

Labor Response

RICHARD M. BANK*

Professor Kaufman predicts that the labor movement will continue to decline and argues that arbitrators can nevertheless find honorable work under the aegis of employer-dominated systems of dispute resolution. I disagree with him on both counts.

First, there is no question that the labor movement is in trouble, but it is at a crossroads, not on its deathbed. The labor movement is in the midst of a serious struggle to reorient its priorities and seize the initiative in shaping its destiny within the context of a fiercely competitive global economy and laws that are scandalously biased toward the interests of anti-union employers. It is much too soon to predict the outcome.

Second, there can be no honorable work for arbitrators under employer-dominated dispute resolution systems. Employer-dominated dispute resolution systems cannot be fair. The arguments that increasingly enlightened employer attitudes, full employment, and government mandates will make them fair “just don’t wash.” There are not enough good employers to sustain industrial justice nationwide. Furthermore, even good employers go bad when pressed by the kind of cutthroat competition our current economic mores promote. Full employment is ephemeral, and in any case, it is an uncertain influence upon employer conduct. Government mandates do not guarantee that nonunion employees will enforce them, and there is good evidence that nonunion employees will not. There simply is no acceptable alternative to dispute resolution under the collective bargaining process.

A crucial point here is that whether the labor movement and collective bargaining flourish or die implicates far more than dispute resolution. The nation’s economic and social welfare may well depend on whether unions and collective bargaining survive and thrive. Therefore, we should be extremely careful before we write them off.

*Director, Center for Collective Bargaining, Corporate Affairs Department, AFL-CIO, Washington, D.C.

The Labor Movement Is at a Crossroads, Reorienting Itself to Focus on Organizing More and Bargaining Better

In my view, Professor Kaufman unduly discounts trends militating toward a resurgence of the labor movement and overstates the power of the trends militating against resurgence. Let me turn first to the substantial initiatives that the labor movement is undertaking to revitalize itself.

The labor movement understands that to survive and thrive, it must make organizing its central mission and that it must focus its resources and energies on organizing more, faster, and smarter. It also understands that to change focus is a long-term process.

The AFL-CIO has urged all affiliates to devote a minimum of 30 percent of their budgets to organizing, and a trend in that direction has begun to snowball with major unions in both the public and private sectors taking the lead. For example, in 1998, State, County, and Municipal Employees¹ committed \$35 million to organizing and the Steelworkers² committed \$40 million. Last year, the Service Employees³ devoted 47 percent of its resources to organizing and won 60,000 new members through government-run elections and card-check procedures.

To reduce unnecessary competition, the AFL-CIO has also urged cooperation among major unions organizing in the same industry or occupation. It has stressed that, in the short term, affiliates should focus organizing efforts in major industries where they already enjoy high union density. It has advised affiliates to use their bargaining, political, and financial power to support organizing efforts.

Because more unions are reorienting toward organizing, they are undertaking more organizing drives and winning more of them. Thus, in the first half of 1998, compared with the first half of 1997, the number of government-supervised elections rose by 8.9 percent, and workers trying to form unions won 51.7 percent of elections, up from 49.2 percent in 1997.

What is more, the size and scope of union organizing drives are increasing. As Professor Kaufman notes in his paper, the Machinists⁴ completed a successful drive to organize 19,000 United Air-

¹American Federation of State, County and Municipal Employees (AFSCME).

²United Steelworkers of America (USWA).

³Service Employees International Union (SEIU).

⁴International Association of Machinists and Aerospace Workers (IAM).

lines passenger service workers last July. At the time, this was the largest single organizing win in more than 20 years. The Service Employees dwarfed the Machinist's triumph in February of this year when it won the right to represent 74,000 California home health care workers in a single election—the largest union election since Ford Motor Co. auto workers formed a union in 1941.

Under the leadership of the AFL-CIO, more and more unions are combining their strength in coordinated mass-organizing campaigns. For example, a coalition of five unions recently kicked off a drive to organize 175,000 employees of the Commonwealth of Puerto Rico. This is the largest organizing campaign by working men and women in the labor movement's history. The first elections arising out of this drive involve more than 66,000 employees and are now in progress. Our exit polls make us quite optimistic about the prospects for victory.

Unions also have had significant breakthroughs persuading employers to embrace neutrality in organizing drives. In some cases, employers have also agreed to alternatives to statutory mechanisms for determining representation, such as card check or community elections.

