thesis, many other experts have joined the chorus. Not a single respected and disinterested voice has been heard to suggest there is any valid, substantial reason for opposing the requirement of just cause.[82] No such reason has been suggested, in my judgment, because there is none.

Comment—

HENRY B. EPSTEIN*

We have heard three excellent and interesting descriptions of novel experiments designed to give a measure of job security to unorganized workers.

In my opinion, careful analysis will show that these are the exceptions which prove the rule. In the American labor-management situation, there is no effective substitute for the protections given a discharged employee by a well-written and administered discharge and arbitration section and an active union. In order to compare the present situation in an organized company with the novel cases described today, I have to review the benefits of unionized grievance procedures, as I see them.

The first and most important factor is the general labor-management climate. Employees who might be discharged in an arbitrary fashion in an unorganized employment situation will usually be treated differently in a unionized environment—depending on the labor-management climate at that time.

Job security for unionized employees encompasses much more than the submission of unsettled discharges to final and binding arbitration. The process includes negotiating the exact language under which discharges are permitted, careful training of stewards and union staff on the contract language, use of a multistep grievance procedure with emphasis on settling cases at the lowest possible level, screening cases for arbitration, screening arbitrators, actually presenting the arbitration case,

[82]At the time I first uttered these words in Maui, I believed them to be literally true. I underestimated the Academy membership's almost infinite capacity for differences of opinion. Immediately several "respected and disinterested" voices were heard to challenge the whole concept of a law requiring "just cause" for the discipline of unorganized employees—primarily, as I understand it, for the reasons mentioned in the text accompanying notes 44–46, *supra*. But I have decided to let my original phrasing stand; at least to date no one has seen fit to commit his contrary views to the permanency of print.

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and finally, paying for the arbitrator, transcripts, lost wages, and other expenses.

As one who has spent almost all of my working life in the labor movement, I obviously think this is a good system that works well for the average discharged union member. It is not a perfect system. As those of you in the audience know, unions vary in effectiveness in their handling of discharge cases. It also has to be pointed out that the decision to take a case to arbitration is a political one.

However, the political situation in a union works to the discharged employee's advantage. The political pressure is on the union to back up the discharged member and get favorable results. It is very difficult for a union to refuse to take a discharge case to arbitration.

How does this compare to the novel cases described today?

The British Experience

As Professor Hepple points out very well, the British approach to notice of dismissals and grounds for dismissal is much different from the American one. Unions in Britain have not negotiated discharge and arbitration procedures similar to our typical American union agreement. Instead, anger about unfair dismissals has been expressed in wildcat walkouts by union members. I must say that this sounds as if it's good for the union members' emotions, though it must be tough on the overall labor-management situation.

After reading Professor Hepple's excellent paper, I get the impression that the British legislation is really an attempt to have a government body serve as an extension of union agreements to take care of unfair dismissal cases. The British tribunals perform the same functions as arbitrators perform in the American system.

The British legislation excludes coverage for employees in their first year of employment and completely excludes all employers with 20 or less employees. It is very possible that the most unfair discharges occur at small business establishments, and they are completely uncovered under this scheme.

The system obviously has the advantage of forcing employers to adopt clear rules on employee conduct and to be careful and build up a solid case before discharging an employee. In my experience, this is the same effect a union agreement has on a

newly organized employer. Clear and fair policies on discharge are a two-edged sword, but inevitable when procedures exist to give greater protection to employees.

Professor Hepple points out that most cases are resolved informally, before coming to a formal hearing. The bottom line is that very few employees win their cases before the tribunals and that enforcement of decisions is difficult, except in industries where unions are strong. Even under the British experiment, the well-organized unions give their members a benefit which is greater than that available to unorganized workers.

Northrop Corporation

As Mr. Littrell points out, the Northrop experiment is unique. I find it hard to believe that many other companies would agree in advance to pay the entire cost of an arbitrator who may overturn an important management decision.

I have no reason to doubt the sincerity and good intentions of Northrop and the working of the grievance and arbitration system. The company admits candidly that the procedure has helped to keep the unions out.

The policy permits employees to appeal the application of company policy in their cases, but the employees have no say in the adoption of company policy.

The aggrieved employee is advised by employee relations representatives who "walk a thin line on a hard road," according to Mr. Littrell. There is now recognition that the employee is at a disadvantage in the presentation of a formal arbitration case and there are attempts being made now to improve that situation.

