WHAT WOULD EMPLOYEE FREE CHOICE MEAN IN THE WORKPLACE?

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LABOR MANAGEMENT RELATIONS AND THE GLOBAL ECONOMIC CRISIS

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It is a pleasure to be with you here today. By my rough count, this is my third speech to this organization during the past couple of decades. I have enjoyed the chance to speak to and with you in the past and look forward to today's program. I am particularly pleased to renew my contact with Maria-Kate Dowling, Associate General Counsel of the National Mediation Board.

Kate was my Deputy Chief Counsel at the NLRB in 1997–98, one of the youngest women (perhaps the youngest) to ever hold that senior of a position. She is illustrative of the very best and brightest who should—and I believe now will—receive great recognition in Washington today.

I want to commend the Association of Labor Relations Agencies for holding this session here today on the practical implications of the Employee Free Choice Act. This significant legislative proposal warrants dispassionate examination in an arena which has been too frequently divided and polarized. My sense is that the bill even with proper amendments—and I am quite confident that if it is enacted it will be amended—will have a considerable impact on the workplace. EFCA and labor law reform contain some of the assumptions that I have held for more than four decades, i.e., that the Act is plagued with lethargic enforcement, creaky and convoluted administrative procedures and ineffective remedies, that it is not working well and that, as a result, some employees who wish to join unions are unable to do so. No one can say with certainty what the precise union membership impact of law reform will be, given the fact that so many other factors are responsible for the precipitous decline of trade unions. But it is safe to say that it is unlikely that any statutory reform in the foreseeable future can by itself accomplish the desirable objective of restoring the middle class—though its proponents so often claim it will!

The fundamental need for reform relates to the rule of law. The National Labor Relations Act, once considered a bedrock of labor rights of freedom of association, has not been performing as advertised. There is nothing terribly new about this story. The overriding theme is that justice is being denied through its delay! The loopholes, disproportionately exploited by employers, have dilated into a "black hole" in Washington headquarters where complaints can sit for more than five years while workers await reinstatement and back pay.

How can we properly address this? I think that the Employee Free Choice Act is right on the mark in establishing a treble damage award for back pay. For too long, an award of back pay minus interim earnings has been regarded by everyone involved on all sides as a "license fee" for employer misconduct because back pay is cheaper than a union contract.

EFCA also provides for fines up to $20,000 for each employer violation as well as new contempt sanctions. And again, I think that the new law has it right in expanding and making more effective the Board's injunctive authority for employer unfair labor practices—in much the same manner that the statute has established them for union unfair labor practices since the Taft-Hartley amendments. Judge (and I hope soon-to-be Justice) Sonia Sotomayor's opinion in *Silverman v. Major League Baseball Player Relations Committee, Inc.*[1] upholding my Board's view that an injunction was appropriate in the baseball players' 1994–95 strike has made this provision's importance about as well known as anything.

On other key issues I think that there is much more room for debate. While card checks are evidence of employee support in some circumstances, I think that they are, as the Supreme Court has characterized them, second best. And in Canada, where the consensus in the 1960s favored card check, a majority of provinces have now settled on secret ballot box elections.

[1] 880 F. Supp. 246 (S.D.N.Y.) (Sotomayor, J.), *aff'd*, 67 F.3d 1054 (2d. Cir. 1995).

Moreover, there will be fewer disputes over the way in which employees mark secret ballots than there will be over cards; fewer disputes means less litigation and less delay.

But the unions are right to say that the election system (and indeed many other provisions of the statute[2]) is broken. Accordingly, my view is that the principal breakdown in the election scheme—which has led to the card check proposal—is delay through which employees are subjected to a one-sided, anti-union campaign by employers for at least two months, and in a minority of instances a much more considerable period of time. The answer here is to both expedite elections—to require that they be held within a couple of weeks of the union's petition, as is done in the provinces of Ontario and British Columbia—and to reverse Supreme Court precedent excluding non-employee union organizers from company premises so that they can carry their side of the message to employees more effectively in the run-up to the ballot itself.

Another reform can provide for postal ballots which give employees a greater opportunity to cast their vote privately in a neutral facility of their choosing outside of the employer's control. In truth, the statute already provides for this, as I noted in my concurring opinion in *San Diego Gas & Electric*[3]—but I think that Congress can be helpful by explicitly providing that postal ballots can be available within the Board's discretion along the lines that I set forth in *San Diego Gas*. The plurality in that case, which limited such ballots only to cases where employees are scattered and unavailable, did not rely upon any provision of the statute as it is written today and the Board, as well as Congress, can reverse that poorly-reasoned opinion at any time that it wants.

