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Edward B. Miller

*Seyfarth, Shaw, Fairweather & Geraldson*

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### Comments

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HOT TOPIC "Future Worker Management"

SEYFARTH, SHAW, FAIRWEATHER & GERALDSON

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THE CONTINUING NEED TO DISTINGUISH  
BETWEEN MYTH AND REALITY\*

In October of last year, this Commission was kind enough to invite me to appear at a hearing you were conducting in Michigan. Unfortunately, I was unable to attend; but I supplied a written statement, which I hope at least some of you may have read. At that time I was not appearing on behalf of any organization or on behalf of any of my firm's clients, and I was expressing only my own views on some of the subject matter to which this Commission was addressing itself. Now this Commission has issued what it calls a "Fact Finding Report," and on this occasion I have been asked by the National Association of Manufacturers and the Labor Policy Association to give you my comments on it. I want to make clear, however, that I am not reciting any position statement prepared for me by either of those organizations, and I am still expressing my own views, which I hope are not too far from the views of the organizations at whose invitation I am pleased to appear.

In October, I asked this Commission to try to separate myth from reality when deliberating about the future of worker-management relations. The Fact Finding Report suggests to me that perhaps you need to do some further work in an effort to make that distinction.

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\* September 8, 1994, remarks of Edward B. Miller, Of Counsel, Seyfarth, Shaw, Fairweather & Geraldson, Chicago, Illinois (former Chairman, National Labor Relations Board), before the Commission on the Future of Worker-Management Relations in Washington, D.C.

I am addressing my attention to your third chapter -- "Worker Representation and Collective Bargaining." In Part A you attempt to describe experience under the National Labor Relations Act, and I respectfully suggest that some of the conclusions you have drawn from facts which were or should have been available to you do not appear to me to have been based on those facts.

It is certainly true, as your Report points out, that the number of NLRB elections has decreased in recent years. You know, of course, that the number of elections conducted is due entirely to the number of petitions for elections which are filed either by unions or by employers. I cannot tell whether some of your further statistics are designed to explain why unions have sought fewer elections -- and elections in smaller units -- than had been true in past years. Your Report seems to suggest, however, that this may be due to the commission of more unfair labor practices by employers. That conclusion is based upon incomplete data and is obviously a very short-range view.

Let me point out, for example, that according to the NLRB's Annual Report for the year ending in 1939, unions won 75% of the elections conducted during that year. During that same year, there were 7,738 employees reinstated after their having experienced discriminatory discharges (Fourth NLRB Annual Report, p. 23).

According to your Exhibit III-5 and your Exhibit III-2, during the years 1970-1974, when there were substantially fewer employees offered reinstatement (4,317), unions were winning only an average of 54.3% of elections -- a figure far less than the 75% won in 1939 when many more employees were being reinstated because of discriminatory discharges.

In 1941, when an astounding 23,475 employees were reinstated to remedy discriminatory discharges, a number greater than in any year referred to in your Exhibit III-5, unions won 83% of the elections! (NLRB Sixth Annual Report, pp. 17, 19)

One can only conclude from this data that at a time when tensions in the workplace must have been at a very substantially higher level than at any time in the last decade or two, unions were winning a much higher percentage of elections even though employers during that time were committing unfair labor practices at a far greater rate than at any time in recent years.

Furthermore, as I pointed out in October, there is good reason to question the reliability of the data which has been compiled by both Paul Weiler and by Bernard Meltzer -- not that the data collected is inaccurate, but that the conclusions they draw from it are totally inconsistent with more clearly relevant data. You were good enough in your Report to note that I had pointed out the very small percentage of elections conducted by the NLRB in which unions are filing any objections whatever to the conduct of employers during election campaigns. Such objections are filed in only about 6% of elections and are found meritorious in only 2% of those cases, as you point out in fnnt. 5, p. 70, of your Report.

Although you mentioned that data, you failed to give it the benefit of your analytical skills. Is not the logical conclusion to draw from this data that employer misconduct occurs in an insignificant number of NLRB election situations? And if so, do not some of the conclusions reached in your Report need reconsideration?

