Chapter 1

# PRESIDENTIAL ADDRESS: WORKPLACE JUSTICE: THE INCREMENTAL CRISIS AND ITS CURES

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## Introduction

There seem to be two broad styles to Academy presidential addresses. One style is entertaining and personal, usually involving happy reminiscence and culminating with optimism. That style is perfect for an annual after-meal talk because it leaves everyone satisfied and a little happier than they were before they entered the banquet hall. The other style is more serious. The speaker identifies a current problem or issue and seeks to resolve it. Those talks are more demanding than entertaining, and they usually are less optimistic.

Both styles are useful, so it is appropriate that we frequently switch between them. Last year's presidential address by Margery Gootnick in Washington was the absolute peak of the first style. So good was it, in fact, that one member told me afterwards that I would need elephants and fireworks to top it. Because the Westin St. Francis would not allow either elephants or fireworks, I can't even try to match Margery. By default, then, I revert to the second style. The formal style is, in any event, more suited to my temperament and long training as an academic. I therefore caution you in advance that I will address a serious issue that might strain your attention in this pleasant after-lunch period.

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*President, 2006–2007, National Academy of Arbitrators, and Webster Professor of Labor Law, University of South Carolina, Columbia, South Carolina. I dedicate this paper to the memory of Tim Heinsz (1948–2004), a brilliant and honorable man, an unsurpassed colleague, and a dear friend. His untimely death deprived the Academy of a great leader and model. If life were fair, Tim, not I, would be delivering the 2007 Presidential Address.

I thank Ted St. Antoine and Rick Bales for their very helpful comments on an earlier draft, Scott Forster of the University of South Carolina School of Law's class of 2009 for his diligent research assistance, and Steve Befort for his careful editing.

My topic today concerns what I term the incremental crisis in workplace justice. Preliminarily, then, I need to explain what I mean by "workplace justice." By that phrase, I refer to fairness in the ways that employers treat employees. In contractual disputes, that means following the terms of applicable bargains. In disciplinary disputes, it also includes such basic ideas as imposing discipline for only actual offenses, providing employees an opportunity to present their arguments and evidence, and proportionality between offense and punishment—principles captured in such familiar phrases as "just cause" and "due process."[1]

It is a simple idea, really: Employers should, for reasons both of morality and self-interest, treat their employees fairly. The moral imperative is as simple as the Golden Rule: Treat employees as you would like to be treated yourself. The self-interest imperative is a little more complicated. Employers want employees to be diligent, committed, and imaginative—to exhibit what Professor Katherine Stone terms "organizational citizenship behavior."[2] In the days when industrial employment was the model—when employees could expect to spend a full career with one employer and receive annual raises, steady promotions, and guaranteed pensions—employees had obvious incentives to work hard and well. Those expectations are now, in most private-sector settings, unrealistic. Deprived of those expectations, employees will make the extra effort desired by their employers only if they believe that their employers will at least treat them fairly during their employment. An employer's mistreatment of employees will ultimately produce a downward spiral in the employment relationship. (More mundanely, fair treatment enforced by a good dispute resolution system is a very low-cost alternative to litigation.)

Public law mandates some elements of workplace justice, for example by requiring occupational safety and prohibiting various types of discrimination. For most workers, however, the greatest need for workplace justice is in their day-to-day relationships with their supervisors, particularly in disciplinary matters. For those disputes, there is usually no viable remedy at law. That is where arbitrators come in. They determine, among other things, whether allegations of misconduct are accurate, whether super-

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[1]Roger Abrams and I explored this subject at length many years ago in *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 34 Duke L.J. 594 (1985).

[2]2007 Daily Lab. Rep. (BNA) (Apr. 30), No. 82:A-11.

visors have followed fair procedures, and whether the employer treats employees consistently.

I speak today of the "incremental crisis" in workplace justice. I say *crisis* because for the first time since the founding of the Academy, the success of a critical component of workplace justice, labor arbitration, is now in serious doubt. I describe the crisis as *incremental* because the withering of labor arbitration has been occurring so gradually that many of us have barely noticed it, like the proverbial frogs in a pot of water being brought to a boil.

Few in this audience would doubt the importance of workplace justice. Rather than argue that point, let me now turn to the nature of the crisis we face. My topic today has four parts. I will first describe the crisis we face, then discuss in turn the causes for that crisis and the prospects for the future. I conclude by suggesting some possible responses to that crisis.

## The Erosion of the Union Movement and Its Dispute Resolution System

For nearly 70 years labor arbitration has been the primary method of providing workplace justice to unionized employees.[3] By creating dispute-resolution systems with arbitration as the last step, labor and management have ensured that a skilled neutral outsider will determine the merits of a grievance. In our small way, arbitrators not only have helped businesses and their workers to resolve disputes without resorting to economic pressure, we also have contributed to the higher goal of justice.

That noble ideal is, I suggest, in danger of marginalization and even irrelevancy. Labor arbitration's success obviously depends on the success of unions in representing America's workers. Our professional fates as labor arbitrators rise and fall with theirs. I will not shock anyone in this audience if I point out that our intertwined fates have fallen steadily for the last several decades. Here are a few statistics that should illustrate the enormity of the problem we face.