Notable in this regard were the successful efforts of the Hotel Employees and Restaurant Employees⁵ to win recognition to represent 4,500 employees at the Bellagio Hotel in Las Vegas last October under a card-check agreement, the successful effort of the Service Employees to organize 2,500 hospital workers at Columbia HCA's Sunrise Hospital under an agreement establishing neutrality and Federal Mediation and Conciliation Service-supervised election, and the success of the Communications Workers⁶ in securing a neutrality agreement from AT&T covering cellular phone workers. At this writing, the Auto Workers⁷ are in the midst of negotiations for a neutrality and card-check agreement covering Daimler-Benz's U.S. nonunion Mercedes and Freightliner operations.

While the labor movement's reorientation toward organizing is still embryonic, it appears to be paying off in small, but significant ways. Last year, net union membership grew by more than 100,000. This was the first time since 1994, and only the fifth time in two decades, that net membership increased. Although there was a

⁵Hotel Employees and Restaurant Employees International Union (HERE).

⁶Communications Workers of America (CWA).

⁷United Automobile, Aerospace and Agricultural Implement Workers of America (UAW).

small decline in the share of the work force represented by unions, this decline was smaller than the year before, and one of the smallest declines in decades.

On the bargaining front, the labor movement understands that in today's global economy, where many employers can relocate productive resources with ease, the strike is not always the most effective weapon. That is why unions are turning to strategic coordinated campaigns that confront employers not just in the workplace but also in the community, in the press, in board rooms, and on Wall Street. These campaigns may not be the magic bullet that will turn the labor movement around, but they are an important new weapon in labor's arsenal.

There are also signs that the labor movement is learning to pull together to win the big ones. Everyone is familiar with the massive Teamsters⁸ strike against United Parcel Service (UPS) several years ago, in which the entire organized labor movement contributed to what most observers felt was a decisive victory for the union. The AFL-CIO offered loans to the Teamsters, so that striking UPS workers could count on strike benefits. The AFL-CIO, working with the Teamsters, won the battle for public opinion on the issue of fighting for good, full-time jobs. AFL-CIO affiliates all over the country helped striking workers with food, donations, and mass sympathy demonstrations. And the Teamsters did a commendable job of communicating with and mobilizing their UPS membership throughout negotiations, so that when the strike occurred, the members knew what they were fighting for and remained united.

Continuing Wage Stagnation and Escalating Inequality in Wealth Distribution Favor the Resurgence of the Labor Movement

Unions will also benefit from social forces that Professor Kaufman discounts. For example, while Professor Kaufman acknowledges wage stagnation and inequality in the distribution of wealth in this country, he believes that nothing less than an economic catastrophe on the scale of the Depression will galvanize workers and the public to support unions. I disagree.

Wage stagnation and rapidly rising inequality in the distribution of wealth are a national disgrace. Continuance of these trends, with a concomitant deepening of the divide between the rich and the

⁸International Brotherhood of Teamsters (IBT).

rest of us, could very well ignite the kind of disillusionment and anger that fueled the Depression-era rush toward unions. Consider these alarming facts as the Dow Jones Industrial Average shoots toward the stratosphere:

- Since the mid-1970s, the top 1 percent of households have doubled their share of the national wealth.
- The top 1 percent of U.S. households now have more wealth than the bottom 95 percent.
- The top 1 percent of U.S. households control nearly half of all of the financial wealth in this country (net worth minus equity in owner-occupied housing).

And what's happening to workers?

- Workers are earning less, adjusting for inflation, than they did when Richard Nixon was president. Average weekly wages for workers in 1998 were 12 percent below 1973, adjusting for inflation.
- During the same period, productivity grew nearly 33 percent, so it is crystal clear that workers are not getting a fair share of the wealth they create.
- The inflation-adjusted net worth of the median household fell from \$54,600 in 1989 to \$49,900 in 1997.
- Nearly one out of five households has zero or negative net worth.
- Household debt as a percentage of personal income rose from 58 percent in 1973 to an estimated 85 percent in 1997.

Perhaps the most trenchant indicator of greed run amok at the top of the economic pyramid is the pay of American CEOs. Let me give you a few examples.