Is there any reliable basis for assuming that the campaigns conducted in the 50% of elections which unions have been losing have been in any respect unlawful? Obviously, the

absence of union objections to those elections suggest that they have not. Is that worth some further exploration?

Surely it at least suggests that a further and better study is needed to determine why unions have been losing elections in somewhere around half of the elections held in every year since 1970. Such a study should include interviews with, and polls of, a representative sample of employees who voted in elections lost by unions where no objections to employer conduct were filed, as well as some where objections were filed, so as to get at the true facts as to why a majority of employees in so many elections have been voting against union representation. Those polls or interviews could surely provide a far more reliable basis for formulating conclusions than the isolated anecdotal evidence reported in your Exhibit III-7.

In my earlier presentation, I also called your attention to the fact that in all recent years the NLRB succeeds in holding elections within something like 45 or 50 days after an election petition is filed. Your Report and its Exhibit III-2 confirm this. Is that not a healthy record? Your Report draws no such conclusion, and this part of your Report ends with the statement that approximately 20% of elections take more than 60 days. What conclusion should be drawn from that? Interestingly, back in 1953 when unions were winning almost 72% of all elections, nearly 20% of the elections were held pursuant to direction by the full Board, which meant that they were not being held until at least 100 days after the petition was filed!

In my monograph, "*An Administrative Appraisal of the NLRB*," published by the University of Pennsylvania's Wharton School, the Third Edition of which was published in 1981, I also pointed out that union election victories were increasing between 1960 and 1965,

at a time when the median time for stipulated elections was also increasing by more than 15%.

But the crucial issue is not these cold statistics. The fact is that the NLRB does proceed expeditiously to hold elections. It is a sad commentary on union organizational skills if they must admit that they cannot hold employee support for even a month and a half! Is it not a more reasonable conclusion that these days only about half of the employees who are asked to decide whether they want union representation freely decide that they don't, and about half freely decide that they do?

With respect to compliance with the National Labor Relations Act, the Board successfully resolves, without the necessity of any hearing at all, the overwhelming percentage of charges filed alleging employer misconduct. Those cooperative -- rather than contentious -- results are achieved in ever-increasing numbers -- over 90%, for example, in 1976 (NLRB Annual Report No. 5, p. 41), and similarly high percentages for the ensuing years. This is where the bulk of the agency's work is done -- at the Regional Offices, where these settlement efforts are so highly successful.

None of that received any substantial attention in your Report, and none of that is consistent with your conclusion that unfair labor practices have risen relative to the declining amount of NLRB representation activity or your conclusion that the processes of representation elections are now highly confrontational and that this is coloring labor-management relations. The fact is that NLRB processes, unlike the processes of both state and federal agencies dealing with employment discrimination, achieve their purpose within an



astoundingly short period of time and achieve it in the overwhelming number of instances as a result of good investigations and effective conciliatory efforts.

A comparison with the enforcement of statutory prohibitions of other unlawful employer and union conduct -- e.g., enforcement of the laws prohibiting discrimination because of invidious reasons such as race, sex, and age -- should be enlightening. The enforcement of those laws has resulted, as your Report points out, in an explosion in highly controversial litigation and huge jury verdicts which benefit about as many lawyers as they do employees. The percentage of employees who file charges of discrimination who can spend the time and money to participate in that type of litigious activity is very small, as any study you might undertake would show. But the federal courts are clogged with those who can and do resort to court litigation. Partially as a result of this, the timetables for enforcement under the Civil Rights Act, you would find, are far worse than those for enforcement of the National Labor Relations Act. Fat, late penalties don't work there to secure prompt compliance with the discrimination laws. That should be borne in mind when you reach the point of making recommendations for improving compliance with the NLRA.

What also needs some analysis is the validity of the premise that what this country needs is expansion of union membership and union power. Your chapter begins with your endorsement of the Wagner Act principle that the declared policy of the United States is "to encourage the practice and procedure of collective bargaining." Based on the employer abuses in the early 1930s, there is no question but that this was the policy promoted by Senator Wagner and a very substantial majority of elected representatives in the Congress.



