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LABOR LAW AT THE CROSSROADS

GERALD W. MCENTEE*

I've been asked to address the question as to whether the nation's labor laws can adapt to the changing needs and characteristics of the workplace as we approach the year 2000.

I will respond with lawyerly prudence:

Yes, no, and maybe.

Before beginning I want to set the scene, to establish a context, because whatever happens will not have sprung from the void. It will be the consequence of forces that were at work when our ancestors discovered fire.

One of those forces is the unremitting social tension between those who have power and those who believe they are entitled to a greater share.

This struggle for power has taken more forms than the clouds, but that which concerns us today is the tension between organized labor and management.

In the best Thomistic tradition, let me define what I mean by organized labor.

A labor union is simply a group of men and women organized to improve their wages, benefits, and working conditions.

Further, labor unions can exist only under some form of representative government; unions are weak or nonexistent under totalitarian regimes, either of the left or the right, and are among the first institutions they attack.

This is because labor unions share another common characteristic: they have traditionally sought to achieve broad social goals.

The second notion I want to introduce is on the role of change in human affairs—technological, political, and social.

Change is rarely an orderly process, and the faith that its course is always onward and upward, or even that its consequences are foreseeable, is open to serious challenge.

Let me give you one small example.

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Within a handful of centuries our driving industrial technology has progressed from the water wheel to electronics.

Telecommunications is only one facet—one small facet—of electronics but it has already wrought fundamental changes in the operation of capitalism.

By increasing the mobility of capital, by accelerating the movement of labor, money, and ideas across national boundaries, by facilitating the rise of the multinational corporation, it has already profoundly affected the entire notion of nationalism, not to mention attitudes toward workers.

To whom does a multinational corporation owe its allegiances? How do its largely unmonitored operations influence our policies on foreign relations and trade, our laws on banking, labor, and much else?

The increasing mobility of capital has played a major role in the rise of Third World industrialism, and we are all seeing the consequences for our own economy.

In 1950, some 34 percent of the American workforce held industrial jobs. Current projections are that by the year 2000 that will have shrunk to 10 percent.

Our economic base is becoming weighted towards services, which now occupy 73 percent of the workforce. Many of the service occupations share two important characteristics: they require less education and pay accordingly.

A McDonald's cashier doesn't even know how to add these days. All he or she does is hit buttons labelled "Big Mac" or "Small Fries" and a computer does the rest. This kind of thing has led some to suggest the approaching end of the American middle class.

And even the service sector and its clerical occupations are not immune to the international impacts of technology.

A growing number of firms which require extensive data processing, such as insurance companies and airlines, are also sending work abroad to Singapore or Hong Kong or other cheap labor markets.

Offshore processors don't have to know English. All they do is punch in the characters, and the bulk results are then transmitted back to the home office via satellite.

Technologically based changes such as these have led Nobel economist Wassily Leontieff and others to suggest the decline of the importance of human labor.

From time immemorial, he says, human labor "played the role of the principal factor of production." But now he thinks that "there are

reasons to believe that human labor will not retain this status in the future.”

He and others foresee a day when the activities of work will be so highly automated that the only job left for humans will be to clean up after the robots.

In fact, General Motors is building a new plant in Saginaw, Michigan to turn out axles. In that plant robots will do everything—and that includes sweeping the floors.

Despite this, I argue with Leontieff's gloomy assessment, because similar magnitudes of change are simultaneously occurring in the social arena. To mention a few, the nature of the family, the increase in one-parent households, the increase of women in the workforce, increased life expectancy, the years that people expect to work.

The roles of the sexes themselves are changed. While men might vicariously enjoy watching Clint Eastwood shoot his way into the sunset, we are offered Alan Alda as the sensitive alternative.

Your generation has different expectations than mine, which being less distantly removed from the depression of the 1930s is more concerned with work as a means of income and security than as a source of psychic satisfaction.

On top of all this, today's Americans—today's workers—are more prone to question basic institutions: church, government, labor union, education, business.

All these things lead to different expectations of personal security, and one way or another these eventually have to be transformed into the laws and regulations we agree to abide by.

This in turn is a process every bit as disorderly as conflict and change, and nowhere is that clearer these days than in Washington, D.C.

The Reagan Administration brought with it a perception of the role of government that was current a half century ago.

It seeks to minimize the role that government plays in our lives, limit it to national security, to certain police powers, and to the encouragement of something called the free market with its “invisible hand.”

This perception of the role of government, as the sword arm that protects entrepreneurs and clears impediments in their path, is a very direct reflection of the social dichotomy I spoke of earlier.

President Reagan's attitudes toward organized labor can be characterized by one of his first actions after assuming office. He broke one of the few unions that supported him, PATCO, the air traffic controllers.

In effect, he told employers throughout the country that the rules established in the 1930s to govern labor-management relations had changed.

God knows we have plenty of evidence of that.

Agencies which have an important role in maintaining worker rights—the Environmental Protection Agency, the Occupational Health and Safety Administration, and the Equal Employment Opportunity Commission—have been all but neutered in the past four years.

There is bountiful additional evidence in the actions of the National Labor Relations Board. Established by the National Relations Act in 1935, the NLRB is charged with overseeing and protecting legal rights to organize and to bargain collectively.

Since 1981, however, the NLRB decisions have been so consistently pro-employer that a number of labor leaders including Lane Kirkland, president of the AFL-CIO, have wondered aloud if it is time for labor to ignore the National Labor Relations Act in order to protect its survival.

The million-member United Food and Commercial Workers Union is already ignoring the NLRB representational process in organizing new locals.

