MANAGEMENT PERSPECTIVE

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My comments will consist of two parts. *First*, I will discuss two of the changing values developed by Bill Rentfro's paper: employee participation and the so-called fractured social contract. *Second*, I will present my views as to the effect on labor arbitration of changing workplace values in a particularly practical, perhaps crass, respect: What volume of arbitration work for Academy members can be anticipated in the next decade, and what factors have bullish or bearish impact on arbitration volume?

Changing Values

Employee Participation and the National Labor Relations Board

Rentfro described several dramatic examples of heightened employee participation in the unionized setting. Employee participation in decisions previously arrogated to management continues to grow in the nonunion setting as well. It goes by a variety of names: employee involvement, total employee participation, quality circles, focus groups, work teams, and many more. Whatever the label, it is clear that a new era in employer-employee relations is upon us, largely modeled after principles adopted by Japanese industry following World War II. These programs are increasing in number and extent because they work. Employees like them, and businesses utilizing them find that the programs contribute to increased efficiency and productivity.

The anomaly is, of course, that many of these programs are illegal. Section 8(a)(2) of the National Labor Relations Act[1] makes it an unfair labor practice for an employer to "dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." Clear and consistent precedent has given an expansive definition of the term "labor organization" so that it embraces any employee committee or group that deals with the employer on wages, benefits, working conditions, or any mandatory subject of bargaining.[2] Because of

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[1]29 U.S.C. §158(a)(2) (1988).

[2]*NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 211–14, 44 LRRM 2204 (1959); *Airstream, Inc.*, 288 NLRB 220, 226–27, 130 LRRM 1281 (1988); *Ona Corp.*, 285 NLRB 400, 405, 128 LRRM 1013 (1987); *St. Vincent's Hosp.*, 244 NLRB 84, 85–86, 102 LRRM 1196 (1979).

the obvious conflict between section 8(a)(2) as applied by the National Labor Relations Board (NLRB) in a nonunion context and the widespread employee involvement movement, it was widely anticipated that the Board would use its next opportunity to bring the law into accord with current employment realities and employee desires.

The NLRB decision in *Electromation*[3] defeated these expectations. Adhering to a rigid stare decisis approach,[4] the Board made no significant doctrinal change. The employee committees in *Electromation* were unlawful because they dealt with the employer on mandatory subjects of bargaining[5] and because the employer dominated them by appointing their members and establishing their agendas.[6] The result is that the changing value of employee involvement has not been met with a corresponding change in the law. There is no widely held value today that employers should not be able to encourage employee involvement in decisions affecting wages, benefits, and working conditions. Section 8(a)(2) as applied by the NLRB in *Electromation* is inconsistent with the overwhelming sentiment of managers and workers in today's largely unorganized employment world. The Board has, in essence, adopted an ostrich-like approach. Many employers and employees participate in employee involvement efforts which, if challenged, would be held violative of section 8(a)(2). In my own law practice, I know of a number of examples. I have repeatedly advised clients of the legal risk posed by *Electromation* and prior NLRB pronouncements on the subject; however, I have also advised them that, unless union organizing activity is present or anticipated, the practical likelihood of a charge is quite small. If one reads NLRB cases on section 8(a)(2), the charging party was, in almost every case, a labor union. In the absence of a labor union on the scene, employees do not file charges against employee participation efforts dominated by their employer. Employees apparently do not feel coerced or intimidated by these programs; rather, they like them. Therefore,

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[3]*Electromation, Inc.*, 309 NLRB No. 163, 142 LRRM 1001 (1992).

[4]The Board has been spectacularly willing to disregard precedent when doing so suits the political or policy objective of current NLRB membership. For example, the Board has switched back and forth four times on the issue of whether election campaign misrepresentations will cause an election result to be set aside. *See Midland Nat'l Life Ins. Co.*, 263 NLRB 127, 110 LRRM 1489 (1982) (election not set aside); *General Knit of Cal.*, 239 NLRB 619, 99 LRRM 1687 (1978) (election set aside); *Shopping Kart Food Mkt.*, 228 NLRB 1311, 94 LRRM 1705 (1977) (election not set aside); *Hollywood Ceramics Co.*, 140 NLRB 221, 51 LRRM 1600 (1962) (election set aside).