- Microsoft CEO Bill Gates owns more wealth than the bottom 45 percent of American households combined, more wealth than the entire gross national product of Central America.
- The average CEO of a large public company made \$10.6 million last year. That is a 36 percent hike over 1997—an astounding 442 percent increase over the average CEO paycheck of \$2 million in 1990.
- The 36 percent raise for CEOs last year compares with a 2.7 percent raise for the average blue-collar worker.⁹

⁹Wolff, *Shifting Fortunes: The Perils of the Growing Wealth Gap in America*, in *United for a Fair Economy* (1999).

What is more, this shameless orgy is purely a U.S. phenomenon. Japanese and European CEOs make far less than their U.S. counterparts. For example, the CEO of Daimler-Benz, the senior partner in the recent merger with Chrysler Corporation, makes about \$2 million annually. The CEO of Chrysler makes over \$16 million annually—eight times as much.¹⁰

Professor Kaufman contends that the public today condemns union overreaching—what he calls union “aggrandizement.” Assuming, for the sake of argument, that the public views the labor movement’s efforts to better the lives of workers and their families as “aggrandizement,” what then should the public make of the apparently insatiable greed of management and the interests it serves?

Labor Law Reform Is Possible

Professor Kaufman makes much of our terrible labor law as a retardant to revitalization of the labor movement, and he sees little prospect of labor law reform. I cannot cavil with him on either point. Nevertheless, there is hope.

Public opinion could swing in favor of labor law reform as an appropriate check and balance to corporate greed as the effects of wage stagnation and escalating inequality in the distribution of wealth continue to unravel the social fabric. Stranger things have happened.

Indeed, *The Wall Street Journal* recently reported that Democratic presidential candidate Bill Bradley may be inching toward endorsing card check.¹¹ Can Al Gore be far behind?

Adversarialism Is Inherent in the Employment Relationship and Does Not Retard Union Growth

In my view, Professor Kaufman overestimates the power of other forces working against the labor movement, such as the adversarialism he attributes to collective bargaining. He largely defeats his own argument regarding adversarialism, since he emphasizes throughout his paper that the employment relationship is inherently conflict-ridden, with or without collective bargaining. Most workers know this too. They also know that the issue is not

¹⁰*Chrysler Pay Draws Fire Overseas*, Wall St. J., May 6, 1998.

¹¹*Bradley Seeks to Woo Labor With Views on Unusual Issues*, Wall St. J., May 18, 1999.

whether their relationship with their employer is adversarial, but whether they will have someone on their side.

Any worker reluctance to seek union representation is not primarily a function of aversion to adversarialism. It is instead a function of their hesitancy to take on a system under which they know they can be fired without recourse for trying to exercise their right to a union, and under which the determination of union representation can be delayed interminably.

Regardless of this understandable reluctance, if things that happen in the workplace become really bad, and if workers have the courage, they will try to secure union representation. This holds true not just for blue-collar workers, but also for the emerging white-collar and pink-collar work force. Unions already represent millions of these workers: teachers, college professors, teaching assistants, nurses, and now doctors. Even lawyers want unions. Several weeks ago, Minnesota Public Defenders voted to be represented by the Teamsters, a union not noted for avoiding adversarialism.

Professor Kaufman touts the competitive advantage to non-union enterprises of being able to act with one voice, albeit management's voice. However, nonunion enterprises are just as conflict-ridden as union enterprises. The difference is that in nonunion enterprises, workers have little or no say in how conflicts are resolved.

It is important to note that when employers embrace unions, they can also enhance the ability to compete by forging high-road partnerships that add significant value to an enterprise. A good example is the very successful partnership between Harley-Davidson and its unions—the Machinists and Paper, Allied-Industrial, Chemical Employees.¹²

Corporate Disregard for Workers as Corporate Stakeholders Favors the Resurgence of the Labor Movement

Professor Kaufman cites evolutionary improvements in the nature of work, better management of nonunion workplaces, and greater nonunion worker satisfaction as factors militating against unions. I think these trends are largely phantoms, because in the current cutthroat drive for profits, the interests of workers as corporate stakeholders have been largely forgotten. More

¹²Paper, Allied Industrial, Chemical Employees International Union (PACE).

and more, management's only loyalty is to shareholder return and the bottom line. To improve the bottom line, more and more employers:

- downsize or relocate to lower-cost venues, even when they are making reasonable profits;
- destroy stable, full-time jobs by converting them to part-time and temporary jobs, or to independent contractor status, with lower pay and fewer benefits;
- deny workers a fair share of the profits produced by increased productivity; then they compound the injury by shifting back to employees and their families the costs of previously hard-won medical benefits, and by lowering the value of employee pensions;
- destroy any semblance of family life for their employees by instituting split shifts, rotating shifts, split workweeks, and mandatory overtime.

