Chapter 5

KEYNOTE ADDRESS

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Moderator: James Oldham, NAA Member, Washington, DC
Speaker: Rich Trumka, Secretary-Treasurer, AFL-CIO, Washington, DC

Oldham: My name is Jim Oldham. I'm serving as the moderator of this session, which means, basically, I will introduce Peter Hurtgen, who will, in turn, introduce Rich Trumka. We are very grateful to Rich Trumka for his willingness to step in so readily on short notice to serve as our keynote speaker. Rich will be talking with us about aspects of the phenomenon that's been in the news so much recently concerning the corporate bankruptcy process and its effect on working families.

Some of us have some experience with that topic. I was the last umpire for Bethlehem Steel as they went under. And, we saw the sad effect of that process on many of the workers.

First, however, let me say a word about Peter Hurtgen, who will not only introduce Rich but also will provide some commentary in response to Rich's remarks. Peter, of course, is an old friend of the Academy, having been with us on a number of occasions. He has had a rich and full career in labor management relations. As most of you know, he was a member of the National Labor Relations Board during the late 1990s and until 2002. He then became the director of the Federal Mediation and Conciliation Service. He has, himself, a serious background in the communications and aerospace industries from his years prior to government service. Peter also is a thoroughbred Hoya, having graduated from both undergraduate and law school at Georgetown. With that, let's welcome Peter Hurtgen.

Hurtgen: Thank you, Jim. The subtitle for this presentation really ought to be, "Oh, How the Mighty Have Fallen." As Jim says, there was a time when I was your luncheon speaker. I have now been replaced by Justice Scalia, that's obvious. You didn't throw

food at him. You didn't sail paper airplanes back and forth while he was speaking. Or, chat idly with your neighbors. Of course, he didn't tell you that some of your decisions were repugnant, either. And, to be fair, you didn't tell him any of his were, either.

But, it's not just simply the change in luncheon speakers that has saddened me here, I think. It is also that Rich Trumka and I have been given 30 minutes to talk to you about bankruptcy matters; while you are giving the topic of sports arbitration an hour and a quarter following us. I mean, where are your priorities? Bankruptcy and its effect on labor in this country are far more vibrant and important issues than the amount of money being given to baseball players or other professional athletes.

Rich Trumka is the number two man in the AFL-CIO. He's a heartbeat away of being the president of it. The record will reflect that he is the Secretary-Treasurer of the AFL-CIO. It is the number two position in that august body. He is the youngest Secretary-Treasurer of the AFL-CIO.

In 1997, he led the creation of the AFL-CIO capital stewardship program, an important and significant achievement that promotes the retirement security of America's working families. As you may know, AFL-CIO member unions sponsor pension and benefit plans worth more than $400 billion in assets; and they are a major force, of course, in the global capital markets. Under Trumka's leadership, the capital stewardship program promotes corporate governance reform, investment manager accountability, and pro-worker investment strategies. Prior to that, he had served three terms as the president of the United Mine Workers of America; and that's where his contribution to the labor movement, I think, was most notable. That organization, as you know, had had some problems prior to Rich and Mr. Miller's involvement; but they got it done. And, it is a testament to his steadfast efforts to promote change where it is needed. And, I think, frankly, his organization needs him and those skills more now than ever.

Rich is a graduate of Penn State University, and he holds a law degree from Villanova. They also have a basketball team, I understand. And, he now serves as president emeritus of the United Mine Workers of America.

He has achieved a plethora of seemingly disparate awards; but the emphasis is, of course, on the awards aspect. He has received the Gompers-Murray-Meany award from the Massachusetts AFL-CIO and the labor responsibility award from the Martin Luther

King, Jr., Center for nonviolent social change. In 1996, he received the Jewish National Fund Tree of Life award for his outstanding commitment to the American Labor Movement, the nation, and to the state of Israel. And in 2003, amazingly enough, he was honored by the Sons of Italy Foundation with its 2003 Humanitarian Award.

I have known Rich for several years both officially and personally. We have worked together on some huge labor-management bargaining problems. And, there is nobody in leadership of organized labor in this country who is more knowledgeable, more zealous, and more creative in getting agreement on difficult issues. He was critical in helping to resolve the West Coast port dispute a few years ago. He also played a major role in several other major national disputes involving other sectors of the economy. He is a great friend and leader of organized labor; but he also is a great friend and leader of a collaborative, collective process of dispute resolution. And, he is somebody for whom I have great respect. It is my distinct pleasure to present Richard Trumka to you.

