

Property of
MARTIN P. CATHERWOOD LIBRARY
NEW YORK STATE SCHOOL
INDUSTRIAL AND LABOR RELATIONS

*Hot Topic
Future Worker Management*

Statement of Julius (Jack) Getman Professor of Law Univ of Texas
Cornell University

I appreciate the opportunity to meet with the Commission. I have been studying the organizing process since the early 70's when I participated in a major field study of NLRB representation elections.¹ During the 80's I did further field work on organizing. I conducted extensive interviews with union organizers, and I attended a two-day management program advising companies on how to stay non-union. From 1986 to 1988 I was President of the American Association of University Professors.

The most important question in U.S. labor relations today is why private sector unions represent so small a proportion of the work force. It was once widely assumed that collective bargaining between unions and employers would be the dominant mode for establishing wages and working conditions in the private sector. Today the percentage of private sector employees represented by unions is small and steadily decreasing. This situation cannot be attributed to the failures of the bargaining process. Where collective bargaining has been employed, it has improved the wages and working conditions of employees and made impressive positive contributions to our society.

Some of the decline of the union movement is attributable to factors, such as the changing nature of the economy and the loss of industrial base, that are only tangentially related to the law. In addition, unions bear some of the responsibility for their lack of organizing success. During their more successful

period, they spent too little money on organizing and routinely assigned their least effective staff people to the task. Management, on the other hand, was prepared to spend a great deal of money, to move facilities, to meet union wage scales in non-union facilities, to hire lawyers; and consultants, to run anti-union campaigns in the effort to defeat unionization. The management effort has been quite successful. Of course, it has been made easier than it should have been by current legal doctrines that increase the natural advantage that accrues to employers seeking to avoid unionization. I will suggest a few changes in the law that I believe would further the goal of a truly free choice by employees.

1. Unions should be given freer access to employees and the right to respond to employer speeches and meetings.

In the mid 1950's the Supreme Court in NLRB v United Steelworker held that employers can make captive audience speeches, opposing unionization, to their employees without granting the union a right to respond. It also held in NLRB v Babcock & Wilcox Co. that an employer has the right to "post his property against nonemployee distribution of union literature," without demonstrating that such a prohibition was necessary for business reasons. While in each case the Court suggested that the Board might come to a different conclusion where it felt that a serious imbalance in organizing opportunity was created, the Court did not suggest how the Board was to measure whether an appropriate balance existed. The Board generally responded by

assuming that no imbalance exists whenever the union has some ability to reach employees by telephone, mail or meetings.² When the Board has attempted a more careful analysis of union organizing opportunities, its approach has been rejected by the courts. Together court and Board decisions have established a policy favoring property rights over the ability of employees to become informed about the arguments favoring unionization.

During the pre-election campaign, employers and their outside consultants have the ability to call the employees together, during what would normally be working time, and state the case against unions. They can also engage in one-on-one meetings with employees during the work day. The union, by contrast, is limited to voluntary meetings away from the job site and solicitation by employees during non-working times. It is only in the rarest circumstances that unions are permitted to respond to captive audience speeches or that union organizers are granted even limited right of access to the employer's premises. However, the assumption of rough equality of organizational opportunity on which the law purports to rest is factually incorrect. The study of organizing campaigns that I conducted together with Professors Goldberg and Brett revealed that the current system gives employers a definite advantage in getting their message to the employees during a formal campaign. Employers have an even greater superiority of access prior to the formal campaign. And this imbalance is being increasingly

exploited by employers who follow the advice of management consultants.

The current system makes it easy for an employer to run a campaign against the individual union organizers. These campaigns are quite common, and they respond to real employee concerns. Even employees favorable to unionization are frequently troubled by the picture of the particular organizer and union when it is exclusively drawn by the employer. The personality and dedication of organizers is always a matter of concern to employees trying to decide upon unionization. At present, the organizer can only overcome this tactic with respect to those employees willing to come to a meeting or meet with the organizer off the premises and not during working hours.

Representation campaigns would more likely reflect true employee choice if unions had a right to respond to employer speeches and meetings, and if union organizers had access to the employees subject to reasonable labor board regulation. Such a system would also have the advantage of demonstrating to employees the law's ability to change the employer's absolute control over their jobs and working conditions.

2. Remedies intended to punish and deter illegal behavior should be permitted under the NLRA.

Under current law remedies imposed by the Board for unfair labor practices must be for the sole purpose of undoing the effect of specific illegal actions. This means that access remedies are almost never granted and that the penalty for

discriminatory discharges is generally limited to reinstatement and backpay, a cost that many employers are willing to pay for the benefits that they think likely to flow from increasing employee fear of unionization. Studies suggest that reinstated workers rarely return for any length of time to the jobs from which they were discharged.