- As Professor David Lewin reminded us yesterday, union density in the U.S. peaked in the mid-1950s at about 35 percent

[3]Nolan & Abrams, *American Labor Arbitration: The Early Years*, 35 U. Fla. L. Rev. 373, 419 (1983).

of the workforce.[4] By the time I entered teaching in 1974, it was about 24 percent. Today it is down to just 12 percent, barely one-third of what it was a half-century ago. The growth of public sector unionism since the 1960s masked an even more shocking decline in the private sector. Private sector union density is off by an astounding four-fifths and now stands at just 7.4 percent.[5] To put it differently, 50 years ago unions represented more than one-third of the workforce. Today they represent less than one-eighth overall, and only 1 in 13 private sector workers.

- The absolute number of union members has also dropped significantly. The membership peak was about 21 million in 1979. By 1985, the number had fallen by about one-fifth to 17 million. During the next two decades the shrinkage continued, albeit at a much slower pace. Although the overall workforce grew explosively in the last 30 years, union membership floated gently but steadily downward. By 2006, there were 15.4 million union members, off by more than one-quarter from the peak. Once again, though, the growth in public sector unionism masked the severity of private sector developments. Private sector union membership has nearly been halved since 1973, from 15 million to 8 million.[6] These quantitative data do not capture the qualitative harm, namely the loss of political and economic power and the weakening of public esteem for unions.
- Naturally these developments have affected labor arbitration. There is no comprehensive listing of all arbitrations, of course, but the combined American Arbitration Association (AAA) and Federal Mediation and Conciliation Service (FMCS) case filings offer a reasonable proxy. Using that proxy, labor arbitration's peak occurred in 1986 at 50,000 cases. By 2006 the total fell by 39 percent to just over 30,000.[7] The trend line is

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[4]Lewin, *Workplace ADR: What's New and What Matters,* in Arbitration 2007, Workplace Justice in a Changing Environment, Proceedings of the 60th Annual Meeting, National Academy of Arbitrators, eds. Befort & Halter (BNA Books 2008).

[5]For the 1954 and 1974 figures, see Nolan & Abrams, *Trends in Private Sector Grievance Arbitration,* in Labor Arbitration Under Fire, eds. Stern & Najita, (ILR Press 1997). For the 2006 figures, see *Union Membership Rates Dropped in 2006 to 12 Percent; Manufacturing Leads the Way,* 2007 Daily Lab. Rep. (BNA) (Jan. 26), No. 17:D-1.

[6]These figures come from unionstats.com, a Web site maintained by two academics who specialize in union membership data, Barry Hirsch of Trinity University and David Macpherson of Florida State University.

[7]For 1986, see Nolan & Abrams, *supra* note 5, at 69; the 2006 numbers come from reports of the American Arbitration Association and the Federal Mediation and Conciliation Service distributed at the 2007 Annual Meeting of the National Academy of Arbitrators.

closer to that of union membership than to union density. That makes sense: The number of labor arbitration cases is largely a function of the number of union members. As unions shrink, so must labor arbitration.[8]

## Suggested Explanations

In short, unions have fallen on hard times, and with them traditional labor arbitration. The first question one has to ask is "Why?"

Union decline has spawned a cottage industry of explanations. The number of diagnostic books and articles is phenomenal. The standard explanations cover a wide range: hostile employers, unfriendly elected and appointed officials, statutory changes in 1947 and 1959, deregulation of major industries, increased domestic competition, globalization, structural shifts in the economy from manufacturing to services, the rusting of the Rustbelt and the rise of the Sunbelt. Some social scientists have pointed to the breakdown of ethnic communities, the growth of the suburbs, and increased education levels. A few brave souls have even suggested that unions themselves bear some of the blame, either because they don't devote enough resources to organizing, because they have become self-perpetuating bureaucracies rather than grass-

[8]Some optimists, notably including former NAA President Jim Harkless, have speculated that the decline in AAA and FMCS cases represents a shift from those agencies to private panels rather than an actual reduction in labor arbitration. I've been looking for all those invisible arbitrations but haven't been able to find them.

The most obvious sources, big users of private panels like the Postal Service, UPS, and the mining and steel industries, don't pan out. All of those, like a lot of their smaller peers, have developed alternative practices to save money and time by reducing their reliance on labor arbitrations. At this meeting, for example, Kevin Rachel, the Postal Service's Manager of Collective Bargaining and Arbitration, reported that the number of arbitration cases dropped from 7,000 in 2001 to just 3,021 in 2006. Rachel, *Necessity is the Mother of Invention: Reducing the Costs of Disputing––Successes and Failures*, in Arbitration 2007, Workplace Justice in a Changing Environment, Proceedings of the 60th Annual Meeting, National Academy of Arbitrators, eds. Befort & Halter (BNA Books 2008), at _. Anecdotal evidence from many experienced arbitrators confirms the decline in cases.

Moreover, the suggestion that the number of arbitration cases has remained steady while the number of union members has declined would mean that the remaining union members arbitrate far more often than ever before, even as their resources shrink. I know of no evidence to support that hypothesis. An apparent increase in the rate of settled or withdrawn cases aggravates the problems facing labor arbitrators. Some NAA members have told me that nearly half of their cases settle before hearing.

In light of these developments, anyone denying the substantial decline in labor arbitration has an obligation to come forward with evidence.

roots organizations, or because they haven't developed a message that appeals to modern workers.[9]

No doubt there is some truth to all of those explanations. Individually and collectively, however, they leave me unsatisfied. Those explanations seem unrelated and incomplete, and they also create a risk of focusing on discrete remedies. Blaming unions' problems on our labor law is not only ahistorical—unions continued to grow in density for a decade after the Taft-Hartley Act of 1947 and in numbers for two more decades—it also suggests that changing the law will make a major difference. There is precious little evidence to support that suggestion. Blaming Republican-appointed judges and National Labor Relations Board (NLRB) members is also historical as the last half-century's decline continued unabated through Democratic as well as Republican administrations. And so on.

