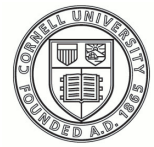

February 1994

Statement of Bruce H. Simon Before the Commission on the Future of Worker-Management Relations

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Hot Topic
Future Worker-Mngmnt

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(Cohen, Weiss and Simon)
to the Commission on the
Future of Worker-Management Relations

February 24, 1994

I. Introduction

Our 30 lawyer firm has been engaged, exclusively, in the representation of labor unions and related benefit funds, for more than 50 years. I don't go back all that far. I joined what was then Cohen & Weiss in 1960.

We represent a broad range of International and Local Unions, arraigned across the labor market. This affords us an instructive variety of experiences in this morning's topic -- representation process and the law.

For example, we are general counsel to the National Association of Letter Carriers, (AFL-CIO) which represents all 230,000 letter carriers employed in every hamlet, town and City in the country. Postal Service labor relations are governed by the Postal Reorganization Act, which replicates the National Labor Relations Act -- with two major differences: There is no right to strike, and there is mandatory interest arbitration in the event direct collective bargaining fails to produce an agreement. There is also no "union shop" provision. The Postal Service's work force in many ways mirrors the nation's workforce in basic demographics (age, sex, race), and comes from all areas of the country including those thought disinclined towards unionism. The NALC, moreover, has a dues structure comparable to many other unions (two hours pay, per month). And, 92% of

eligible workers belong to the union on a purely voluntary basis.

We also are General Counsel to the Air Line Pilots Association, (AFL-CIO) which represents over 35,000 of the nation's airline pilots. It is difficult to conceive of a more highly educated, high tech, workforce. The popular perception is that such a group is not a high yield union member constituency. Yet, virtually all of the nation's pilots are unionized. Indeed, a very high percentage of all workers in the airline industry, and on the railroads, are unionized. The airline industry, as you know, is governed by the Railway Labor Act. It is interesting in that regard that neither the unions covered by the RLA nor the employers have recommended any legislative changes to that Act.

The harsh reality our clients face under the National Labor Relations Act is in sharp contrast to our experience in the public sector and under the Railway Labor Act. Here, we act as General Counsel to the American Federation of Television and Radio Artists (AFTRA), and as Special Counsel to the International Brotherhood of Teamsters, the United Steelworkers of America, and the United Auto Workers (all, AFL-CIO). Perhaps most significantly (because it is where most of the organizing is attempted) we represent approximately 15 local unions (ranging in size from a few hundred to tens of thousands), in a wide variety of industries.

You have heard many individual accounts of the extraordinary roadblocks placed in the way of NLRA organizing efforts. Do not dismiss them as anecdotal -- or as merely the inevitable, but not

truly representative, "worst cases " of any complex system. In fact, they represent the day-in, day-out reality. As employers see that vitriolic, intimidating, no-holds-barred anti-union campaigns work in maintaining their company's "union free" policy, a Gresham's law of union-resisting efforts has taken over -- with the worst employer tactics pushing others out of the market.

II. The current legal structure no longer supports the basic social compact which underlies our national labor policy.

I begin with the perhaps audacious assumption that this Commission will conclude that the social compact embodied in the law -- specifically the Norris-LaGuardia Act, the Wagner Act and the RLA -- remains the bedrock of this nation's labor-management policy: that workers, free from employer coercion, should be able to select a union to represent them in bargaining collectively with respect to the terms and conditions of their employment; that workers' right to withhold labor is a basic human right to be safeguarded as the workers' ultimate protection when all else fails to produce a "bargain" in a free market economy.

I make that initial assumption because, candidly, if you have not come to that conclusion, or if you have not had it reinforced, by this point in your exploration, I doubt that this union lawyer is going to bring you to an epiphany.

I make one further assumption -- that you will conclude that the legal system for protecting these worker rights has proved to be inadequate to the task and that employers have taken advantage

of these inadequacies to breach this social compact. Specifically, the law has not -- and is not -- affording a significant number of workers the free uncoerced opportunity to assert their rights to effective union representation.

I am a little more hesitant in making this assumption, because of the drumbeat rhetoric you have heard about the shortcomings and limitations of trade unionism and the supposed antipathy of today's supposedly satisfied, empowered, new-age work force, toward neanderthal labor unions. However, I believe that even those of you who may, in some small dark corner of your souls, harbor similar doubts, will have the objectivity to recognize that it is the workers, themselves, whose judgment on those issues must be respected and protected.

For those who believe that, in fact, unions are no longer relevant to the American workforce, a fair mechanism to permit workers to exercise their own judgment should be no threat. It is no answer to the charge that employer coercion effectively chills union organizing efforts that union efforts would fail anyway. Obviously the labor movement believes the contrary. And, overall, unions, I believe, are prepared to run the risk that they are wrong. The basic point is that they want a fair opportunity to show that they are right.

If my two basic assumptions are correct, the task remains to develop an analytic framework to measure the utility of the available options.

I understand this is the fact finding portion of your

undertaking, and that specific recommendations are not the order of the day. But since it is likely that the articulation of your findings of facts inevitably will shape the nature of your recommendations, let me push the envelop just a bit.

I urge you not to fixate on the specific worst case stories that have -- quite properly -- been brought to your attention-to get your attention. It would be easy -- but manifestly inadequate -- to express deep sympathy for the victims of especially outrageous cases of employer coercion, but conclude that all that is necessary is to tweak the remedial sections of the law to punish future malefactors sufficiently to dissuade the harshest predatory activities.