Trumka: You know, Peter, I can understand why you were amazed that the Sons of Italy would give me an award. I can trace my heritage back to a single country. You don't have that same luxury. And, I have some real empathy for you because you were de-frocked as the luncheon speaker; but then I thought about it a little further and what does it say of me that I'm being introduced by a de-frocked luncheon speaker. I want to thank you for those mostly kind words. I do want to say this, seriously, about Peter. I want to thank you one, for your friendship, and two, your leadership; and I really want to thank you for your commitment to the process of collective bargaining and making that process saner. You have been a tremendously stabilizing voice in all the positions you've held before and in what you do now. And on behalf of working people, I want to say, thank you, because we sincerely appreciate all of your efforts.

I want to mention two other people who come to mind when I think about collective bargaining, dispute resolution, and arbitration. These two titans are my very good friend Bill Usery and our departed friend, John Dunlop, both of whom were instrumental in the entire process.

When I was president of the Mine Workers Union, I negotiated several major contracts, including one that culminated in a historic year-long strike at Pittston. And, in my position as Secre-

tary-Treasurer of the AFL-CIO, I'm now called on to help with negotiations in many industries. In a number of those negotiations, employers intimated, referenced, and actually posed a threat of bankruptcy. Such tactics have been a weapon of choice of employers, large and small, for some time. We have always had trouble documenting the factual basis for the threats, even when facing publicly held companies. So, we always adopted the attitude that it was so much bargaining chatter designed to scare employees and to influence public opinion.

Traditionally, self-respecting business leaders viewed bankruptcy as a haven of last resort that imparted a scar like the proverbial scarlet letter. Well, that view has changed rapidly over the past several years. Too many employers now know none of that shame. Today, they are using bankruptcy as a cynical business strategy to dry the well of collective bargaining, using actual bankruptcy filings to force unions into accepting massive concessions, especially in pension, health care, and retiree benefits. They also are using bankruptcy to abrogate union contracts altogether.

Employees today are not just being directed to the back of the line. They are being kicked out of the line altogether. And, the impact on collective bargaining, labor relations, and working families has been devastating. This bankruptcy strategy is now widespread. More than 1,500 large or fairly large companies are now in bankruptcy. This strategy works because the balance that bankruptcy law envisions in compromising the interest of all corporate stakeholders has completely eroded, leaving workers at the mercy of management.

Actually, the term "eroded" isn't really strong enough because what has happened is that bankruptcy judges have been digging under the roots of our collective bargaining system by interpreting Section 1113 of the Bankruptcy Code to give managers almost unbridled power to unilaterally implement wholesale, draconian cuts in wages, benefits, and working conditions.

The timing of the Section 1113 process, which takes place at the outset of bankruptcy, compounds the problem. Non-labor claims and issues are settled much later in the process, which empowers management to set reduced terms and conditions of employment in a vacuum; that is, without reference to what other creditors should or would sacrifice. Imagine if any of you as an arbitrator were given only one side of a case or perhaps only portions of

a case and were then expected to make a fair judgment on the whole dispute.

Creditor committees, of course, encourage management to gain the most labor savings possible up front because it increases what remains for them in hopes of reducing their losses. It is as if human capital in a business enterprise has little or no value any more. Managers, of course, deal with their own interests very differently. They demand big bonuses and lavish equity stakes in the reorganized company as the price for steering through bankruptcy the companies they have mismanaged. Unfortunately, judges routinely approve their demands.

In short, the bankruptcy process allows managers to enrich themselves with the sacrifices they extract from rank-and-file employees, which reinforces their readiness to use bankruptcy as a pro-active business strategy. And, when one company in an industry successfully uses the bankruptcy strategy, it has a domino effect on other companies that have to do the same in order to reduce their costs and compete. Witness what happened in the steel industry and most recently in the airline industry where every major carrier, outside of Southwest and American, has taken the bankruptcy route.

Of course, there are other related strategies that employers are using to avoid their obligations to unionized workers. Mesaba Airlines created a holding company to limit the ability of creditors to reach their assets. They transferred the profits of the operating company to the holding company; and then they bankrupted the operating company. Employers also can declare bankruptcy for just their U.S. operations, using the savings from the restructuring of domestic operations to invest in off-shore operations and jeopardize the already shaky job security of the company's American workers.