Consider the list of explanations again, however, and you'll note some utterly intractable forces at play. A Democratic president couldn't and wouldn't stop international trade. A Democratic Congress isn't going to recreate cartels in the trucking, telecommunications, and power generation industries. Toyota is not going to drive its employees into the arms of the United Auto Workers (UAW), and if it doesn't, Detroit's (formerly) Big Three are not going to regain their old market shares. Wal-Mart's employees aren't likely to join the United Food and Commercial Workers (UFCW) or Service Employees International Union (SEIU) *en masse* any time soon, and that in turn means that unionized retailers and grocery stores will continue to face serious competitive pressures. Moreover, with the notable exception of Canada, unions have declined significantly in almost all major industrialized nations, most of which have nothing like our labor law or our determined employer opposition to unions. That gives the lie to purely national political or legal explanations.

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[9]Among the many works exploring these themes are Craver, Can Unions Survive? The Rejuvenation of the American Labor Movement (NYU Press 1993); Fitch, Solidarity for Sale: How Corruption Destroyed the Labor Movement and Undermined America's Promise (Public Affairs 2006); Nelson, Shifting Fortunes: The Rise and Decline of American Labor from the 1820s to the Present (Ivan R. Dee 1997); Green, Epitaph for American Labor: How Union Leaders Lost Touch with America (AEI Press 1996); Kochan, The Transformation of American Industrial Relations, 2d ed. (ILR Press 1994); Troy, The Twilight of the Old Unionism (M. E. Sharpe 2004); Wheeler, The Future of the American Labor Movement (Cambridge U. Press 2002); Estlund, *The Ossification of American Labor Law*, 102 Colum. L. Rev. 1527 (2002); Cleaner, *Intensity of Management Resistance: Understanding the Decline of Unionization in the Private Sector*, 22 J. Lab. Res. 519 (2001); and Brudney et al., *Judicial Hostility Towards Labor Unions? Applying the Social Science Background Model to a Celebrated Concern*, 60 Ohio St. L.J. 1675 (1999).

Clearly some much bigger force is at work. Let me next describe what I think that force is.

## An Alternative Explanation

What then might tie together these explanations, and perhaps give us better insight into future prospects? I'd like to offer one unifying theory. Unfortunately that theory paints an even bleaker picture than the one that we are accustomed to seeing.[10] I fear that we have been looking at the situation in the wrong way, just as looking at one of those dual-image, black-and-white silhouettes can reveal either a Grecian vase or two human heads. We have wrongly focused on the recent union decline as if it were unique, a departure from some "normal" pattern to which we will soon return. The reverse is more likely true: The few decades of uninterrupted union growth after the mid-1930s are the real anomaly in American history, not the more recent years of union decline.

Here is the reason for the labor movement's short-lived triumph. Unions are most successful when they can negotiate at the national level with other powerful institutions in society, government, and business. (That was the origin of the once-common phrase one seldom hears any more, "Big Government, Big Business, and Big Labor.") Industrial relations scholars refer to national-level bargaining by those interest groups as *corporatism.* When those institutions cooperate, they can divvy up the national wealth. Each corporatist partner, of course, tries to maximize its share of the pie, as every Economics 101 textbook would quickly note. In a free economy, however, labor monopolies and oligopolies, like those of business, quickly break down under competitive pressure absent enormous support from government. To put it concretely, and to echo Professor Lewin once again, unions can win above-market wages and benefits only so long as employers are willing to pay those rates, and employers can do that only so

[10]In the interest of full disclosure, I confess that my comments on this point were inspired by Professor Michael Wachter's recent article, *Labor Unions: A Corporatist Institution in a Competitive World*, 155 U. Pa. L. Rev. 581 (2007). Other scholars who looked at the same history from a much different perspective independently and unknowingly supported Wachter's thesis. One of those is the distinguished (and very pro-union) labor historian Nelson Lichtenstein. He has touched on these themes in several books but recently summarized them in *Labor and the New Congress: A Strategy for Winning,* in 54 Dissent No. 3, 64 (Spring 2007).

long as the government protects them from serious nonunion competition.[11]

The United States was never as committed to corporatism as was Western Europe. Still, corporatism enjoyed widespread support here from the 1930s until the 1970s, particularly among intellectuals and policy makers. Not coincidentally, those decades encompass the longest sustained period of union power in our nation's history. The high points of American corporatism came early. In 1933, President Roosevelt convinced Congress to pass the National Industrial Recovery Act (NIRA). In essence, the NIRA suspended the anti-trust laws so that businesses could form price-fixing cartels and make a lot more money than they otherwise would.[12] Unions supported the law because businesses in turn agreed to accept Section 7(a), which for the first time gave unions federal protection in organizing employees.

The NIRA lasted only two years before the Supreme Court found it unconstitutional in the famous *Schechter Poultry* case.[13] The urge to some form of corporatism continued, however. The Wagner Act of 1935 contained elements of that theory. During World War II, the Roosevelt Administration initiated another corporatist bargain. Unions gave up the right to strike for the duration of the war, thus making it possible for businesses to make a profit despite government price controls; in return for the unions' concession, the government facilitated unionization and compulsory union membership.[14] As late as the 1960s, President John Kennedy brought the heads of the major steel companies and the leaders of the Steelworkers union together at the White House to craft an industrywide corporatist bargain and thereby prevent a crippling strike.

