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Hot Topic "Future Worker Management"

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ANDREW M. KRAMER

APPEARING ON BEHALF OF

"THE MANAGEMENT LAWYERS WORKING GROUP"

BEFORE THE

COMMISSION FOR THE FUTURE OF

WORKER-MANAGEMENT RELATIONS

September 8, 1994

Mr. Chairman and Members of the Commission: My name is Andrew M. Kramer and I am a Partner in the law firm of Jones, Day, Reavis & Pogue. I appear today on behalf of the Management Lawyers Working Group. For over twenty-five years I have represented public and private employers throughout the United States in all phases of labor and employment law. In 1973, I drafted the Executive Order in Illinois giving Illinois state employees the right to bargain and took leave from private practice to chair the agency which implemented that order. Thus, I have a long and sustained interest in the issues that are before this Commission.

FIRST CONTRACT ARBITRATION

My comments today will be directed at several of the questions which the Commission set forth in its May, 1994 Fact Finding Report. In its Report, the Commission, among other things, asked about what might be done "to increase the probability" that workers who successfully organize achieve "a first contract and on-going collective bargaining relationship." This question seemingly presumes that "something" should be done. Indeed, it has been suggested to the Commission that that "something" should be binding arbitration if an impasse in bargaining is reached in first contract settings.[1] While I strongly believe that the Commission should reject the imposition

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[1] Statement of Julius Getman at p. 8. See, also, Weiler, Striking A New Balance: Freedom Of Contract And The Prospects Of Union Representation, 98 Harv. L. Rev. 351, 405-412 (1984); Gottesman, In Despair, Starting Over: Imagining A Labor Law For Unorganized Workers, 69 Chi. Kent L. Rev. 59, 95-96 (1993).

of interest arbitration for first contracts, I also, however, believe that there is a potential for greater use of mediation as a device to promote agreement on a voluntary basis.

My position on this subject follows the traditional views of both management and labor against the use of compulsory arbitration. Both sides have historically recognized that great damage can be done to our system of collective bargaining if there is governmental intervention in setting the terms of collective bargaining agreements. One of the fundamental principles on which the National Labor Relations Act is based is that of free collective bargaining.[2] The principle of free collective bargaining requires recognition of the corollary principle that employers and unions are free to establish "their own charter for the ordering of industrial relations . . ."[3] without government intervention.

We know, of course, that the collective bargaining process is not really entirely free. Numerous restrictions are already imposed. Employer conduct at the bargaining table is subject to Board and court scrutiny. The Board defines the scope and subject of negotiations, and employer freedom to impose contract terms is limited by Board review and regulation.

Employing interest arbitration as a remedy in first contract settings will have an obvious impact on the vital concept of allowing private ordering of agreements without

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2 H.K. Porter Co. v. NLRB, 397 U.S. 99, 108 (1970); NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 401-04 (1952).

3 Local 24, Int'l Bhd. of Teamsters v. Oliver, 358 U.S. 283, 295 (1959).

government involvement. Indeed, even in Canada, where several provinces have implemented first contract arbitration, it has been recently stated that the process is doing "exactly" what it was not intended to do and has become "a substitute for free collective bargaining."[4]

First contracts are and will remain difficult to negotiate. This difficulty, however, is generally not the result of unlawful employer conduct. There are a myriad of issues presented in any first contract setting. The parties' greatest problems tend to be over the so-called non-economic items of an agreement. Issues such as seniority, hours of work, job classifications, pay for time not worked, vacation eligibility, grievance procedures and subcontracting are but a few of the important and difficult items that the parties for the first time must address on a mutual basis. There is no cookie-cutter approach to any of these issues since they must be tailored to the specific work site.

Additionally, the bargaining agenda of a union in a first contract setting often reflects the extent of promises made during the organizing campaign. Union positions on seniority, wages and benefits often will have the same "ring" as the statements made during the representation drive. Thus, reaching agreement in a first contract setting is not easy under the best of circumstances and the failure to reach agreement cannot simply be attributed to unlawful employer conduct.

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[4] Heenan, Issues For The Dunlop Commission: The Canadian Experience, NYU 47th Conf. on Labor (June 1, 1994) at p. 16.

Most importantly, to permit interest arbitration in a first contract setting will significantly lessen the parties' incentive to reach agreement. Since the first contract, probably more than any other, sets out the basic terms of employment (e.g., seniority, hours of work, fringe benefits), one can only wonder why a union would not want to press all of its demands with full knowledge that it will always have arbitration available to obtain an agreement. Thus, it is not surprising to find that the Canadian experience, however well intended, has been criticized as frustrating free collective bargaining.

The fact that some propose constraints as to when arbitration would be imposed does not change the fundamental flaws present in the concept. For those who say it would only be invoked upon a finding of bad faith, we nonetheless foresee a new level of governmental scrutiny of the bargaining process and significant delays. Moreover, as noted by Roy Heenan's analysis of the Canadian experience, the use of the remedy as a limited one for so-called bad faith cases simply does not work.