When it comes to the damage often done by bankruptcy to pensions, the Pension Benefit Guarantee Corporation (PBGC) protects its own interests as an insurer. And, those interests are not always aligned with the interests of workers. One classic example of that is the United Airlines bankruptcy where the PBGC got a 24 percent interest in the restructured company in return for going along with the termination of the company's defined benefit pension plan. So, the PBGC will be United's largest share-holder and the proceeds when the investment is liquidated will go into the

PBGC coffers and not into restoring the benefits of the terminated plans.

Bankruptcy, as an acceptable business strategy, is now spreading to other industries, most notably auto manufacturing. This is being led by Delphi's current efforts to void its contracts and to cut wages and benefits in half after moving substantial production off shore. In fact, Delphi did not just ask the bankruptcy court to nullify the contract; it asked the bankruptcy court to give Delphi the power to nullify the contract whenever it decided to do it, a decidedly new twist. Members of the Auto Workers and the United Electrical Workers have voted overwhelmingly to strike if the company succeeds with this request. Such a strike would cripple GM along with Delphi. Now, a lawyer for the UAW, my friend, Bruce Simon, called Delphi's restructuring plan "ghoulish," and said it was misusing the bankruptcy process simply to gain leverage over the unions. I agree. And I can assure you that a strike by the Delphi workers will be no ordinary confrontation. The entire labor movement will go to the ramparts because we all know it's our jobs and it's our benefits that are on the line if Delphi succeeds. If they succeed, the domino effect will be crushing and we will see autos join steel and airlines on the disassembly line.

So, what to do about all of this? Well, nothing short of a complete overhaul of the corporate bankruptcy laws will buck this destructive trend. I find it ironic that while Congress found time to reform our personal bankruptcy laws to help creditors, it has not found the courage to stop employers from robbing employees of their living standards through the blatant misuse of the bankruptcy process.

The AFL-CIO has made bankruptcy reform and pension reform twin legislative goals for this year, and we are determined to make them big issues in the elections this fall and beyond. We will use these failures as further evidence of a meltdown in domestic and foreign policy on the part of an administration that has shown itself to be totally anti-worker. Senator Evan Bayh of Indiana and Congressman John Conyers of Michigan are giving all incumbent members of Congress a chance to demonstrate that they care about working families by introducing legislation to protect the rights of working families during corporate bankruptcy proceedings. It's called the Fairness and Accountability in Reorganizations Act. It will help make sure that workers are treated more fairly by limiting executive compensation deals and requiring corpora-

tions to provide a more detailed picture of their financials before attempting to fool around with collective bargaining agreements.

We are supporting this effort; and we suggest that all of you do the same because it's the first step toward leveling the playing field a bit. But, quite frankly, we can't stop there. In the long run, we need amendments to current laws that would set much stronger standards for terminating collective bargaining agreements, that would require a reasonable equality of sacrifice between rank-and-file employees and executives, that would prevent executives from declaring bankruptcy for just their U.S. operations, and that would raise the bankruptcy priority status of the obligations owed employees and retirees.

On the issue of termination of contracts, we might also consider amending the law to take that decision out of the hands of judges and put it in the hands of arbitrators. Unlike many judges, arbitrators better understand how collective bargaining works and can actively guide the parties to voluntary agreements that more fairly balance the interest of employers and employees. That system is getting a trial right now in Canada.

Fairer contracts are essential in and of themselves. They would also help preserve employee morale, which is indispensable to a successful exit and recovery from bankruptcy. ALPA, the Airline Pilots Association, and Delta recently submitted their disagreement over bankruptcy concessions to arbitration. The process produced a tentative agreement, which the pilots are voting on right now. So in enacting all these reforms, we need to contrast our bankruptcy laws with those of other countries and accept their best practices as part of ours. We need to get at these tasks because bankruptcy is being used on a wholesale basis to destroy the working middle class.

While I have your attention on legislation, let me also urge your support for the Employee Free Choice Act, which is aimed at leveling another playing field that is now tilted in favor of employers. We have 57 million workers who, according to credible independent polls, say that they would join a union tomorrow if they had the chance. But, they don't have that chance because our labor laws are even weaker than our corporate bankruptcy laws. Those workers know that if they try to join or form a union, they would be folded, spindled, and mutilated in the process. Employers violate the spirit and the letter of our labor laws by firing and intimidating workers who try to join a union at the rate of one in every

seven minutes. That means that once in every seven minutes, a worker in this country gets fired, intimidated, or discriminated against because he or she tried to form a union.