The classic example of American corporatism, however, is the mid–20th century automobile industry. For many years after the end of World War II, the Big Three American automobile manufacturers constituted a powerful oligopoly with little domestic and no international competition. That allowed them to obtain what the economists call "monopoly rents"—above-market returns on investment made possible by the lack of competition. To maintain

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[11] *See* Lewin, *supra* note 4.

[12] The theory was that cartels could prevent price declines and "ruinous competition" and thereby end the Depression. With the advantage of hindsight, that theory appears silly, but at the time it seemed plausible.

[13] *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

[14] On these early corporatist bargains, see Lichtenstein, *supra* note 10.

labor peace and keep those monopoly rents coming, the industry shared its excess profits with the UAW. When the UAW demanded guaranteed annual wage increases, generous pensions, first-dollar health insurance, and unprecedented job security, it was easier for the manufacturers to grant the demands and pass the extra costs on to consumers who had no alternatives than to refuse and risk derailing the gravy train.

You can follow that story through industry after industry in which unions were particularly strong at the time: trucking, airlines, and railroads, when government agencies limited new entrants to those fields; telecommunications, which meant the old AT&T monopoly; power generation; and so on. In each case, unions briefly came close to achieving their time-honored goal of "taking wages out of competition."

## How Did the American Corporatist Moment End?

To understand why American corporatism failed, we must first remember that, unlike most other Western countries, the United States never had a complete "social partnership." Ours was but an imperfect imitation of the European model and thus was far less stable than the original. It helps to picture corporatism as a three-legged stool.

### *Labor's Leg*

The first leg of the stool, that was provided by labor, was never very solid. It always wobbled. One problem was that unions themselves couldn't play the corporatist game very well. The key to corporatism is the existence of powerful peak organizations that can negotiate large-scale bargains and force their terms on subordinate groups. We simply did not have a "peak organization" of labor that could effectively command the entire labor movement. Some unions, particularly strong industrial unions like the Auto Workers and Steelworkers, did negotiate some industrywide contracts, "pattern" bargains, or "me-too" agreements. The best that unions could do in other situations was to exercise some influence. Most other unions, notably the old-line craft organizations, had little influence over their locals. The confederations, the AF of L and the CIO, had virtually none. Their inability to make enforceable national bargains meant that employers had little incentive to negotiate seriously at that level.

One result was that subordinate groups played economic leapfrog during their periods of strength and drove up the union-nonunion wage differential—that is, the extra amount that unionized employees received over their nonunion counterparts. This leap-frogging gave employers tremendous incentives to avoid or escape unionization. Each time the wage differential increased, unionized employers found themselves at a bigger labor cost disadvantage. Thus they built their new factories in South Carolina and Texas, and more recently in Mexico and China, rather than in Massachusetts or Michigan.

In this sense, the union movement has been the victim of its own success. By dramatically raising the cost of union labor, it forced employers to react. Unfortunately for unions, management's reactions have had devastating consequences on union employment. That unions spent decades centralizing their structures and emphasizing political activity over grass-roots organizing—i.e., spending rather than increasing their power—only multiplied their long-term difficulties.

*Government's Leg*

Government provided and then removed the second leg of the corporatist stool. That leg was stable only until the federal government realized that fostering cartels and restricting competition raises prices, lowers efficiency, and stifles innovation. Accordingly, by the late 1970s the government again attacked monopolies and oligopolies—partially by old-fashioned anti-trust actions against giants like IBM and AT&T, but primarily by permitting competition. The most obvious steps in that development began under Jimmy Carter, not Ronald Reagan, including airline and trucking deregulation. Deregulating trucking, for example, allowed anyone who could to buy a rig and carry goods anywhere for any price. The result was a flood of nonunion carriers that prevented most unionized carriers from paying above-market wages to their drivers. Some unionized carriers went out of business; the rest negotiated give-backs or limited future labor cost increases. AT&T's decision to settle the government's antitrust suit by splitting off the regional Bells turned a virtual monopoly into a loose oligopoly; the introduction of computers and cell phones shattered that oligopoly and created a competitive (and partially nonunion) communications industry.

Freeing international trade by reducing tariffs and other barriers to imports had similar effects. Every president since World War II encouraged this process. As important as President Clinton's support of the North American Free Trade Agreement (NAFTA) was, it was just one scene in the middle of a long play. International trade naturally meant international competition, and that exposed American employers to even more cost pressures. Once consumers got over their suspicions of foreign products, Detroit, for example, could no longer continue business as usual. (In one delicious bit of irony, the UAW's successful effort to force foreign car manufacturers to open plants in the U.S. backfired almost beyond belief: Toyota toppled the former Big Three mainly with *domestic* products, not with imports.) The inevitable result was to force American automobile manufacturers to reduce their unionized work forces, trim benefits, and limit future wages.

*Business's Leg*

Employers had reluctantly provided the third leg only because doing so was temporarily preferable to suffering strikes. Corporatist bargains were feasible only so as long as there were no serious competitors with lower labor costs. As domestic and international competition increased, consumers had more alternatives and American employers lost their monopoly rents. They could no longer pass along their excess labor costs to the newly liberated consumers. Other things being equal, a business with above-market labor costs will continually lose market share. A business with a shrinking market share eventually must cut those costs or shut down.