There appear to be several pluses in the system, as described by Mr. Littrell. It does emphasize getting settlements at the lowest possible level, and the existence of a grievance procedure with teeth does keep management on its toes. The test, it seems to me, comes when there is a major challenge to company decisions. How do those well-educated and diplomatic personnel men who walk a thin line react when top management says, "You've got to decide which side you're on"? Another test must come when dealing with the troublesome employee—the one with a lot of complaints and grievances. Does he get full and enthusiastic representation, or is he counseled to leave the company because he doesn't really fit in?

Northrop is giving its employees many of the benefits and procedures of a union agreement without the need to have a union. An interesting subject for a research project would be to determine whether it would have been cheaper for Northrop to have become unionized and to have worked out these procedures through normal collective bargaining. I suspect it would have been better for the ulcers of those employee relations reps walking a thin line in the personnel department.

Professor St. Antoine's Overview

Professor St. Antoine's presentation is a comprehensive overview of all possible considerations in connection with unjust discipline. Because of its comprehensive nature, it's possible to easily find something to agree with and something to question in the paper.

The review points to the three categories of American workers who presently have protection against unfair discipline. An interesting sidelight is that unionized public employees are in two of the three categories. The first public employee collective bargaining agreement I negotiated in Hawaii gave an employee the option of choosing whether to use the contractual grievance procedure or the established civil service appeal procedure.

Professor St. Antoine then estimates the number of employees who are terminated every year without any protection or rights. Several court cases are cited to point to a growing trend of courts to protect employees who have been unfairly disciplined. To me, these cases sound like isolated cases in which a sympathetic judge grasped at straws to help an employee who was obviously unfairly treated.

A lot of the thought in the presentation follows the theme of giving unorganized workers the protections and benefits unions have built up for their members over the years.

Consciously or unconsciously, every union negotiator goes through many of the same processes employed by Professor St. Antoine. Even if the negotiator is using a model contract from union headquarters, there are certain key points to watch. For example, a good contract section should cover not only discharge, because there are other forms of serious discipline. Be sure to write in "all" discipline or itemize: "discharge, suspension, demotion, etc." Also, a discipline section is meaningless unless there is strong language about layoffs, so that a layoff

can't be used as a hidden way to get rid of an unwanted employee. Then there's the problem of coverage. Over the union's objections, probationary employees are usually excluded, so try to make the probationary period as short as possible.

A well-rounded approach is going to require going over all these grounds that have been travelled earlier by the unions. If the goal is to bring a measure of justice to employees previously unprotected, I find it hard to justify excluding employees of small businesses and middle management. They are probably the ones who need the protection more than other groups.

I agree with Professor St. Antoine that this is not a matter for the courts to handle. Placing these new functions in existing government agencies will also create problems. Look at the tremendous backlog of EEOC cases. Agencies like the Legal Aid Society and the Public Defender often find themselves plagued with huge caseloads, tiny budgets, and inexperienced staffs.

I really question the assumption that this is an idea whose time has come. Legislation to prohibit discrimination because of race, sex, religion, and age came slowly and only after major pushes by interested constituencies. It is still not adequately enforced and will probably face a weakening in the present political climate. If some of the laws are not repealed, they will be weakened by budget cuts and indifferent enforcement.

If you took a public opinion poll today and asked people whether they felt "unjust dismissals" should be controlled, you would probably get a very high percentage of yeses. If you asked the same people: "Do you think that an American businessman should have the right to manage his business efficiently and remove people he feels are interfering with the efficiency of his business?" you would probably also get a large "Yes."

Because of this contradictory thinking, I question whether this is really an idea whose time has come.

Probable Union Position

Would American unions support legislation similar to the British law, if it were introduced in Congress?

It would be hard not to support such a measure. Unions would support such a proposal for the same reasons that they support minimum wage legislation, national health insurance, OSHA, and antidiscrimination legislation. Most antidiscrimination crusades have originated elsewhere and then received the support

of the labor movement. Sometimes this is with mixed feelings, as when the affirmative action movement conflicts with traditional union positions on seniority.

The American labor movement does have a social conscience. It still sees itself as the spokesman for all working people, organized and unorganized.

While American unions would probably support such a proposal, I do not see such a plan succeeding in the immediate future. I don't see any great enthusiasm among unions for such a change since the membership is pretty well protected by the present contract language and procedures. And, in all honesty, I cannot see the Reagan Administration and a conservative Congress supporting a proposal for another government agency and greater restrictions on American business.