We have 216 co-sponsors in the House and 43 in the Senate for our bill, which provides for union recognition upon documentation of majority support by workers. It provides for stiffer penalties for employers that violate the law. And, it provides for arbitration as a final resort in first contracts.

In sum, I'll just say this, for the sake of collective bargaining and for the sake of the American middle class, please join us in fighting for bankruptcy and pension reform and for labor law reform so that we can better protect the jobs and the lives of America's working families. Thank you.

Hurtgen: My expertise, candidly, does not run to bankruptcy issues. But, like all of us in this room, we are students of the phenomenon and see what it is doing and how it's affecting labor management relations in certain high-profile sectors of the economy. I have an overarching observation, not necessarily in contravention to what Rich has said; but, perhaps, putting it in a different context and that is that the Bankruptcy Code is imperfect legislation for a number of reasons. We have an imperfect democracy as well as an imperfect Congress that passes these laws.

The purpose for our bankruptcy system is to allow a new path for an employer that has gotten into trouble by way of bad judgment concerning products or services, or financial structure, or agreements with labor organizations. It is wrong, I think, to simply cast this as a device for management and shareholders to line their pockets. It is a system designed to put the debtor back in shape and if the debtor's problem is in significant part caused by agreements entered into over the years with a labor organization that has put the economic cost of doing business at an unsustainable level, why then, it is crocodile tears to cry and complain that labor now has to start paying part of that price.

Reasonable people will argue and disagree over the application of that philosophy or the purpose of the statute. And, I don't disagree with Rich in one significant respect in that I think arbitrators can have a very significant role in the negotiations that the statute requires be undertaken before a special master or a bankruptcy judge rejects a collective bargaining agreement. Rich is concerned about the fact that the labor agreement and the resolution of the dispute about it comes first in the process. I can see his point, but it seems to me it's better for his end of things and for the union

to be first rather than last in terms of the stakeholders whose interests get determined by a bankruptcy judge. He seeks legislation that would require the arbitration of these disputes in bankruptcy. I would not personally have any opposition to that, but I note that under the law as it exists now, that can happen. All it takes is the master or judge to require the parties to submit to an arbitrator as they did in the Delta Airlines matter. It seems to me it would be wise for more of these bankruptcy judges to do that because the issues that confront a judge in bankruptcy matters often are beyond that judge's expertise. I think those arbitrators who are schooled in a labor-management perspective and who know about collective bargaining can add value by producing settlements that treat employees fairly among all the stakeholders and get the debtor back in business because that is the whole point of the statute.

Trumka: I just want to reiterate a few things and also comment on some things that Peter said. He said that the purpose of the Bankruptcy Act is to correct the bad judgment of management. If you are thinking about correcting the problem in the long term, then I think we ought to broaden out our thinking a little bit. Because when you look at the mandatory subjects of bargaining, most of the things that end up killing us involve issues in which labor has had no say. We can't talk about new products or about locating operations overseas. They are non-subjects of bargaining. So, we really need in today's world of globalization to look at the definition of mandatory subjects of bargaining. And, if you really want employees to be partners, then really give them the chance to be partners.

Peter also said that we should not have large crocodile tears when we are asked to pay part of the price for management's misdeeds. We don't mind paying part of the price. But the reality is, we pay a disproportionate part of the price. We lose our pensions, we lose our health care, we get rolled back to 1970 wages, while management people more often than not not only don't get rolled back, they benefit instead.

Also, Peter said it is a benefit to us to be first in line. Well, let me just reiterate this to you. When we're first in line and they're taking away a contract, there is no business plan in place. As a result, there is simply no way for us to be able to show that these cuts are not necessary or fair. There is no way for us to show alternatives because there is no business plan addressing alternatives. And, the decider of that case is at the mercy of the facts that are provided to them by management at that point.

We really think that this has become a corrosive process. For those of you who believe that collective bargaining is the best way to solve many of the problems that we have in the country right now, I would urge you to take a good, good hard look at one, the labor laws that we have and two, the bankruptcy laws that we have. You simply cannot keep taking people's pensions and health care away and expect them to come back and be happy, productive employees.

Thank you.