Employers used two means to pull their leg from beneath the corporatist stool. First, employers who could do so found ways around the extra labor costs: importing, outsourcing, subcontracting, computerization, relocating facilities, resisting union organizing, you name it. Second, those who *couldn't* escape found themselves pushed to the brink of bankruptcy or beyond—airlines, most obviously, but also automobile manufacturers, parts suppliers, and many others. Whether by the first means or the second, the goal and result are the same: Labor costs fall toward market levels, just as every labor economist would predict. That in turn makes it very hard for unions to expand their reach: If they can't promise both better wages and greater job security, then what do they have to sell to prospective members?

Viewing these developments in historical context, one can see the unique and transitory nature of America's flirtation with corporatism and the concomitant period of union strength. What is most troubling in this portrait is its inevitability. It shows that the root cause of union decline is not just a Republican Congress or stodgy labor leaders, but rather a return to the true "normalcy" of an economy hostile to monopoly rents and restrictions on competition. If that portrait is accurate, then there really isn't much prospect of a turnaround. A turnaround would require an alignment of the stars seen only once before in our history, and this at a time when there are many more stars to align and many more forces opposing such an alignment.

## The Foreseeable Future

Even without a crystal ball, some predictions are reasonably safe.

First, barring a most unlikely radical revision of our labor law or a major external disruption such as another depression, the absolute number of union members is likely to continue its slow descent. Employment in heavily unionized industries continues to shrink. Just think of the 70,000 UAW workers recently bought out or laid off in the last year at the (former) Big Three and their parts suppliers. Public sector employment, in these days of subcontracting to private firms, is no longer growing fast enough to make up for much of the private sector decline. Even the increased expenditures on organizing prompted by The Change To Win (CTW) coalition's split from the AFL-CIO have not produced major results.

Some of the relatively rare recent union successes, when looked at carefully, are really top-down political spoils rather than grassroots organizing victories.[15] Some unions have gained members by pushing states to require union-supporting "project labor agreements" on government construction sites. Others have convinced states to reclassify state-paid home-care workers as employees so as to make them organizable under state law. As welcome as the

[15]See, for example, Scott, *New Ways of Governing the Workplace*, 11 Employee Rts. & Employment Pol'y J. 128, 130–35 (2007). Scott, the General Counsel of the Service Employees International Union, explains how SEIU used its political leverage in California, Oregon, Washington, and elsewhere to create "home health care authorities" and thus transform home health care workers from independent contractors to public employees subject to state collective bargaining laws.

new sources of dues may be, those schemes do not reflect vigorous organizing or grass-roots enthusiasm. Even card-based voluntary recognition, which now accounts for a high percentage of new union members, usually begins with a card-check/neutrality agreement negotiated at the corporate level and only later involves the relatively simple task of convincing employees to sign authorization cards. Most of the rest of the recent union victories involve modestly paid service workers in cleaning services and the like. Those workers are essential to any union recovery, but they do not represent the commanding heights of the new economy. Major breakthroughs in growing 21st century industries are virtually non-existent.[16]

Even if the newly organized jobs were monetarily equal to the lost union jobs, there aren't enough of them to compensate for the losses. John Sweeney promised increased organizing efforts when he was elected president of the AFL-CIO in 1995. Ten years later, with no signs of recovery, CTW split away with the stated objective of doing even more organizing. Despite minor upticks in a few years, neither organization has turned the trend. In 1994, just before Sweeney's election, there were about 16,740,000 million union members. Ten years later, there were 15,472,000. At the end of 2006, there were just 15,359,000.[17]

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[16]But what about the prospects for radical labor law reform? Obviously eliminating NLRB elections and allowing unions to gain recognition through card checks would help unions, but the so-called Employee Free Choice Act (EFCA) recently passed by the House of Representatives won't become law in the near future, if at all. It won't happen during the Bush administration because labor doesn't have 67 votes to override a veto. It isn't likely to happen even after that because EFCA is one of the few labor issues that would prompt a filibuster, and labor can't beat a filibuster without a much larger Democratic majority in the Senate. The experience with a much weaker labor law reform bill in 1978 is instructive. Despite a Democratic president and overwhelming Democratic majorities in both houses, labor––which of course was much stronger then––failed in five cloture attempts to corral the 60 votes it needed. Barbara Townley tells the whole story in *Labor Law Reform in US Industrial Relations* (Gower 1986). The U.S. has been in a position of stasis on labor relations issues for nearly 50 years, with no signs of a fundamental shift. In Cindy Estlund's insightful metaphor, our labor law has "ossified" in recent decades. Estlund, *The Ossification of American Labor Law*, *supra* note 9.

Even if the EFCA were to be enacted, it would not by itself suffice to restore unions to their former glory. As I explain in this paper, the problems facing unions are far more varied and serious than employer election conduct or the Board's sometimes cumbersome procedures. In a recent conference on the future of labor, MIT Professor Thomas Kochan concluded that passage of the EFCA could foster "some marginal union growth but fundamentally is not going to change the quality of labor relations." Harvard Professor Richard Freeman estimated that the EFCA would increase union density by just one or two percentage points. "It still means 91 percent of [private sector] workers will have no collective representation." *Organizing: Employee Free Choice Act No Panacea for Ills of Labor Relations, Forum Told*, 2007 Daily Lab. Rep. (BNA) (Oct. 4), No. 192:C-1.

[17]The numbers in this paragraph come from unionstats.com, *supra* note 6.