This is not to say that labor enjoyed a life of bread and roses before the Reagan Administration.

To the contrary. For almost 40 years now, since passage of the restrictive Taft-Hartley Act in 1947, labor has found it consistently difficult to win major federal legislation favorable to workers and their unions.

In 1978, during the Carter Administration, labor made an all-out effort to revise the basic 1935 law, the National Labor Relations Act.

Faced with increasing employer resistance to unionization, labor wanted to speed up NLRB processes for resolving disputes, and we also wanted tougher penalties for violating workers' rights, particularly in organizing and in collective bargaining.

Labor put everything we had into that effort—money, marbles, and chalk—but Senate conservatives led by Hatch and Helms filibustered the bill to death.

We could not win cloture, we fell six votes shy, even in a Senate with a 61-38 Democratic margin.

During the recent presidential campaign, just about every candidate except Walter Mondale, Republican and Democrat alike, sought political profit by kicking labor.

We were described as a dangerous special interest, and listening to some of those campaign speeches you would have thought that the AFL-CIO—intent on malign purposes, faster than a speeding locomotive, and

able to leap tall buildings in a single bound—had to be stopped at any cost.

And every one of those candidates knew that labor's influence has been waning for years. To take just one measure, 30 years ago about 35 percent of the American workforce belonged to unions; by last year this had shrunk to less than 19 percent.

That vulnerability under the law is perhaps nowhere clearer than in AFSCME's bailiwick, the public sector.

In most matters, federal labor-related laws specifically exclude the 16 million or so people who work for federal, state, and local government.

As workers, they are truly second-class citizens, not covered by the National Labor Relations Act, or health or safety, or pension protection or just about anything else.

Instead, AFSCME has had to deal with 50 different sets of laws, and has had to fight state by state and sometimes city by city to win rights that most private-sector workers take for granted.

The February Supreme Court decision on San Antonio transit workers may help change this.

In its 1976 decision in *Usery v. National League of Cities* the court granted states almost total immunity from federal labor laws. The recent decision overturned *Usery* in regard to wages and hours, but the implications of *San Antonio* will probably require years to sort out.

Legislatively, then, a very checkered pattern for labor, and far different from that of almost every other industrialized western nation where labor unions are uniformly much stronger.

And I include our next door neighbor, Canada. It has an economy very like ours and even many of the same unions, and labor's power there has not impeded the country's growth.

Fifteen years ago the American and Canadian labor movements were relatively equal in size. But while most unions in the United States have decreased in size, those in Canada have continued to grow.

Why? Because Canadian laws are not lopsidedly stacked against labor.

One thing for certain, in recent decades organized labor had become perhaps too complacent, too satisfied with its past accomplishments, such accomplishments as:

The NLRB itself . . . the eight-hour day . . . disability compensation . . . unemployment insurance . . . the outlawing of child labor.

And beyond immediate workplace concerns, support of public edu-

cation . . . of civil rights for women and minorities . . . of Social Security for the aged and Medicare for the sick . . .

Now the point of all the foregoing is that what happens to labor laws in the next 15 years will be affected by a bewildering complex of past and future events, and thus prognostication becomes a very risky business.

I was reminded of this again and again as a member of a committee of the AFL-CIO's Executive Council examining the evolution of work and how organized labor should deal with it.

We considered the changing nature of the workforce, the expectations of workers, and the failure of the law to protect workers from employers intent on avoiding unionization at all costs.

We examined the changing needs of today's workers, such needs as child care, part-time jobs, parental leave, and flex-time.

We looked at industrial dislocation and the need for job security and retraining.

We considered workplace conditions such as health and safety and of ways to give workers a greater voice in workplace management.

We examined the declining effect of labor's traditional weapons such as the strike and their replacement by such devices as corporate campaigns.

And from all this came up with a set of recommendations for the AFL-CIO and its 96 affiliated unions.

- To experiment with new ways of representing workers and addressing their concerns, such as by seeking additional laws to protect their health and safety and to banish sex-based pay discrimination.
- To establish new categories of memberships for workers not employed in bargaining units.
- To concentrate and coordinate organizing, relying more heavily on electronic media.
- To renew efforts to stimulate membership participation in union affairs and to train officers and rank-and-filers.

There was more, much more, but the point is that organized labor has embarked on a process of bottom-up renewal, and the priority goal is to secure for workers a stronger voice in their fate, a fairer share of power.

To the specific question, "Can labor laws adapt to the changing needs of the workplace?" Certainly they can.

Despite the rise of those strange phenomena called neo-conservatism and neo-liberalism, despite the Democratic Party's current anguish, despite the results of the recent presidential campaign, and despite the ele-

gies for organized labor that we read in the newspapers every day, I believe that those who write our obituary are premature.

In the late 1920s they were saying that organized labor had had it, but we're immeasurably stronger now than then.

And you may recall that back in the early Sixties they were saying that God is dead, but you certainly wouldn't know it twenty years later.

I think that what has happened to labor in very recent years has been akin to the experience of that Missouri mule. The Reagan Administration has been the 2 by 4 that has gotten labor's undivided attention.

Because of that . . . and because of that age-old imperative for men and women to seek greater control over their earthly lot . . . and because in America we use the law to chart our way through the tides of change . . . and because of AFSCME's own experience as a democratic and activist and participatory union, I believe that in the year 2000 the laws governing labor-management relations will be, if anything, more progressive than they are today.

If they are not, if we continue to witness a steady erosion of workers' rights, if we continue to see a concentration of corporate power and the hardening of ideological attitudes, it will have been because of changes in this society that few of us wish to contemplate.

Thank you.