The third important feature of EFCA provides for interest arbitration in first contract negotiations. Clearly, as Professors Ferguson and Kochan have established, there is a problem

[2] I have discussed this in a fair amount of detail in WILLIAM B. GOULD IV, AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW (1993).
[3] 325 N.L.R.B. 1143, 1146 (1998).

here—only 56% of newly-certified bargaining units reach a contract, and only 37% do so within the first certification year—that cannot be easily remedied by refusal-to-bargain litigation. The surface bargaining cases have not been an effective avenue through which to establish or restore collective bargaining relationships that should have been less dysfunctional in the first instance.

However, EFCA-sponsored interest arbitration, in contrast to the "grievance" or "rights" variety, is relatively untested in the private sector in the United States. In Canada, which has first contract arbitration in most provinces, the process is rare and used sparingly (except in Manitoba where it is automatic after a specific time period). The conundrum is that the *potential* for a mechanism like this must be available to rescue bargaining which is at a stall, and yet its mere availability can undermine the collective bargaining process itself which is furthered by the Act.

The proper approach here, it seems to me, is to provide that the mediator—perhaps in consultation with the NLRB itself—should certify after extensive mediatory efforts that collective bargaining is either at an impasse or dysfunctional. As it presently stands, EFCA simply allows for arbitration to be invoked after three months of collective bargaining and subsequent mediation. Not only is this period of time too abbreviated, but by spelling out a specific period of time after which arbitration is automatic, it encourages the parties to maneuver in anticipation of arbitration in a way which can erode the voluntary collective bargaining process. Moreover, this approach fails to take into account the fact that both sides are frequently learning for the first time as they put together their very first collective bargaining agreement.

Arbitration must be used sparingly, although it should remain available in the final analysis so as to shore up a relationship which might otherwise disappear. This must be what the law encourages not only because of the considerations above but also because experience with interest arbitration in the public sector—where it is available in many jurisdictions for police and

fire—is itself extensive and time-consuming. Amongst the interest arbitrations that I have done was one between the Detroit Board of Education and the Federation of Teachers[4] twenty years ago where hearings continued day and night for a week, detailed briefs were filed thereafter, and the arbitration board was required to meet and decide on the basis of voluminous submissions at the end of it all. Though we cannot tolerate delays such as the fifteen months which apparently exist in the public sector in Michigan, framers of the law must realize that it will take considerable time and expense. This is another reason why arbitration should be the rare exception and not the rule at the end of collective bargaining.

Yet there is one other consideration. My view is that final-offer baseball arbitration, where the arbitrator is obliged to select one package offer or the other, is the best approach because it creates uncertainty which promotes voluntary negotiation. But because there is much uncertainty for the arbitrator as well as for the parties, I am of the view that his award should appear initially in the form of recommendations and that the parties should have 10-14 days to negotiate with the arbitrator acting as a mediator. If the parties cannot resolve their differences in that time, the recommendations within the parameters of the initial award would be final and binding. In this way the real potential for arbitral error is diminished, and the integrity of the process maintained.

There are a few other matters that I think you should consider which should be a vital part of labor law reform, and yet are not covered in EFCA. First, Congress should encourage rulemaking in lieu of adjudication so as to avoid repetitive and wasteful litigation which enhance cost and delay. My Board attempted to do this in the 1990s and was stopped by appropriations riders fashioned by the Republican Congress. A different political environment exists this time

[4] School Board of the City of Detroit v. Detroit Federation of Teachers, 93 Lab. Arb. Rep. (BNA) 648 (1989) (Gould, Arb.).

around and Congress and the Board should take full advantage of the opportunity to resolve disputes expeditiously and sensibly.

Second, the amount of litigation before the Board can be reduced if Congress unfreezes the Board's jurisdictional guidelines and thus decreases the volume of cases that come before it by taking into account fifty years of inflation. The freeze has resulted in NLRB assertion of jurisdiction over very small employers. Again, the Republican Congress in the 1990s insisted that I withdraw Board jurisdiction when I was Chairman but, as I pointed out to them, only Congress can change these statutory provisions which were enacted a half-century ago and which have left Board jurisdiction in terms of dollar values the same as it was then—even though the dollar is worth one-seventh of what it was at that time (see Appendix 1).

But at this time, Congress can initiate action on this which will both deregulate labor-management relations for small employers in some jurisdictions and, since state law should be followed, also allow the states to enact more expansive laws protecting union organizing. This promotes the kind of laboratory conditions of which Justice Brandeis spoke a century ago and relieves small business from the federal regulation under which it currently lives. Here Congress can and should take the lead as the 1959 amendments require.