Second, and consequentially, the union density rate is likely to continue its fall. Stagnant or declining union membership during a period of rapid employment growth mathematically guarantees it. From 2000–2006, for example, unions lost 900,000 members even as the economy added nearly 7.5 million jobs. The problem unions face is that even standing still requires immense effort. Just to *maintain* the 2005 density rate of 12.5 percent, for example, unions would have had to organize 640,000 more employees last year than they actually did. To *gain* just 1 percent in density, they would have had to organize almost 2,000,000 more.[18] That didn't happen, of course, and there is no sign it will happen in the foreseeable future. I suggested earlier that the strength of the union movement in the mid-20th century was an historical exception rather than the rule. One density statistic will demonstrate what I had in mind. Believe it or not, overall union density in 2007 is just about what it was a full century ago![19]

Third, closer to our immediate concerns, the number of labor arbitration cases is likely to continue to dip, probably in closer proportion to the absolute number of union members than to the density rate. The natural tendency for parties to seek less expensive means to resolve disputes, as in the Postal Service and United Parcel Service (UPS), may be balanced by the need for surviving unions, lacking the strength to strike, to demonstrate their worth by grieving and arbitrating more. Federal sector unions may provide something of a model; unable to strike, they arbitrate. Even so, that incentive won't fully compensate for the fact that there will be fewer union members to file grievances.

Many of us haven't noticed the impact of the decline in traditional labor arbitration. Well-established arbitrators and public sector arbitration advocates have seen relatively little change in their workload and income. The impact falls instead on others like newer neutrals, particularly on those people who under previous situations might have become labor arbitrators but cannot do so in the current climate—victims whose names we will never know.[20]

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[18] *Id.*

[19] Kaufman, *Prospects for Union Growth in the United States in the Early 21st Century*, in Unions in the 21st Century eds. Verma & Kochan (Palgrave Macmillan 2004), at 44–47.

[20] A separate but inextricably related issue concerns Academy membership. Several years ago, when I first spoke to the Academy on related matters, I worried about our then-dwindling membership numbers. Nolan, *The National Academy of Labor and Employment Arbitrators?*, in Arbitration 1999, Quo Vadis? The Future of Arbitration and Collective

## What Then Must We Do?[21]

Let me conclude by returning to my initial point, the threat that the decline of unions and of labor arbitration presents for workplace justice. The vast majority of America's workers—88 percent of the total workforce, and nearly 93 percent of the private sector workforce—lacks access to labor arbitration. However good labor arbitration is (and like all of us in this room, I believe it is the best and fairest method of resolving workplace disputes), it provides no help to most Americans.

I therefore want to speak for a moment about what we can and should do to provide workplace justice for the nation's unrepresented employees. Lest I encourage an unrealistic optimism, I should first emphasize that I know our options are severely limited. External constraints mean that we cannot cure all problems or insist that employers do more for employees than they are willing or legally obligated to do. Within those constraints, however, there is some room for positive action.

### *Advocates and Arbitrators*

For unions, I confess that I have little advice that others have not already offered. Over the last decade or so, union leaders, industrial relations scholars, and other experts have written at least a dozen books and scores of articles urging one or another course of action to improve union organizing success. (Three of the best books, by the way, have been by Academy members, Professors Hoyt Wheeler, Charles Craver, and William

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Bargaining, Proceedings of the 52d Annual Meeting, National Academy of Arbitrators, eds. Grenig & Briggs (BNA Books 2000), at 52. The combination of an aging membership and declining numbers of traditional labor arbitration cases naturally led to more exits than entrances. Since then we have maintained our membership level through our own versions of chewing gum and bailing wire, primarily a burst of recruitment of previously uninterested Canadians, rounding up some "veterans" who had been put off by our lengthy membership application, and cutting the expected number of decided cases from nearly 100 to just over 50. We have tapped out the first two wells and can't feasibly cut our case threshold any further. Despite our best efforts, applications have again begun to decrease.

To be sure, the fear of shrinking should not by itself drive our policies. Nevertheless, the future of the Academy and its ability to contribute to workplace dispute resolution are important considerations. If we want the Academy to maintain its place as the leading professional association in our field, we must make sure that it continues to attract the best of those who resolve employment disputes.

[21] Originally Luke 3:10, but more relevantly from Tolstoy's book of that name (1886).

Gould.[22]) The labor movement itself recently split partly because of differences over strategy among those with the most knowledge and experience. If those many fine minds cannot find a way to convince 21st century workers that they need unions, then I have no magic formula to offer.

There is one idea relevant to my topic of workplace justice that I can share with unions. Former NAA president Walter Gershenfeld has argued for years that unions are missing an opportunity to market themselves to nonunion employees by representing them in nonunion dispute resolution procedures (for a fee, of course).[23] Although one cannot ignore the tactical, logistical, and economic barriers to such an endeavor, Walter's idea is worth exploring. More importantly, that suggestion is just one possibility for new and more creative means of employee representation.

Employers have more options. Chief among them is the creation of fair dispute resolution procedures that cover *all* employees. There is no lack of good models. Anheuser-Busch, Kraft, UPS, and Haliburton, to name just a few, have perfected simple, flexible, successful, and cost-effective dispute resolution systems that range from open-door policies to internal appeals to peer review to mediation and to arbitration.[24] Executives responsible for those systems rave about them, reporting that the savings in litigation costs alone pay for the programs.[25] (And that doesn't even consider the secondary benefits of ensuring good management practices.)