[5]309 NLRB No. 163, at 5.

[6]*Id.* at 6.

employers in very substantial numbers choose to violate section 8(a)(2) because there is no participant in the employment setting who would like to see the section enforced. While the NLRB no doubt did the safe thing in adhering to past precedent, a decision which leaves the law substantially out of step with sentiments of the very employees whom the law was designed to protect does nothing more than encourage disrespect for the legal system.

The Fractured Social Contract

Semantics seem to be important here. To refer to a social "contract" is to imply contractual rights for its breach. This has never been the case with respect to the alleged social contract that employees doing a good job would have lifetime employment. Indeed, employees have been acutely conscious that there is no such contract. This awareness led to the great rise in union membership in the 1940s and 1950s. Employees were aware that, if they did not have the protection of a labor contract, they had no legal protection at all against the termination of their employment.

And employment has indeed terminated throughout our history. Before the enactment of age discrimination laws,[7] employers openly spoke of the need for new blood, thinking, or ideas and let older managers go so that this could be achieved. Indeed, 20 years ago and more, there was a greater incidence of employees refusing promotion to the management ranks from a collective bargaining unit because of their knowledge that the legal protection of the labor contract was not replicated outside of that contract.

Thus, there has been no social contract which has recently become fractured. Rather, there are only two changes. *First*, the frequency of employment displacement has become greater in degree. As American business has become subject to tighter competitive and cost pressures, employee displacement has risen. *Second*, in a more dramatic change, Congress, the state legislatures, and appellate courts have created a panoply of legal rights for discharged workers having nothing whatever to do with the collective bargaining agreement. These include the discrimination laws[8] and the case-law development of theories of wrongful discharge.[9]

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[7]*E.g.*, the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 *et seq.* (1988).

[8]Most prominently, Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. §2000e *et seq.* (1988).

[9]*See generally* Olsen, *Wrongful Discharge Claims Raised by At-Will Employees: A New Legal Concern for Employers*, 32 Lab. L.J. 265 (May 1981).

Effect on Volume of Labor Arbitration

Bearish Factors

Labor arbitration conducted under a collective bargaining agreement between management and a union is on the decline. There are at least three major reasons why this is so:

1. Decline of Unions in the Work Force. Obviously, the lower the percentage of employees covered by a collective bargaining agreement, the lower the volume of grievances and arbitrations for covered employees. The proportion of total work force participants represented by unions has been declining every year in recent times and has now reached 15.8 percent.[10] This figure is greatly inflated by public-sector unionization since only 11.5 percent of employees in the private sector are covered by collective bargaining agreements.[11] Unless organized labor can find a way to turn around its diminishing importance in today's American economy, the volume of labor arbitrations can be expected to continue its decline.

2. Alternative Remedies. In many situations, discharged employees covered by a collective bargaining agreement have no incentive to pursue grievance and arbitration rights under the agreement because another law provides greater remedies. These employees either use the grievance and arbitration process as a tactical warmup for the court case or bypass the contractual procedures all together.

Traditionally, labor arbitrators have awarded only a "make whole" remedy for wrongful discharge. Employees are reinstated with back pay; they are not given compensation for any emotional distress or punitive damages.[12] In contrast, Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991,[13] provides a remedy of up to $300,000 in damages for emotional distress and punitive damages over and above the pecuniary loss suffered by the plaintiff. In addition, a successful plaintiff receives an award of attorney's fees. Discharged employees who claim their termination was based on race, sex, ethnic origin, or religion have standing to pursue claims under this law. Employees may seek emotional distress and punitive damages uncapped by federal law if they are

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[10] *Bureau of Labor Statistics Report,* 1993 Daily Lab. Rep. (BNA) (Feb. 8), No. 25:B-3.
[11] *Id.*
[12] Elkouri & Elkouri, How Arbitration Works, 4th ed. (BNA Books, 1985), at 688.
[13] 42 U.S.C. §2000e *et seq.* (1988).