I urge you, rather, to probe beneath the surface symptomology and analyze the underlying systemic issues. First, consider the extent to which, if at all, the employer has any right to interfere with the exercise by employees of their right to determine whether to have collective representation. Second, consider the extent to which aspects of the substantive labor law other than those that directly regulate organizing are inherently coercive of employees rights, including the right to organize; thirdly, reflect on whether the current employer power/coercion relationship with employees is not diametrically opposed to the modern concept of jointness deemed essential to globally competitive productivity and quality standards.

Let's start with the propriety of an employer's interference in an employee's right to determine whether to be represented by

a union. Have I improperly skewed the issue by speaking in terms of "interference"? I think not. Let us reflect on the respective interests of the employer and the employee in the making of the employee's decision whether or not to make common cause with fellow employees.

We do not start with a clean state. The Wagner Act was an attempt to effect a sea-change in the traditional view of the employer-worker relationship. It embodies the realization that, notwithstanding the mythology of the perfect labor market (where every hiring in theory is the product of an individual bargain between a mobile, informed individual worker and an employer), reality is very different. The hoary common law labels revealed that which the free market myth masked: that the functioning (as opposed to theoretical) labor market is based upon a master-servant relationship, grounded in the master's superior economic power and protected by law. A frank recognition of the inequality of the parties' bargaining power is the very essence of the master-servant relationship. It was precisely that imbalance and inequality that the social compact addressed.

Why should the employer -- the other side of the bargaining relationship (whether with an individual or a collective representative) -- have any legitimate interest in determining the outcome of the individual workers' choice of how to organize their side of the relationship.

The argument is made that the employer brings the "full story" to the employees attention. In whose interest is the

employer acting in such an exercise? Is it some "paternal interest" the master has in enhancing the economic, or other, interests of the servant? Of course not. This is not a fairy tale. Obviously, the employer acts in its own interest. But it is not the employer's interest which the social compact sought to protect. Precisely to the contrary.

It is also argued that even if there is no legitimate employer interest which needs legal protection, employers should be able to make the "anti-union case" because workers have a right to hear it, and employers have the capacity and resources to make it.

This argument is doubly flawed. The underlying assumption is that American workers are naifs, simplistic wards in need of paternalistic guidance. Nonsense. Today's workers do not live in an information vacuum. The vigorous public debate on the relative merits and demerits, strengths and weaknesses, of unionism and individual action has not taken place under a barrel. This is a communication/information-driven era. Workers today are sophisticated. The notion that they "need" their employer to bring this essential information to their previously sheltered, unaware state, is beyond the cynical -- it is insulting.

Quite aside from that, experience has demonstrated that the typical employer anti-union campaign is an exercise in illegitimate power not in legitimate communication: The aim is not to produce an "enlightened worker," but to produce a

frightened worker. In the real world of organizing, the risk that some workers somewhere are so abysmally ignorant that some altruistic employers might actually perform an educational role, is far outweighed by the repeatedly demonstrated employer proclivity to frighten and coerce.

Next, I would like to explore another reality of today's workplace environment -- the power that an employer has to instill fear in workers is not just a product of relative economic strength. It is very much a function of a set of legal rules which enhance that economic power. Take, for example, the employment-at-will doctrine; the First National Maintenance case and its implications; and the doctrines that allow employers to control where and by whom this work will be performed. All of these proceed from the basic underlying assumption that labor is a commodity; that a master-servant relationship is the proper order of things.

Is it any wonder that an employee, repeatedly reminded that his employment is largely at the whim of his employer -- and that the continued existence of the employing entity is essentially within the unilateral control of the employer, with or without a union -- is going to approach a union organizing campaign hesitantly?

I recognize that it is not likely, at least in the short run, to expect revolutionary changes in the basic legal framework that permits employers -- union and non-union -- unilaterally to control the economic life and death of their employees. But

precisely because that is the case, it is even more important that employers not have the additional power to pretermit employee decisions to exercise that measure of influence as the law provides over their terms and conditions of employment.

Finally, I suggest that there is a broad, long-term national interest in restructuring the system of determining union representational status to discourage -- rather than encourage -- the harsh, bitter, divisive aspects of the employer anti-union campaign.

Some emerging truths seem unassailable -- Taylorism is an anachronism; autocratic management is inefficient; a highly motivated, thoroughly trained, fully empowered workforce is the key to increased productivity.

Is it not crystal-clear that continuation of class warfare where employees seek to organize is inconsistent with those goals?

Is it not contrary to the public good for union organizing campaigns to be contests over whether a system that provides employees a voice and a measure of independent power is legitimate, with the employer using his economic power to forestall the adoption of such a system.

Conclusion

If, as I believe (and I believe you believe) collective bargaining is worth preserving;

If, as I believe (and I believe you believe) the current state of our legal system permits employers to misuse their

inherent economic power to coerce employees in the exercise of the employees' rights to self-determination regarding collective representation;

Then the initial question before you is whether a mere tinkering with the system -- tightening time schedules here, increasing penalties there, addressing the "worst case" excesses alone -- will be sufficient. I respectfully urge upon you the proposition that the answer is "no."

As a society, we must own up to the reality that our basic legal framework for determining the free choice of employees whether or not to organize is fundamentally flawed. It fails to confront the power/coercion/fear syndrome inherent in protection of an employer's involvement in the exercise by employees of employee rights.