Arbitrators (and through them, the Academy) have important roles to play in ensuring workplace justice. Finding opportunities to play those roles, however, will be a challenge. The first step is to recognize what we are—*workplace* dispute resolvers. Some of us choose to work in only certain segments of the workplace, but wherever we work our job is the same: To solve employment-related problems objectively and with full respect toward control-

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[22]See the books by Wheeler and Craver cited in note 9, and Gould, IV, Agenda for Reform: The Future of Employment Relationships and the Law (MIT Press 1993). Among other notable prescriptive works, see Turner *et al.* eds., Rekindling the Movement: Labor's Quest for Relevance in the Twenty-First Century (ILR Press 2001) and Dannin, Taking Back the Workers' Law: How to Fight the Assault on Labor Rights (Cornell U. Press 2006).

[23]Gershenfeld, *Presidential Address: Yesterday, Today and Tomorrow in the Field of Arbitration*, in Arbitration 2004: New Issues and Innovations in Workplace Dispute Resolution, Proceedings of the 57th Annual Meeting, National Academy of Arbitrators, ed. Charles J. Coleman (BNA Books 2005), at 11–12.

[24]See Adler, *Drafting ADR Programs: Management-Integrated Conflict Management Systems*, in How ADR Works, ed. Brand (BNA Books 2002), at 791.

[25]Bales, Compulsory Arbitration: The Grand Experiment (ILR Press 1997), at 112–13.

ling authorities such as laws and contracts. In short, what we do is provide workplace justice.

The next step for arbitrators is to ask ourselves where the disputes we used to resolve have gone. Obviously some of those disputes just don't exist any more: In a nonunion facility, there are no enforceable claims stemming from subcontracting or from supervisors performing bargaining unit work. But some of the old disputes still exist, albeit in different forms and in different forums. Moreover, there are many new subject areas, particularly statutory and common law claims, and those too are going to different forums.

When the new forum is a court or other government agency, there may be no role for traditional labor arbitrators, but there are other roles for independent ADR professionals. Many of us have mediated Equal Employment Opportunity Commission (EEOC) cases, for example. Others have served as hearing officers for administrative agencies or referees or special masters or expert witnesses for courts. Academy members are uniquely qualified to fill those roles—if we are willing to break out of our traditional mold.

Non-traditional ADR work may also be available *outside* of courts and administrative agencies, but only if we seek it out. The Anheuser-Busch and Kraft systems, for example, have both mediation and arbitration steps that use Academy members, among others. Some private dispute-resolution plans still use advocates rather than true neutrals. Like parties to labor arbitration agreements, those plan sponsors will eventually learn that advocates bring with them a mind-set even when they strive for objectivity. One way neutral dispute resolvers can hasten that discovery is to perform better than others—but that will require intensive training.

Neutrals have a more important reason than mere economics for expanding their activities. Only by offering our services beyond our customary venues can we fulfill the vision of the earliest labor arbitrators—that is, to do our part to ensure that *all* workers have access to workplace justice. In their day, they naturally assumed that access would come through a rapidly growing union movement. We no longer have the comfort of that assumption.

*The Academy*

As the leading professional association of America's workplace resolvers, the National Academy of Arbitrators should do every-

thing it can to help guarantee workplace justice for all workers. Doing so will require us to be more ambitious and more energetic than ever before. Others will have their own lists of possible activities for our organization, but here is my preliminary effort.

- We must start by acknowledging that we represent, and eagerly want to represent, all qualified neutral workplace dispute resolvers.

If we limit our scope to one small subset of that universe, we cannot possibly have a major impact on the rest. To be sure, we can make pronouncements about other types of workplace dispute resolution through policy statements, amicus briefs, and the like, but who will listen to us seriously if we do not even claim to represent those who work in those fields?

We began to move in that direction many years ago with the Beck Report of 1993.[26] After carefully investigating the alternative forms of employment dispute resolution at the time, the Beck Committee took a cautious approach. It recommended that the Academy should remain officially neutral regarding members' participation in employment arbitration but should take "a significantly broader institutional role" with respect to that work. More specifically, the Committee urged the Academy to amend its Constitution so that our statement of purpose would cover "the arbitration of such employment disputes in addition to the arbitration of labor-management disputes"; to extend the legal representation fund to cover such work; and to take the lead in ensuring that our educational programs "devote a significant amount of time to topics beyond" traditional labor arbitration.

In response, we did change our Constitution, but only to "promote the study and understanding" of employment arbitration, not to add employment arbitration generally to our statement of purpose. We did not extend the legal representation fund. Ever since then, however, we have frequently included other forms of workplace ADR on the programs for our annual, Fall, and regional meetings.

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[26] *Report of the Committee to Consider the Academy's Role, If Any, With Regard to Alternative Labor Dispute Resolution Procedures*, in Arbitration 1993: Arbitration and the Changing World of Work, Proceedings of the 46th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1994), at 325.

- Second, to fulfill our new role we must begin to credit our applicants for much of their work in nontraditional areas of workplace dispute resolution.

Including qualified neutrals who practice employment arbitration and other forms of workplace ADR as well as traditional labor arbitration is essential if we are to stake a valid claim as a legitimate representative of workplace dispute resolvers. The Beck Committee expressly declined to recommend any change in our admission requirements. It did drop a tantalizing hint by noting that the Membership Committee should continue to consider "the pertinency and quality of the rest of the applicant's working life," which "manifestly includes [the] various ADR activities" covered by the Report.