But you do not mention that the policy of the National Labor Relations Act, as amended in 1947, is:

To prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either of the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

The emphasis of public policy changed from deliberate and unqualified promotion of unionization to even-handed administration of a law designed to prevent unfair practices of both employers and unions. Is it this Commission's view that this is the wrong policy, and that what we need now is a policy designed primarily to increase union membership? No doubt our union friends would like to see that achieved, but is this what the American people want -- or need?

At the risk of myself becoming yet another anecdotal, and thus perhaps unreliable, witness, let me tell you quickly about my own experience. I have been representing employers for some four decades -- indeed for most of my professional career, except for the four and a half years in which I served as Chairman of the National Labor Relations Board. In my private practice, I have not observed an increase in workplace tensions between employees and management in either union or nonunion shops. Of course there are some where the atmosphere is very tense, and that was true when I began to practice just as it is true today. The causes of those tense situations are as diverse as human beings are diverse. Some come about through an ill-advised strike, or perhaps through an ill-advised employer

reaction to a strike, either or both of which can certainly create hostilities that sometimes last an unfortunately long time. Others are due to poor management, and still others are due to highly abrasive union business agents or, more frequently, the occasional union steward or committeeman who carries a very large chip on his or her shoulder. A few -- but very few (despite what we hear or read in media sources) -- are due to unscrupulous managers or unscrupulous union officers. But, as your Report properly points out, there are very many relationships between employers and unions in this country which have matured and resulted in effective, cooperative approaches to work-related problems.

The dramatic reduction in the number and scope of strikes in recent years may have been due in part to a relatively high unemployment level, but the cause is certainly deeper than that -- and it is not intimidation of unions by big bad employers. I suggest it is more likely due to decreased, rather than increased, hostility between unionized employers and their unions. Both have learned that strikes are not fun and can never really be won by either party. That has been a valuable lesson for both parties and is applauded by the public which, as you may recall, not so many years ago was about ready to support any kind of legislation that would outlaw strikes. We almost never hear that kind of talk any more.

Certainly all of us who represent employers will tell you that the attention given by management to personnel policies has increased enormously over the past two to four decades. While certainly not all employees enjoy ideal relationships with their employers, I can assure you that on the whole those relationships are far better than those which prevailed a few short decades ago, despite the concerns which have been caused by the contraction of work forces necessitated by intense foreign and domestic competition.

There are many employers who are worrying that your Report is a preface to pre-conceived recommendations. I hope that is not true. If you issue recommendations along the lines of previous so-called labor law reform proposals (which the late, great, former NLRB General Counsel, Peter Nash, used to call "labor law deformed"), you will do all of us lawyers a great favor and the public a great disservice. If you would like my views on any of those subjects, and my views as to where some kinds of change could be helpful, I refer you to the final chapter in the monograph I mentioned earlier, which was published by The Wharton School. But, as an example of what won't help, let me return to a comparison I initiated a few moments ago: If you are thinking about recommending legislation which would give the same kind of punitive remedies in the traditional labor law area as are now provided for in employment discrimination litigation, you will increase litigation, encourage the lengthy delays which are incident to litigation in all our court systems, and benefit very few employees.

Most managements today promptly come into compliance if one of the NLRB Regional Offices advises that its investigation has developed facts indicating the probability that a violation of the NLRA has occurred. That is how the Regions resolve 90 plus percent of the charges without resort to litigation. But if a Regional Office were to advise that an amended law forces it to insist on large fines and liquidated or punitive damages whenever its investigation indicates a violation, most of my clients, at least, would litigate rather than settle. Whom would that help?

The real problem, as others have told you, of the middle '90s is how we in America can successfully meet global competition. Increased governmental regulation and increased

potential for litigation will not help that effort. If that should be the contribution made by this Commission, you will have done well for your union friends and for us lawyers, but you will have done a great disservice to the country.

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