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Has Labor Law Failed--A Management View

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HAS LABOR LAW FAILED? A MANAGEMENT VIEW

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In considering the question of whether "labor law" has somehow failed, one must examine the current state of the law and compare it against the purposes for which "labor law" was originally intended. In so doing, one must assume that both those who champion the elimination of current laws and procedures and those who favor their continuation would agree that the American democratic and capitalistic economic system should be preserved. With that assumption as our starting point, I submit that the purpose of "labor law" is to maintain a proper balance in the tension between the interests of labor and management.

Historically, the statutory enactments promoting that end were adopted as the result of a perception that American businesses, particularly the major American industries of their time, had amassed sufficient economic and political power that the balance in this tension was disrupted in favor of these business enterprises. Legislation was enacted in response to insure that those who supplied the essential commodity of their labors had their personal and collective interests protected and the proper balance was thus reestablished. Not the least of the results of this political reaction to the times was the creation of the National Labor Relations Board.

Since the creation of the National Labor Relations Board and parallel propogation of both federal and state enactments intended to enhance the protection offered working men and women, this country has continually undergone an economic and political metamorphosis. The day when American business and labor could look to the continued growth of national markets to provide the necessary economic base for expansion has long since passed. So too has the day when American workers could count upon protectionist policies to impede the flow of foreign goods into our markets. The political reality of today is that American businesses and hence their employees compete directly at all levels with foreign producers which seek to provide goods and services to America's customers, often with subsidies from their own governments. Some would argue that the United States has indeed entered into an era of relatively free market economy throughout the world.

Concurrent with increasing freedoms in the market place, American investers and business organizations have found increasingly attactive investment opportunities outside the borders of the United States. Securities exchanges of other

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countries, particularly Canada and Japan, have assumed increasingly important roles in the world investment picture. American producers now regularly affiliate with businesses in other countries or invest American capital in production facilities located far from our shores. While the reasons for these economic changes are exceedingly complex, the simplistic reality is that American investors and businesses have funnelled increasing amounts of capital into ventures overseas simply because the opportunity for greater return on investment exists outside our borders.

At least one of the factors which influences the investment decisions of American employers is the relative ability offered by each opportunity to control the factors affecting the profitability of the venture involved. Business activities within the United States are subject to regulation by the National Labor Relations Board and coverage under the National Labor Relations Act. In addition, of course, business enterprises in this country are subject to an extensive array of federal regulatory and statutory requirements all enacted with the same central purpose—to protect the rights of working men and women. Where not preempted by this pervasive federal scheme, state and local requirements are also imposed. In considering the efficacy of "labor law," one must therefore consider all aspects of the balance between labor and capital rather than isolate one particular administrative body and, upon decrying its performance, advocate the abolition of the entire scheme of which that element is but one part.

In this discussion, I will first consider the National Labor Relations Board. Does its current record indeed demonstrate that it has "transformed itself . . . into an active and conscious proponent of the destruction of labor unions, of American industrial democracy, and ultimately, of workers' rights and prosperity?"[1] I submit that the statistics support a contrary conclusion. How can it be said that an administrative tribunal has demonstrated significant anti-union basis when it has sustained, in whole or in part, complaints against employers in fifty percent of the cases litigated before it? In fact, that statistic alone would seem to indicate that the National Labor Relations Board has been almost perfectly evenhanded in its rulings concerning employer unfair labor practices.[2] That statistic should be compared directly to the Board's previous record which demonstrates that similar complaints were upheld against employers eighty-four percent of the time.[3] Surely it cannot seriously be contended that an administrative tribunal which rules in favor of the employee eighty-four percent of the time is anything but biased against the employer. Further, it would not seem that an increase of eleven percent in the number of cases sustained against labor unions on a national basis demonstrates the dramatic shift in Board philosophy which Mr. Trumka cites.[4]

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[1] Trumka, *Why Labor Law Has Failed*, 89 W. VA. L. REV. 874 (1987).

[2] *Id.* at 876.

[3] *Id.*

[4] *Id.* Extrapolation of Mr. Trumka's statistics.