Similarly, for those who say that arbitration would only be invoked if a certain period of time elapses, we foresee no meaningful bargaining until that time came. Experience shows that under such circumstances, there will generally be no rush to reach agreement, since the ultimate presence of arbitration serves as a disincentive for early resolution.

And, for those who think that final offer style arbitration will create an incentive for agreement, we know that this is not the case. Indeed, final offer arbitration in a first

contract setting can be, for both sides, a prescription for disaster.

Having said this, I nonetheless believe that there are steps which can be taken to enhance the prospects of reaching agreement in a first contract setting. The Federal Mediation and Conciliation Service ("FMCS") could take on a much more effective role in bringing parties together. This, however, will require an improvement in the training and quality of the Service's mediators.

Today, we face a new world of collective bargaining. Issues affecting agreement range from health care alternatives, 401(k) options, gain-sharing plans, retiree health benefits and many other specialized issues which parties now confront on a regular basis. Moreover, knowledge of industry practices and global competition are critical to those at the bargaining table. Unfortunately, I do not believe that we have FMCS mediators who are trained or equipped with the knowledge necessary to deal with these issues so as to become a proactive force in bringing about agreement.

The Commission should consider recommending the establishment of a training academy or program for mediators. Such a program would also afford a role for labor and management to help educate these individuals on the problems confronted at the bargaining table. Mediation offers the opportunity to maximize the statutory goal of freedom of contract without sacrificing the parties' ability to reach their own agreement.

It will, however, only be as successful as the people who are trained and selected to serve that role.

ACCESS TO EMPLOYER PROPERTY

Another question raised by the Commission concerns whether unions should be granted greater access to employees during an organizational campaign. For the reasons discussed below, my answer is respectfully, "no."

As the Commission is well aware, the right of employees to communicate in a meaningful and effective manner has long been recognized as being within the ambit of Section 7 of the National Labor Relations Act. Recognition of this right, however, does not mean that an employer must surrender his property rights once a union organizational campaign commences. Quite the contrary, the Board and courts have repeatedly dealt with the issue of how best to accommodate the competing labor and management interests.[5] As recently stated by the Supreme Court, Section 7 "simply does not protect non-employee union organizers except in the rare case where 'the inaccessibility of employees makes ineffective the reasonable attempts by non-employees to communicate with them through the usual channels.'"[6]

Affording access to unions whenever an employer communicates with his employees about unionization raises serious

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[5] See, e.g., Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180 (1978); Lechmere, Inc. v. NLRB, 112 S. Ct. 841 (1992).

[6] Lechmere, Inc. v. NLRB, 112 S. Ct. at 843 (quoting NLRB v. The Babcock and Wilcox Co., 351 U.S. 105, 112 (1956).

policy and constitutional questions.[7] Given the sensitive balance established by case law between employers' property rights and employees' Section 7 rights, a generalized equal access rule is not appropriate. To justify an infringement of employer property rights, there must be a showing that such infringement is necessary. This general showing, in my view, has not been made.

In addition to the potential abridgment of employer property rights, establishing an equal access rule might well occasion First Amendment problems. If an employer's right to address his employees on matters related to union organization is contingent on his allowing union organizers to enter his property to solicit employee support, one can seriously argue that the employer's right of free speech is being infringed. As the Supreme Court has noted, the so-called free speech provision of the Act, Section 8(c), "merely implements the First Amendment."[8]

Thus, in other contexts, the Supreme Court, for example, has struck down a statute requiring newspapers to provide political candidates with free space to reply to any newspaper attack on the candidate's character.[9] Similarly, the Supreme Court has struck down a state requirement that a

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[7] See, Agricultural Labor Relations Bd. v. Superior Court of Tulare County, 16 Cal. 3d 392, 546 P.2d 687, appeal dismissed, 429 U.S. 802 (1976) (California Supreme Court upholding an access rule of the California Agricultural Labor Relations Board in a four-three decision).

[8] NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969).

[9] Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

privately owned utility include in its billing statement a speech of a third party.[10] Like the editors of the newspaper or the utility, an employer required to provide access would have to yield some of the control which he is otherwise entitled to exert over his property and business affairs. Also, like these other owners, such an employer would have to foster points of view which he might find distasteful by surrendering his property to be used as a forum for their publication. Indeed, unions would be given greater access rights than other members of the public; and an employer might well decide that the best course is to limit communications with its employees, "thereby reducing the free flow of information and ideas that the First Amendment seeks to promote."[11]

In sum, the balance between employees' organizational rights and employers' property rights is a delicate one and is unsuited to a general rule mandating access.

IMPACT OF FEDERAL PREEMPTION AND INCREASED REGULATION OF THE WORK PLACE

Another question posed by the Commission is how cooperation in mature bargaining relationships might be enhanced. This question overlaps to some extent some of the other issues posed by the Commission. I would like, however, to briefly comment on some facets of this inquiry.

