of more rulemaking in lieu of adjudication. The emphasis should be on representation – voting cases which are in special need of acceleration – and these Board rulings should not be appealable to the courts.

The worst thing that a new Obama Board can do is to simply come into office and reverse the decisions of the Bush II Board through adjudication, bad as so many of them are! If a new approach such as rulemaking is undertaken—my Board unsuccessfully tried to do it in the hostile political environment of the '90's—this will involve all parties in the decision making process and make it more difficult for previous decisions to be reversed with ease. The Board will be more depoliticized and rapid oscillations between labor and management with each new administration diminished.

This should appeal to Democrats and Republicans or at least a substantial portion of them. And I think that rulemaking, along with changes in the appointment process if they are backed by Senator Obama, will produce appointments of the very best people who will want to serve for the very best reasons from all corners of our country.

But there is something else of which the reform proponents must take note and that is the development of private procedures as surrogate for some of the functions of today's moribund NLRB. Out of adversity responsible parties have attempted to fill and expand upon the regulatory vacuum with creativity.

Late last year I was appointed Independent Monitor by a large British multinational transportation company, First Group, which employs approximately 100,000 employees in the United States to hear freedom of association complaints arising out of union organizational efforts. This FOA policy is derived from the corporate social responsibility policy which is concerned with both environmental and human rights – and the idea that there is no inherent inconsistency between profits and any of these rights.

The FOA policy explicitly states that its protections for employees are stronger than those of the National Labor Relations Act (though employees and union organizers may always file a charge with the NLRB). Illustrative of this is the mandate which management gives itself to refrain from antiunion campaigning. In its policy First Group commits itself not to speak (non-coercively as well as coercively) so as to influence an employee's view or choice with regard to union activity.

The policy, rooted in Convention 87 of the International Labor Organization which promotes the right of employees to organize, provides that all recognition disputes be resolved through secret ballot box elections conducted by the NLRB in an expeditious manner—and that freedom of association complaints be resolved through an Independent Monitor recommendation within thirty to sixty days of the filing of the complaint. The company has the authority to accept, modify or reject the Monitor's recommendation. At this point the company has accepted a substantial majority of my recommendations.

Since First Group only utilizes the ballot box for recognition, it has accepted my report recommending that all interrogations of employees are prohibited by its policy since there is no need to determine employee sentiment with card checks outside the secret ballot. The same general prohibitions against any policy which limit talking about

the union during working time as well as non-working time—and the traditional working time for work guidelines with regard to solicitation and distribution have been contained within Independent Monitor reports accepted by the company.

Finally, in contrast to a statute such as the National Labor Relations Act which remains the only modern employment law which is not posted in company facilities, extensive publicity about the program have been provided in enclosed bulletin boards and a DVD for the company's 100,000 employees.

Of course, the program is only 10 months old and thus still relatively embryonic. But much has been accomplished and, in the main, praised by both management and labor. It warrants the attention of American investors and management.

Does this provide any ideas for labor law reform? A central lesson to be derived from the First Group policy is that trial type adjudication is not the exclusive vehicle through which administrative objectives can be achieved. There are other roads to Rome beyond the convoluted and multi layered administrative process of the NLRA.

Additionally, the First Group provision of more substantial protection for employees should be appealing to unions. From the company's perspective, corporate liability is limited because of the abbreviated period of time that it takes to resolve a complaint, its reputation is not unfairly besmirched in the context of lengthy litigation—and its acceptance of independent recommendations enhances its good citizenship status under international as well as national labor law.

Admittedly, the last consideration is of greater concern at this juncture in Europe than in the United States! But globalization may and should ultimately produce both

greater awareness of international obligations and undercut the corrosive “them and us” divide which is harmful to good relations.

It therefore seems to me that the policy has practical implications for American as well as European companies operating here in its promotion of a dispute resolution system which is a substitute for sometimes acrimonious litigation which is promoted by the statute. During my Chairmanship my Board created the concept of settlement administrative law judges who were frequently successful in intervening to resolve cases that would otherwise go to hearing. Why can’t the parties be given an option of proceeding toward immediate investigation of the kind provided for by the First Group Policy presided over by an Administrative Law Judge or a respected private citizen acceptable to both the union and the company based upon a NLRB investigative process spanning a mere thirty to sixty days.

If both sides accept third party recommendations the matter is at an end in just a couple of months. Although the NLRB has not ruled on what deference, if any, should be given to such Independent Monitor recommendations, it seems to me that if one party accepted the recommendations and the other side rejected them, perhaps the Board should take those recommendations into account when the matter finally goes to litigation. Again, if the process is unsuccessful and does not attract acceptance by both sides—remember that under the First Group approach the party may file a charge with NLRB at any time—the normal procedures could go forward.

In sum, I think that this program could constitute the basis for statutory amendments which, along with others, can inspire broad support overriding previously existing divisions.

It is quite possible that 2009 may be the year in which both long recognized statutory deficiencies are remedied—and a litigation model that serves no one except the litigious as well as recidivists who do not support freedom of association and collective bargaining is overhauled. To paraphrase President Lincoln, we must disenthrall ourselves as we approach this debate.

I hope that our discussion tonight pushes this process forward. I wish you Godspeed in your work and I look forward to a good dialogue with you and others committed to a genuine rule of law in our future.