These are major—even predominant—management trends today. None constitutes an improvement or better treatment of workers, and none makes nonunion employees more satisfied with their status.

Moreover, when pushed by the menace of competition, even good employers will race to the bottom. Here, the recent history of Levi Strauss and Company is instructive. Levi Strauss has long been recognized as one of the most union-friendly U.S. employers. In the past few years, Levi Strauss has seen its market share decline, largely because of bad marketing decisions. As the company's chairman and chief executive Robert Haas said: "We took our eye off the consumer, and we weren't as nimble as we should have been."¹³ And what was the company's response to problems caused in large part by bad management? To lay off most of its North American production workers and to shift production overseas to low-wage countries. Regardless of Levi Strauss' good intentions toward its workers, they paid the price for management's mistakes. The only good news in this story is that for employees at the doomed plants, Needletrades¹⁴ had negotiated a \$245 million severance package that includes cash payments, extended health benefits, and \$6,000 per employee for job retraining, college tuition, and moving expenses. Could anyone seriously argue that employer goodwill alone would ever have produced this package?

¹³*Levi Is Closing 11 Factories: 5,900 Jobs Cut*, N.Y. Times, Feb. 23, 1999.

¹⁴Union of Needletrades, Industrial and Textile Employees (UNITE).

Full Employment, Globalization, etc., Do Not Foreclose Labor Movement Resurgence

Professor Kaufman argues that full employment requires employers to treat employees well. There are two short answers to this argument. First, even if he is right, who knows how long full employment will last? Second, there is no proof that he is right. The current round of full employment has established no sustained trend of substantial wage increases.

Professor Kaufman posits the inability of unions to raise wages and win other improvements in the conditions of work as contributing to the decline of the labor movement. This argument is just plain wrong. Despite management's full-bore assault upon employee living standards and working conditions, union employees still fare far better than their nonunion counterparts. Compensation for both union and nonunion workers has stagnated, but the current differential between union and nonunion compensation is about 40 percent.¹⁵ And there is no real doubt that working conditions in union workplaces are substantially superior to those in comparable nonunion organizations.

Professor Kaufman argues that deregulation, globalization, and the readiness of employers to use striker replacements have made workers fearful of losing jobs and hesitant to strike. He is right that these forces have made workers fearful, but they have also made workers angry. The record is far from closed on whether worker fear or anger will prevail in the end.

There certainly has been no paucity of major strikes recently. Almost every leading union has had one or more. Over the past 6 years, the Teamsters union has struck every one of its national employers. Last year, Auto Workers locals in Flint, Michigan struck General Motors (GM) and shut down most of GM's North American assembly plants. Today, the Steelworkers union is engaged in no less than six major strikes against employers in the aluminum, rubber, and shipbuilding industries. Air Line Pilots¹⁶ recently struck Northwest Airlines to get a fair contract. And, in their recent alleged sickout, pilots at American Airlines unhesitatingly took on management over its acquisition of Reno Air.

¹⁵Freeman, *American Exceptionalism in the Labor Market*, in *Labor Economics and Industrial Relations* (Harvard Univ. Press 1977).

¹⁶Air Line Pilots Association International (ALPA).

Government Action Has Not Made the Need for Unions Less Urgent

Professor Kaufman's final argument for labor movement decline is that government has made the need for unions less urgent by protecting workers regarding discrimination and occupational safety and health, and by establishing floors, for example, for pay, pension vesting, and family leave. Government action in these areas has not made unions less relevant, because government action is either peripheral to the blood and guts of collective bargaining or sets only minimum standards for core collective bargaining subjects. Minimum standards are no substitute for full-blow, day-in, day-out union representation that can—and almost always does—result in much higher standards. Employers understand this. Workers understand this. Arbitrators understand this.

There Is No Honorable Work for Arbitrators Under Employer-Dominated Dispute Resolution Systems

Having argued that the labor movement and collective bargaining are moribund, Professor Kaufman turns to the future of industrial dispute resolution. He contends that arbitrators should feel comfortable endorsing unilaterally imposed dispute resolution systems. He does so because he believes that employer goodwill, engendered by evolving enlightenment or the pressure of full employment, or both, will guarantee fundamental fairness when buttressed by government standards.