One of the threats to mature collective bargaining relationships is the emerging role of state legislation over

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10 Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal., 475 U.S. 1 (1975).

11 Id. at p. 14.

matters subject to collective bargaining. While at one time the concept of preemption under the National Labor Relations Act was well defined, I no longer believe that this is the case.[12] The Supreme Court has, for example, now upheld the right of states to establish minimum health and severance benefits, rejecting the argument that such laws undercut the collective bargaining process by granting benefits employees might not have been able to, or even wanted to, bargain for. Decisions such as these will have a negative impact on the ability of employers and unions to create their own agreement.

The same problem is now true with respect to allowing employees to mount actions that might otherwise have been resolved through grievance/arbitration procedures.[13] All of this activity undermines the bargain struck between the parties and ultimately weakens the impact of the collective bargaining process.

The impact is not just at the state and local level. Application of other federal laws also affects existing collective bargaining relationships. Examples today are unfortunately far too numerous.

One area of recent conflict relates to the Americans With Disabilities Act. Under the ADA, employers have a duty to

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12 See, New York Tel. Co. v. New York State Dep't of Labor, 440 U.S. 519 (1979); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985); Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987).

13 Compare, Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) with Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988).

make reasonable accommodations to the known physical or mental limitations of otherwise qualified disabled applicants or employees, unless such accommodations would impose an undue hardship on the employer. On the other hand, the NLRA prohibits employers from unilaterally altering the terms and conditions of employment contained in a bargaining agreement without further bargaining. Thus, there is immediate tension between duties imposed under the NLRA and those imposed under the ADA. If an employer makes accommodations that modify existing contractual restrictions without bargaining, it can be in breach of its duty to bargain obligation.

While the EEOC and NLRB have endeavored to try to reach some accommodation to reconcile these and other issues, these conflicting statutory schemes place employers and unions in a difficult position. The same is true when employees are allowed to litigate issues which can be appropriately resolved under existing grievance and arbitration procedures. The Commission should encourage giving primacy to the bargaining relationship and the dispute resolution procedures contained in collective bargaining agreements. Indeed, there should be clear legislative intent as to the preemptive scope of the collective bargaining process so as to avoid the problems now faced under both state and federal law.

NON-EXCLUSIVE REPRESENTATION

Finally, I would like to briefly comment on the Commission's inquiry concerning non-majority representation. The Commission has heard from the AFL-CIO that the law should provide

a mechanism for workers to designate a representative, even if there is less than majority support, and impose upon an employer the obligation to meet and confer with that representative.[14] This recommendation is a recipe for chaos.

The concept of "meet and confer" was principally used in public sector jurisdictions as an alternative vehicle to full-scale collective bargaining. Meet and confer statutes were generally replaced by statutes giving full-scale bargaining rights. Nonetheless, the scope of the duty imposed under meet and confer laws was not insubstantial. Moreover, such laws were generally found in jurisdictions where there was no existing right to bargain. Here, of course, it is being presented as a means to require employer negotiations with some segment of an employer's work force even though a majority of employees have not chosen such representation.

The problems posed by this proposal are many and varied. First, what is the threshold level of interest to trigger an obligation to recognize a union as the representative for a group of employees? Is the number 5%, 10%, 20% or higher? Whatever the number, is each group permitted to "represent" the same job classifications? How do you determine if employee interest is sustained? Is an employer allowed to poll the employees? What is the nature of the bargaining obligation? How do you prevent conflicting bargaining demands and/or the

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[14] Statement before the Commission For The Future Of Worker-Management Relations by David M. Silberman, Director, AFL-CIO Task Force On Labor Law at p. 15.

establishment of rival groups which may be based on race, sex, national origin or other lines?

These are not academic concerns. Indeed, these concerns expose the folly of this proposal. In a plant or office, an employer could well have to deal with numerous groups, all with their own agenda. Indeed, such a world would invite conflict, as agreement with one group would be used as the "floor" for agreement by the next group. The concept of being whipsawed would take on even larger meaning. The great virtue of a union as the exclusive representative would disappear and the employer would be obligated to mediate the conflicts presented within its own work force.

At a time when we talk of becoming a more productive society, such a proposal takes us many steps backward. The shop floor would have the potential of becoming the meeting room floor. Instead of reducing conflict, the process would likely generate greater conflict as one group seeks to outdo another. The meet and confer standard, as public sector experience would attest, only offered confusion and frustration as to what the parties had to talk about or agree upon. Establishing such a standard on a non-majority basis would only magnify that confusion and frustration.

Moreover, the very fragmentation that the law tries now to prevent with respect to bargaining units -- in both the public and private sector -- would be potentially present in every work site. Thus, in my view, this concept is contrary to

the policies underlying the Mission Statement of this Commission, and should be rejected.