In 2001, the Fleischli Committee revisited the membership requirements question.[27] After surveying the membership and discussing possibilities at several meetings, it recommended against changing the threshold requirements to count nontraditional work but picked up on the Beck Committee's hint. The Membership Committee, it recommended, should "give such weight as it deems appropriate" beyond the threshold to other forms of workplace ADR.

The next step in our hesitant movement came with the report of the Organizational Planning Committee (better known as the Holley Report) in 2004.[28] The OPC posed three options regarding Academy membership: a "natural equilibrium model" that would not change our standards at all; a "growth model" that would change our criteria to reflect our changed arbitration practices, in particular by counting employment arbitration work toward our threshold; and a "maintenance of membership model" that would maintain existing requirements but take other (less controversial) steps to attract members. As usually happens when a committee lays out three options, The Holley Committee recommended the middle course. Despite its conservative approach, the OPC report did open up the membership issue for debate. A Board of Governors retreat debated that question at length, and that in turn led to the New Directions Committee (NDC).

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[27] *Report of the Special Committee on the Academy's Future*, available on the members-only portion of the Academy's Web site at http://naarb.org/members/view_publications.asp.

[28] *A Comprehensive Strategic Plan: Strategies for the Future*, available on the members-only portion of the Academy's Web site at http://naarb.org/members/view_publications.asp.

Now the New Directions Committee has reported to the membership. It unanimously recommends that we broaden our jurisdictional scope and begin "to accept as members individuals engaged in a range of workplace dispute resolution activities," that is, to count nontraditional cases toward our threshold rather than merely as "added weight." Nearly simultaneously, the Board of Governors adopted a resolution explaining how it proposed to implement the NDC resolution if the membership adopted it. The Board's approach is modest and measured. It constitutes a reasonable first step on the road to a modernized and broader Academy. I am confident the membership will agree with the Board.

- Third, we need to increase our efforts to educate our members and other neutrals in the skills and knowledge that they need to bring workplace justice into the nonunion portion of our economy.

Occasional sessions at our meetings do not amount to comprehensive training. We should direct the Program Committee and Continuing Education Committee to develop a multi-year curriculum on the new forms of workplace dispute resolution and present a portion of that curriculum at each meeting.

Those programs should cover practical and doctrinal issues and should also present the best scholarship in the new fields. The Fall Education Conference would be the best venue for presentations on identifying and entering the nontraditional forums: where the work is being done, what criteria apply to those who would like to perform it, and the business aspects of nonunion work. That conference and the annual meeting should include sessions on the substantive and procedural law applicable in statutory and common law cases that are likely to appear in non-labor disputes, for example the federal rules of civil procedure and the federal rules of evidence, the basics of our anti-discrimination laws, and more. Ethical issues must form a major part of the curriculum, too, beginning with the Due Process Protocol, continuing to the Academy's Guidelines for Employment Arbitration, and including a new code of responsibility for such arbitration that we should help draft.

Last April the Academy sponsored a major conference in Chicago on due process issues in employment arbitration.[29] Participants included many leading employment arbitration advocates, arbitrators, and scholars. The papers presented there will soon be published in a leading law review. That conference provides an excellent model for our substantive education efforts.

- Fourth, we need to take a much more active public role on nontraditional workplace dispute resolution issues.

We have already made a few attempts to influence the development of employment arbitration. With the notable exception of the Due Process Protocol, which one former Academy president helped to inspire and draft, those attempts have had limited impact. The courts have not given our employment arbitration amicus briefs the respect received by our labor arbitration briefs. Hardly anyone outside the Academy is aware of our Guidelines for Employment Arbitration, even though they provide an excellent roadmap for arbitrators asked to serve under an unfamiliar employment arbitration plan. Our sister organizations like the American Arbitration Association understandably do not regard the Academy as representing neutrals outside of labor arbitration.

Once we commit our organization to participating in the wider world of workplace ADR, that should change. The best and most visible thing we could do right now would be to take the lead in forming a task force to develop a new code of professional responsibility for arbitrators of employment disputes. Employment arbitration presents too many distinct ethical issues to fit easily within the existing Code. Moreover, one of our current Code sponsors, the Federal Mediation and Conciliation Service, does not handle employment arbitrations and thus could not consent to the necessary changes. A new code is essential, and no group is better placed to help draft it than the Academy.

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[29] *Beyond the Protocol: The Future of Due Process in Workplace Dispute Resolution*, April 13–14, 2007, co-chaired by Hoyt Wheeler and Marty Malin.

As we do more in those areas, our reputation should increase, and as our reputation improves, our work should be given more respect.

## Conclusion

I'm afraid I have taken too much of your time already, so let me briefly conclude.

Over the years, those of us who have helped to refine labor arbitration have developed an immense intellectual and moral capital. We have honed our dispute resolution skills to the point that we can use them almost anywhere. We know what workplace justice looks like and we know how to achieve it. We understand that in the knottiest disputes, only objective consideration of the facts after full presentation by both sides will lead to the best possible decisions. We know as well that unfair procedures inevitably lead to unfair results.

In short, all of us have something extremely important to offer to modern workers and their employers—to the *entire* workforce, that is, not merely the small and shrinking fraction of it that we have traditionally served. It would be a tragic waste of that intellectual and moral capital not to use it where it is most needed today. I do not have a detailed roadmap that will enable us to widen the reach of workplace justice. I only know that we must *begin* that journey now if we hope to complete it in our professional lifetimes. I urge each of you, union advocates and leaders, management advocates and executives, and ADR professionals alike, to determine what *you* can do to cure the incremental crisis in workplace justice, and then take your own first steps toward that goal.