Third, labor law reform must take into account that it is not simply employers who are promoting delay before the NLRB and the courts at this juncture—in many instances it has been the Board itself as cases have languished in the black hole in Washington headquarters for half a decade or more while workers awaited reinstatement and back pay. As Professor G. Calvin Mackenzie of Colby College has noted, much of this is attributable to the "transcendent loss of purpose in the appointment process" at the NLRB where appointees "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 packaging and "batching" of appointees was unknown prior to 1994 and has become so embedded in the appointment process that even President Obama has batched a Republican Senate Labor Committee policy director with his two Democratic nominees.

This approach should be abandoned. It fosters delay through the reticence of decision-makers who procrastinate, concerned about congressional reaction. If reappointments were barred, this tendency would be diminished. At the same time, Congress should extend the term of office to eight years, reduce the number of Board members from five to three so as to eliminate the potential for individual Board member obstruction (with the reduction of cases obtained through withdrawal of jurisdiction this can work more easily), and explicitly provide that when a Board member's term expires he or she can serve no longer. In this way we will attract the best people who will serve for the very best reasons.

Finally, one of the most interesting developments in recent years relates to alternative dispute resolution mechanisms devised by the parties, particularly as a result of their frustration about the National Labor Relations Board and its ability to function promptly. One classic example of this approach is set forth in the procedures devised by First Group America to deal with complaints involving freedom of association issues arising out of union organizational campaigns or relating to discrimination on account of union activity. The First Group machinery provides that an Independent Monitor (I have functioned in that capacity for the past 18 months) is to make public recommendations regarding such complaints within 30-60 days of the time that they are filed. Most recommendations have been accepted and the program has been praised by both sides. The process is able to move with dispatch because there is simply a provision for investigation rather than a full-fledged hearing. Congress ought to explicitly encourage parties to

devise such procedures, and their existence may provide guidance with regard to how lengthy proceedings before the Board and the courts—which are frequently excessively time-consuming or wasteful—can be abbreviated.

Conclusion

The job of labor law reform is an important one and the Employee Free Choice Act has done more than any other mechanism in recent years to get this issue front and center. The chance to engage in this process does not come often and thus it is important that the country gets it right this time around.

EFCA is right on the mark when it comes to sanctions, damages, penalties, and contempt proceedings. It has gone off course in connection with card check—but fortunately through expedited and postal elections as well as union access to private property that matter can be addressed with some measure of success. On arbitration, EFCA got us part of the way there, but much more needs to be done and revised.

The reform initiative provides a great opportunity to have a new look at some of the problems that have plagued the Board and the Act for far too long, i.e., the appointments process and its relationship to delay, the failure or inability to borrow from voluntary machinery, and the need to get small employers beyond the reach of the Act either for the purpose of deregulation or for, in those jurisdictions that want it that way, more expansive protection than is provided by the National Labor Relations Act even as revised in 2009—if it is to be.

This is the beginning of a great debate. It is a debate which necessarily involves labor and management, Democrats and Republicans, and the result must be not only sensible in content but the product of some measure of consensus and compromise.

Appendix 1: NLRB Jurisdictional Amounts Adjusted for Inflation

TYPE OF BUSINESS	DOLLAR AMOUNT	YEAR SET	2009 DOLLARS
Non-retail business	$50,000	1959	$364,592.78
Office buildings and shopping centers	$100,000	1959	$729,185.57
Retail business	$500,000	1959	$3,645,927.80
Public utility	$250,000	1959	$1,822,963.92
Newspaper	$200,000	1959	$1,458,371.13
Radio, television, or telephone company	$100,000	1959	$729,185.57
Hotel, apartment, condo or coop	$500,000	1967	$3,176,541.92
Hospital	$250,000	1975	$986,026.95
Nursing Home or Visiting Nurses Associations	$100,000	1975	$394,410.78
Other private health care institutions	$250,000	1975	$986,026.95
Day care center	$250,000	1976	$932,306.68
Transit system	$250,000	1959	$1,822,963.92
Private college or school	$1,000,000	1970	$5,468,891.75
Symphony	$1,000,000	1970	$5,468,891.75
Law firm or legal aid program	$250,000	1977	$875,383.66
Social Service Provider	$250,000	1987	$466,974.03
Museum, library, or cultural center	$1,000,000	1970	$5,468,891.75
Restaurant or Private Club	$500,000	1959	$3,645,927.80