the victims of adverse employment action based on race under section 1981 of the Post-Civil War Reconstruction statutes.[14] Race has been broadly defined to include ethnic origin.[15] Employees claiming discrimination on the basis of a protected disability have a court remedy under the Americans with Disabilities Act.[16] These remedies follow those available under Title VII and the Civil Rights Act of 1991. Victims of age discrimination may recover not only the amount of monetary loss suffered, but an equal amount as liquidated damages. Liquidated damages are available for any willful violation of the Age Discrimination in Employment Act.[17] The Family and Medical Leave Act of 1993 (FMLA) provides for civil suit for all monetary losses suffered by employees who have been the victims of adverse action caused by assertion of rights under the Act or opposition to practices made unlawful by the FMLA.[18]

Under the burgeoning judge-made doctrines of wrongful discharge, employees may recover very substantial damages for emotional distress and punitive damages. The status of these doctrines varies from state to state. Accepted theories include (1) the principle that an employer's policies, whether expressed in a handbook or otherwise, are an implied contract; (2) a doctrine that employees may not be retaliated against for exercise of rights protected by public policy or for refusal to perform acts condemned by public policy; and (3) a doctrine that implies a covenant of good faith and fair dealing in every employment relationship.[19]

Most of the foregoing laws provide these greater remedies irrespective of the employee's coverage under a collective bargaining agreement.[20] They thus provide, in many cases, a more attractive alternative to the discharged employee than traditional labor arbitration.

3. Employee Participation in the Unionized Sector. As Rentfro has described in greater detail, the employee-involvement movement has been manifested in consensual arrangements in some major

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[14]42 U.S.C. §1981 (1988).

[15]*Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 43 FEP Cases 1309 (1987); *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 43 FEP Cases 1305 (1987).

[16]42 U.S.C. §12101 *et seq.* (1992).

[17]29 U.S.C. §626(b), 29 U.S.C. §216(b) (1988).

[18]Pub. L. No. 103-3, 107 Stat. 6.

[19]Olsen, *supra* note 9, at 267–81.

[20]The only significant exception is the doctrine that state law wrongful discharge suits which require interpretation of a collective bargaining agreement are preempted by the contract remedies of the Labor-Management Relations Act. *Compare Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 118 LRRM 3345 (1985) (breach of state-law implied duty of good faith preempted) *with Lingle v. Magic Chef, Norge Div.*, 486 U.S. 399, 128 LRRM 2521 (1988) (public policy wrongful discharge not preempted).

collective bargaining units discouraging the use of arbitration. Employees participating in a more meaningful way and at an earlier stage in management decisions are less likely to file grievances challenging those decisions.

Employee participation programs in the unionized setting are largely restricted to those pursued with the agreement of the union. An employer who creates an advisory committee without bargaining with the union risks a violation not only of section 8(a)(2) but also of section 8(a)(5) for unilateral action without bargaining with the designated representative or for direct dealing with employees rather than with their exclusive bargaining representative.[21] The topic of employee participation programs is only a permissive subject of bargaining, and a union wishing to defeat such efforts need only refuse to discuss them.[22] A question remains as to the legality of an employer in a unionized setting unilaterally establishing an employee participatory program dealing solely with permissive subjects of bargaining. The NLRB suggests that any charges involving this issue be submitted for consideration by its Office of Advice.[23]

An employee committee dealing only with permissive subjects of bargaining (i.e., not with wages, benefits, or conditions of employment) in a nonunion setting does not constitute a violation of the Act.[24] Surely this should also be the rule in the unionized setting. If the law turns out differently, it provides yet another reason for an employer to strongly resist union organizing efforts.