There is one area in which Mr. Trumka and I may agree, however. That is the glaring ineffectiveness of many of the Board's procedures and its seemingly random results. As a result of the Board's apparent utilization of inappropriate cases as vehicles for modification of existing doctrines, those of us practicing labor law from the management side find it increasingly difficult to advise clients concerning their rights and responsibilities. I suspect the same is true when viewed from the union perspective. As lawyers, we increasingly find ourselves in the position of having to advise clients that the state of the law is unclear. In such an environment we must synthesize our opinions and judgments from an increasingly complex and seemingly contradictory body of decisions at the federal level. It is as though these decisions have become so fact-specific that we cannot directly apply their teachings to the real world environment in which we must operate. The current administrative process, therefore, makes it difficult for management and labor alike to plan the conduct of their affairs. The predictability of "labor law" has been significantly reduced to the detriment of both.

It is submitted, however, that this decrease in predictability works a far greater hardship upon the employer than it does upon the union. While one often thinks of labor law as involving major corporations and their respective unions, the Board's decisions and procedures apply with full force not only to these behemoths but also to the full spectrum of business organizations. The result of this unpredictability upon moderate to large employers is a significant increase in the costs associated with doing business. It requires additional scrutiny and planning. It increases internal costs associated with the management of personnel relations. It increases legal and other costs associated with defense of unfair labor practice charges or other litigation. These increased costs, of course, add to the expense of doing business within the geographic jurisdiction of the Board. As such, they are an additional factor which will enter into the corporations' investment decisions and which will, when combined with other factors, tend to promote the exit of capital to third world nations rather than investment of that capital into enterprises over which the Board has jurisdiction.

But while the Board's rulings may have some undefined effect upon the investment decisions of major employers, its convoluted and bureaucratic procedures can be devastating for the small businessman, the heart of the American entrepreneurial system. Since Mr. Trumka has cited two cases which many of us would agree seem outrageous,[5] I will take the liberty of citing one of my own. Within the State of West Virginia, there are many relatively small employers who form the lifeblood of its economy. One of those is among the small shops tied closely to the coal industry in the southern part of the state. Several years ago one of the owners of that shop and one of its employees exchanged words over a period of several weeks. The emotion of the situation was heightened by a significant

[5] *Id.* at 874, 879.

downturn in the coal business and an ongoing personal dispute between these individuals. The facts of the case are not important to an understanding of the issue. Suffice it to say that the employer was eventually found guilty of unfair labor practices when the situation degenerated.[6] As with any such case, there were significant management rights worthy of protection just as there were employee rights which were sacrosanct. In the coal fields of West Virginia, the fierce independence and pride of our people affects those in management as well as the hourly workforce and the importance of the parties' relative rights can take on emotional characteristics.

But the Board is a bureaucracy not designed for the prompt or economical resolution of such disputes. It employs procedures which are often unintelligible and always oppressive for the small businessman. Not the least inequity in the procedures is the fact that the employer must retain and pay for his own representation while the "aggrieved" employee may command the full fury of the government bureaucracy without cost. In the case of a small southern West Virginia hydraulic shop, the proceedings before the Board have involved two hearings, an appeal to the Fourth Circuit Court of Appeals, remand by the Fourth Circuit to the Board on separate issues, a final ruling that unfair labor practices have occurred, the issuance of a back-pay stipulation by the Board, and a response to that stipulation by the employer. The bureaucratic maze through which the employer has been forced to wander has consumed nearly four years. As a result, the back-pay specification, when interest is added, will most certainly reach an amount which this small shop will be unable to pay. The likely result will be that this business will close. Such a closure is the direct result of the Board's convoluted procedures applied to major corporations and small employers alike. While this system may be relatively efficient for major employers, it is wholly unacceptable for the vast majority of small to moderate size businesses. Either these procedures should be effectively revised or the statute should be changed to exclude a far greater percentage of small businesses from coverage on a federal level.