This is wishful thinking. I have already addressed the deficiencies of employer goodwill and full employment as guarantors of fairness. It is equally clear that government standards would not guarantee fairness, because it is unlikely that unrepresented workers would enforce them. In a recent study, David Weil compared Occupational Safety and Health Administration inspection records for the 2 years preceding and following the implementation of mandated workplace safety committees in the state of Oregon. He found that workplace safety enforcement strengthened considerably in union workplaces but edged up only slightly in nonunion workplaces. His conclusion: the committees were a supplement to, rather than a substitute for, labor unions.¹⁷

¹⁷Weil, *Are Mandated Health and Safety Committees Substitutes for or Supplements to Labor Unions?*, 52(3), *Indus. & Lab. Rel. Rev.* 339 (Apr. 1999).

Even assuming, for the sake of argument, that government standards could effectively guarantee the fairness of employer-imposed systems of dispute resolution, if we accept another of Professor Kaufman's arguments at face value, such guarantees will never become reality. Therefore, we are wasting our time even talking about them.

Professor Kaufman says we will not see labor law reform that makes it easier for unions to organize because employers are powerful enough to thwart this intrusion upon their interests. Yet, the reforms Professor Kaufman advocates would have the government guarantee in every workplace the right of every nonunion employee to challenge actions that employers can now take with impunity. Why should we think employers would be any more hospitable to this level of intrusion than to labor law reform, under which their actions would be subject to challenge only if their employees chose a union, and only if that union obtained a contract with an enforceable grievance procedure?

Conclusion

The AFL-CIO recently conducted a major poll and series of focus groups in which nearly 50 percent of nonunion workers eligible for representation said they would vote for a union tomorrow. Benevolent employers and government standards do not keep these workers from joining unions. What keeps workers from joining unions is the entirely unfair and repressive process we have for determining union representation, a process that enshrines endless delay in determining representation, a process that results in 10,000 workers being fired annually for their organizing efforts.

For fair and effective representation of workers, there is no substitute for unions and collective bargaining, and you and your leadership know it. As your past president George Nicolau said in his impassioned defense of collective bargaining at your 50th annual meeting: "A strong collective bargaining system is essential to any industrial democracy."¹⁸

And note well that George Nicolau was especially suspicious of unilaterally imposed arbitration systems. He said: "[Arbitration] is under attack because of the unfairness of many employer-promulgated arbitration systems that disregard basic elements of fairness

¹⁸Nicolau, *Presidential Address: The Challenge and the Prize*, in *Arbitration 1997: The Next Fifty Years*, Proceedings of the 50th Annual Meeting, National Academy of Arbitrators, ed. Najita (BNA Books 1998), 1, 6.

and due process and, being bad arbitration, give all arbitration a bad name.”¹⁹

It is much too soon to write off the labor movement and collective bargaining, especially when the alternatives are unfair or pie-in-the-sky, and most likely, both. The U.S. labor movement, although clearly imperiled, is still the world’s biggest and richest. It is battling to revitalize itself and to preserve and expand the collective bargaining process of which we all are justifiably proud with every resource at its command.

We need your help. So, let me close with George Nicolau’s injunction to you:

Speaking up for collective bargaining and speaking against those who would deny or curtail that fundamental right, as many of us have done and will continue to do, is not about jobs for arbitrators. . . . Nor is it about who wins or loses a particular case. What it is about is the preservation and strengthening of a system of governance that is an imperative in a democratic society. There is no acceptable substitute for free labor unions or for fair labor laws. As responsible individuals, we must do what we can to ensure that the basic right to organize and to be represented by representatives of your own choosing is not curtailed or hindered, but fostered.²⁰

No one could say it better.

Management Response

R. THEODORE CLARK, JR.*

Professor Kaufman’s paper is comprehensive in its scope and raises any number of interesting issues for discussion and debate. My focus this morning, however, is going to be considerably narrower in that I am going to limit my comments to four areas: First, the sharply contrasting fortunes of organized labor in the public and private sectors of the economy; second, the future of dispute resolution generally and the Academy’s role in employment dispute resolution in particular; third, a critique of Professor Kaufman’s recommendation that federal legislation be enacted establishing minimum standards for arbitration of nonunion employment disputes; and fourth, a few concluding observations.

¹⁹*Id.* at 4–5.

²⁰*Id.* at 7.

*Attorney, Seyfarth, Shaw, Fairweather & Geraldson, Chicago, Illinois.