Bullish Factors

1. Alternative Dispute Resolution in the Nonunion Setting. Employers in the nonunion setting are increasing their use of alternative dispute resolution (ADR) procedures culminating in neutral arbitration. This is done to promote increased employee satisfaction and deter union organizing. This movement can be expected to expand dramatically if agreements entered into before the discharge claim arises, providing for ADR as the exclusive forum for resolution of employment claims, become enforceable. In *Gilmer v. Interstate/Johnson Lane Corp.*[25] the U.S. Supreme Court may have

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[21] *NLRB General Counsel Memorandum on Electromation, Memorandum GC 93-4*, 1993 Daily Lab. Rep. (BNA) (Apr. 15), No. 78:G-1, 16–17.
[22] *Id.* at 18.
[23] *Id.* at 17–18.
[24] *Id.* at 8–10.
[25] 111 S.Ct. 1647, 55 FEP Cases 1116 (1991).

opened the door to this result. There, the Court enforced an agreement between an employee of a broker-dealer firm and the New York Stock Exchange, which provided arbitration as the sole remedy for any employment claims. The Court held that under the Federal Arbitration Act[26] such an agreement was enforceable and precluded Gilmer's asserting his age discrimination claim in federal district court.[27]

Many questions exist as to the applicability of the *Gilmer* result in more typical circumstances. Clear precedential barriers to any such preclusion doctrine are present in cases such as *Alexander v. Gardner-Denver Co.*,[28] in which an employee was permitted a de novo federal district court trial of his Title VII discrimination claim after he had fully utilized the grievance and arbitration procedure of his collective bargaining agreement. This approach—permitting employees two bites at the apple—has been followed in other employment law settings.[29] Employers who, by agreement with their employees, succeed in designating the neutral arbitrator as the exclusive forum for discharge claims would, in my view, be well served. As the quid pro quo for this result, employers should, and I believe would, readily agree to cloak the arbitrator with power to award all the remedies available in the courts under the various employment law theories.

2. *Alternative Dispute Resolution as a Forum for Statutory Claims.* The day may come when arbitration is widely utilized as the forum for resolving statutory claims even in the absence of any prior agreement between employers and employees. Litigants may simply decide on a case-by-case basis that they prefer to arbitrate rather than litigate their claims. Encouragement for this procedure is found in a number of statutes. For example, section 118 of the Civil Rights Act of 1991 provides:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, mini trials, and arbitration, is encouraged to resolve disputes under the Act or provisions of federal law amended by this title.[30]

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[26]9 U.S.C. §1 *et seq.* (1988).
[27]111 S.Ct. at 1657.
[28]415 U.S. 36, 7 FEP Cases 81 (1974).
[29]*McDonald v. City of West Branch, Mich.*, 466 U.S. 284, 115 LRRM 3646 (1984) (arbitration cannot preclude court suit under 42 U.S.C. §1983 (1988)); *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 24 WH Cases 1284 (1981) (arbitration cannot preclude court suit under Fair Labor Standards Act).
[30]Pub. L. 102-166, 105 Stat. 1071 (1991).

Section 513 of the Americans with Disabilities Act contains nearly identical language.[31]

The Model Uniform Employment Termination Act, proposed to be adopted by states, provides a statutory scheme replacing judge-made theories of wrongful discharge. In essence, it provides every employee a lawsuit to determine whether termination was for just cause but caps the remedies available at levels substantially beneath those available under current wrongful discharge law.[32] Section 6 of the Model Act sets forth a procedure by which litigants are encouraged to utilize arbitration rather than the courtroom. The arbitration procedure would be similar to that in labor-management settings except that the arbitrator would be appointed by a public agency rather than agreed to by the parties.[33]

ADR is further encouraged in employment litigation, as in civil litigation generally, by pressure upon lawyers. For example, a provision recently added to Colorado's Rules of Professional Conduct states:

> In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or reach the legal objectives sought.[34]

Conclusion

For the foregoing reasons, it is my expectation that the volume of employment disputes submitted to a neutral arbitrator will decline in the short term, but around the corner we may expect to see a very substantial increase in arbitrated employment disputes. The increase will not, however, come under collective bargaining agreements but from other sources.

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[31]42 U.S.C. §12212 (1992).
[32]Model Uniform Employment Termination Act (1991).
[33]*Id.* §6.
[34]Colorado Rules of Professional Conduct, Rule 2.1 (1993).