Putting aside the relative perceptions of the UMWA and management regarding the National Labor Relations Board, it is entirely inaccurate, as Mr. Trumka seems to assert, to say that the balance in labor/management relations somehow favors the employer. It is particularly unrealistic to make that assertion in the context of the coal industry. It is perhaps the American coal miner, particularly those represented by the United Mine Workers of America, who is afforded the greatest measure of protection of all employees in this country (and therefore perhaps throughout the world). Each and every American coal miner is protected from discrimination in employment based upon age[7], race, sex, religion, or other minority classifications by both federal and state law.[8] An em-

[6] *In re* United Hydraulic Service, Inc., 9 CA-17643, 9 CA-17962, and 9 CA-19166.

[7] Age Discrimination in Employment Act, 29 U.S.C. § 623 (1982).

[8] 42 U.S.C. § 2000e (1982); W. VA. CODE § 5-11-9 (Supp. 1986).

ployer cannot legally take adverse employment action against any member of the UMWA during the hiring process or the course of considering promotions, transfers, demotions, layoffs, reassignments, or any of the other multiplicity of actions which management might otherwise undertake with impunity. Both federal and state law prohibit an employer from discriminating against an applicant for employment or employee on the basis of any handicap suffered by that individual.[9] Handicaps, of course, can run the gamut from quadriplegia to seemingly minor conditions.[10] Further, the individual need not suffer an actual handicap at all to be afforded protection. It is enough that the employer perceived him to be handicapped whether he was or not.[11]

Once employed, the individual is entitled to the protection of any number of federal wage and hour laws and may prompt an audit of the employer's practices through the filing of a complaint with the Department of Labor.[12] Further, he is protected under similar provisions of West Virginia law.[13] Under some circumstances he may assert that he is entitled to statutory penalties when his employer delays in payment of accrued wages or benefits.[14] Under the common law of West Virginia, his claim for wages, benefits, and statutory penalties is elevated to the same level as a mechanic's lien and may be asserted against properties owned and controlled by independent third parties in the event of a default in payment by his immediate employer.[15] Once engaged in the employment relationship, the UMWA member is entitled to all of the protections afforded by the National Bituminous Coal Wage Agreement. Not the least of these protections is the right to arbitrate essentially all of his grievances up to and including his discharge for cause.[16] Under such circumstances, it is ludicrous to assert that the employer may take some adverse employment action against an employee without being held accountable through a subsequent independent review of its actions.

Substantial as the protections may be in the areas of nondiscrimination and entitlements of employment, they pale in comparison to the protections offered the UMWA miner when he asserts that some advserse employment action was undertaken as a result of his exercise of "safety rights." Notwithstanding the customary union rhetoric to the contrary, it remains in the best interest of man-

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[9] 42 U.S.C. § 2000e; W. VA. CODE § 5-11-11 (Supp. 1986).

[10] Handicap discrimination cases handled by our office have included intestinal problems, bronchitis, heart defect diagnosed as unifocal premature ventricular contractions, orthopedic disabilities, and others.

[11] *See generally* West Virginia Human Rights Commission Administrative Regulations (Series I) 2.07 (1984); 29 U.S.C. § 706(7) (1982); 45 C.F.R. § 84.3 (1986).

[12] 29 U.S.C. § 216 (1982).

[13] Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201, 219 (1982); W. VA. CODE § 21-5c-1 (1985).

[14] W. VA. CODE § 21-5-4(e) (1985).

[15] Farley v. Zapata Coal Corp., 281 S.E.2d 238 (W. Va. 1981).

[16] National Bituminous Coal Wage Agreement of 1984, Art. XXIII.

agement to insure the safest possible work environment. The alternative, with its attendant increase in lost time injuries, results in significant production disruptions and decreased output with corresponding increases in costs and further erosion in competitive position. Furthermore, most employers, recognizing that their interests lie in the maintenance of a safe work place, regularly accept from their workers suggestions which will result in enhancement of the safety in the work environment.

But even the most cooperative employer must at some point exercise its contractual right to instruct its employees to work under conditions which the employee asserts are unacceptable. The National Bituminous Coal Wage Agreement, in order to establish a framework within which the tensions between the desire to enhance safety and the need for maximum productivity and minimum cost, provides an understandable, succinct and workable procedure through which an employee who believes that he or she is being required to work under truly unsafe conditions can have that issue resolved promptly.[17] This same framework inures to the advantage of the employer since, if the "unsafe condition" is acknowledged by the union safety representative not to exist, the employee will be required to return to work.[18]

Repeatedly, however, cases arise in which an employee is guilty of clear insubordination in refusing to follow management's directives. In the proper exercise of its rights, management then takes some adverse employment action. That action may range from a written warning to discharge. As the severity of the penalty increases so does the apparent tendency of the employee to assert, often in retrospect, that his insubordination was founded upon his exercise of "safety rights." Once he raises that issue he calls into play perhaps the most complex and unfair of all systems of protection which can be afforded him. He may (and ususally will) first proceed to arbitration. In many cases, the disciplinary action is upheld by the arbitrator on a variety of grounds. The employee may then file a charge with the West Virginia Coal Mine Safety Board of Appeals alleging that his employer has been guilty of discrimination in violation of West Virginia law.[19] Under these circumstances, the Board will refuse to defer to the arbitrator's findings and will relitigate all issues surrounding the disciplinary action which was imposed upon the employee.[20] It will render its judgment independent of the judgment of any arbitrator. That process has been both approved and disapproved by the circuit courts of this state.[21] However, the process does not end there. The em-

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[17] *Id.*, Art. III(i).

[18] *Id.*

[19] W. VA. CODE § 22A-1A-20 (1985).

[20] *See generally* Pantuso v. Cedar Coal Co., 83-DIS-9 (1983); Davis v. Kitt Energy Corp., 83-DIS-1 (1983); Ray v. Southern Ohio Coal Co., 86-DIS-12 (1986).

[21] Stollings v. Belva Coal Co., No. AP-CA-80-64 (Kanawha Co. Cir. Ct. filed Sept. 11, 1981); Davis v. Kitt Energy Corp., No. 84-C-37 (Barbour Co. Cir. Ct., consolidated July 28, 1986).

ployee can file a complaint with the Mine Safety and Health Administration alleging that the employer has violated the provisions of 30 U.S.C. § 815(c).[22] That claim will be processed by MSHA and, if a finding of probable cause is returned, the employer may be forced to relitigate exactly the same issues which were presented not only to the arbitrator but also to the West Virginia Coal Mine Safety Board of Appeals. This remains true notwithstanding the fact that the arbitrator may have converted a discharge into a suspension and the West Virginia authorities may have already reinstated the miner with full back pay.[23]

Further complicating litigation of these cases is the fact that each of these tribunals takes a different view as to the facts which the miner must prove in order to prevail.[24] Stated differently, the employer is forced to defend in three separate forums successively with the likelihood of conflicting results. As a practical matter, the odds of a West Virginia coal mine employer sustaining the discharge of a UMWA coal miner who asserts that his termination was in any fashion related to his "safety activity" is relatively remote.

In addition to these protections, the UMWA miner shares with all other citizens of West Virginia the right to seek redress for any number of civil wrongs through the trial courts of record. He may claim discharge in violation of a substantial public policy,[25] outrageous conduct or the intentional or negligent infliction of emotional distress by his employer,[26] breach of his contract of employment whether encompassed in a written agreement or in the form of verbal representations.[27] Moreover, he may sue those who administer his benefit plans

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[22] 30 U.S.C. § 815(c)(1982).

[23] Secretary, *ex rel.* Pantuso v. Cedar Coal Co., WEVA 84-193-D.

[24] Arbitrators under the National Bituminous Coal Wage Agreement regularly take the position that their duty is to test the good faith with which the employee exercised his or her "personal safety rights" within the meaning of that term under the agreement. The West Virginia Coal Mine Safety Board of Appeals, however, has de facto taken the position that good faith is not relevant to its determinations and that prima facie case of discrimination under West Virginia law is (1) that the employee made some safety complaint, and (2) that the employee's subsequent discharge creates a "rebuttable inference" that the discharge was discriminatory. *See generally* Pantuso v. Cedar Coal Co., *supra* note 20. The Federal Mine Safety and Health Review Commission, on the other hand, takes the position that it may consider a "mixed motive" case in which the employee's discharge was based, in part, upon discriminatory animus but that no violation occurs if the employee's conduct or insubordination would have been sufficient, in and of itself, to warrant the disciplinary action or discharge. *See* Secretary of Labor *ex rel.* Pantuso v. Consolidation Coal Co., 2 FMSHRC 2786, 2 Mine Safety & Health Rep. (BNA) 1001 (1980), *rev'd sub nom.,* Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary of Labor *ex rel.* Robinette v. United Castle Coal Co., 3 FMSHRC 803, 2 Mine Safety & Health Rep. (BNA) 1213 (1981). *See also* Marshall v. Commonwealth Aguarium, 469 F. Supp. 690 (D. Mass. 1979), *aff'd,* 611 F.2d 1 (lst Cir. 1979).

[25] *See generally* Harless v. First Nat'l Bank of Fairmont, 162 W. Va. 116, 246 S.E.2d 270 (1978) (Harless I).

[26] *See* Harless v. First Nat'l. Bank of Fairmont, 169 W. Va. 673, 289 S.E.2d 692 (1982) (Harless II); Womack v. Eldridge, 215 Va. 338, 210 S.E.2d 145 (1974).

[27] *See generally* Cook v. Heck's Inc., 342 S.E.2d 453 (W. Va. 1986).

for breach of their fiduciary duty,[28] may bring criminal charges against fellow employees or supervisors and, may sue his union for breach of its duty of fair representation. Finally, in connection with his assertion of each and every one of the protections listed above, he may recover attorneys fees and costs either under statute or in the form of the contingent fee concept so cherished by the plaintiff's bar. Realistically, his assertion of any or all of these rights goes forward without substantial cost to the employee.

And what rights may management place upon the scales in order to bring the tension between labor and capital into proper balance? A cynic might say that management brings only the right to defend, at its own expense, against the charges brought by its employees. Absent exceptional circumstances, the employer is virtually without remedy for the wrongs committed by individuals in its employ. It may seek to exercise its "management rights" but arguably any exercise of those rights which is perceived by the affected employee to be adverse will likely result in some challenge by the employee of that action. Even if it does not, the very fact that the employee is provided with a plethora of legal and contractual protections forces management to assume that a challenge will be lodged and to consider the costs and risks associated with defending against that challenge — and thus supporting its right to make the decision in the first place — throughout its decision-making process. In many instances, management will decline to assert its valid rights merely because it knows that it will be required to support its adverse employment decision at great cost and inconvenience as the disgruntled employee files, and at his employer's expense litigates, charge after charge before a variety of federal and state tribunals.

So when one considers the "balance" of rights which today exist between labor and management, the National Labor Relations Board cannot be singled out for criticism. It is not "labor law" as interpreted by the National Labor Relations Board which has failed, but rather, the process by which the respective rights of management and labor are enforced. Though proceedings before the Board and its decisions may be a part of that complex scheme under which the decisions of managers and their employees are tested, it remains perhaps the last vestige of this system in which the employer as well as the employee has a right to challenge what it believes to be inappropriate conduct and has a relatively equal opportunity for full litigation. In all other instances, the employer is virtually powerless to challenge even relatively egregious employee conduct. In all other forums the employer is simply permitted to defend against charges raised by his employees. Were the Board and its proceedings to be eliminated as suggested by Mr. Trumka, this act would result in a significant reduction in what is already a limited right on the part of the employer to challenge his employee's conduct. Without the Board, UMWA miners, union organizers and employees could act

[28] 29 U.S.C. § 1109 (1982).

with virtual impunity to the disadvantage of the employer. Such a result would most certainly have the effect of further eroding the confidence of American business in the system by which the "balance of interests" is currently maintained. This, in turn, would most certainly result in an increased diversion of American assets and capital into endeavors and geographic areas where the investor/employer has a more realistic opportunity to exercise some control over the management of his investment. No investor or employer can be guaranteed that he will survive in today's economic and business climate; he seeks simply to exercise the greatest control possible over his own decisions in order to enhance the prospect of making a profit. The elimination of the Board and the body of law it has developed, without a corresponding elimination of the majority of the duplicative statutory and regulatory protections offered the employee would, I believe, be another step in the continuing erosion of the American system of capital investment.