In deciding whether to issue a bargaining order under current law, the Board must determine "the possibility of erasing the effects of past practices and of ensuring a fair election...by the use of traditional remedies..." This standard forces the Board to make uninformed judgments about the likely impact of unfair labor practices, and of the effectiveness of remedies, on voter behavior. It is not surprising that Board bargaining order decisions inevitably reflect efforts to punish and deter. In part this is because the Board's "traditional" remedies are so weak that they are most unlikely to deter campaign violations or encourage obedience to the law. However, given the reviewing standard that limits the Board to undoing the impact of unlawful behavior in particular cases, and the fact that bargaining orders may serve to override rather than to protect free choice, it is not surprising that reviewing Courts frequently set aside Board bargaining orders.

It would better serve the policies of the Act if the Board could impose remedies designed to punish employers who intentionally commit what are legislatively determined to be serious unfair labor practices such as discriminatory discharges

or bargaining with a view to eliminating a union. If a system of treble damages, injunctions, and loss on government contracts were developed, adherence to the law would likely be given a far higher priority by employers than it currently is. Where employers bargain with a view to not reaching agreement but to rid themselves of a union, the Board should be able to impose a settlement that will include the imposition of an agreement.

3. Employers should not be permitted to permanently replace striking workers.

Since 1937 when the Mackay decision was issued, its application has permitted the devastation of unions, communities, families, and individuals simply because employees exercise rights supposedly protected by the National Labor Relations Act. The Mackay doctrine has been defended on the grounds that the right to permanently replace is somehow necessary to permit employers to withstand strikes. The metaphor of the "level playing field" has frequently been employed in its support. Scholarly investigation, including my own study of the paper industry, disputes this conclusion. Temporary replacement workers, supervisors, and newly hired workers who are not replacements will generally be available to permit an employer to operate during a strike.

The consequences of Mackay for the organizing process are significant. In every hard-fought election, employers make a variant of the following argument: "Under the law I am required to bargain with the union and I will do that, but I can and will

bargain hard. I am not required to make any concessions or agree to any terms that I do not think are in the Company's best interests. The only way the union can try to force me is by pulling you out on strike. If you go on strike to force me to accept unrealistic union demands, I have the right to permanently replace you, and I will not hesitate to exercise this right." Such an argument is perfectly legal. Its common use, together with employee knowledge of recent strikes in which other employees were permanently replaced, helps to account for the fact, that employees regularly perceive threats of reprisal in hard-fought election campaigns that do not violate the law. In fact in such cases employers are in fact legally threatening employees with job loss if they vote for representation. Mackay may also affect the campaign dynamic because employees fear to be placed in a situation in which they will have to choose between loyalty to fellow employees and preserving their jobs.

5. Faculty members in private sector colleges and universities should have the right to choose unionization.

In the Yeshiva case the Supreme Court concluded that faculty in "mature" colleges and universities are managers under the Act who do not need the right of free choice with regard to unionization because their interests and those of the administration are the same. Since that decision, the great majority of faculty at private universities have been denied the right to choose representation. The conclusion that faculty are managers at any university with a committee structure of any

significance reflects a monumental misunderstanding of the conditions of faculty employment at many institutions of higher education. During my period as President of the American Association of University Professors, I had the opportunity to visit a variety of campuses around the country. The reality of academic life in many places bore little resemblance to the ideal picture drawn by the Court in its Yeshiva decision.

The Yeshiva decision has the remarkable effect of declaring all faculty in most institutions to be "managers" because of the administrative role of a few. If this approach were applied to other sectors of the economy, it would deny representation rights to many employees and provide employers with a simple technique for avoiding unionization. The Yeshiva decision endangers labor management cooperative programs that adopt committee structures similar to those common in academic institutions. Unions that favor such program might be bargaining their members out of the Acts protection.

6. Binding arbitration should be available where impasse is reached during first contract negotiations.

It is a sensible policy to keep the government's role in collective bargaining limited. However, this policy judgement has led the Board and courts to give an unnecessarily limited scope to the duty to bargain. After a successful organizing campaign, employers are too often able to use the bargaining process to avoid agreement and eliminate the union. A well counseled employer can usually bargain in this way without being found

guilty of violating the Act. Even if a refusal to bargain is found, no effective remedy is imposed. We have learned from the public sector that using some form of arbitration to resolve disputes in such situations does not interfere with the bargaining process to the extent previously assumed. The risks to free collective bargaining; from surface bargaining are greater than the risks from alternate dispute resolution techniques such as binding arbitration or more effective Board remedies.

The current system distorts free choice in two ways. Some employees who formally choose representations are denied true collective bargaining; other employees may decide that voting for representation or otherwise supporting a union will be a futile act that may cause the employee trouble but is unlikely to lead to positive results. An employee, otherwise favorable to unions, with a realistic understanding of the risks posed by current law, could well decide to vote no in a representation election. If an effective alternative such as first contract arbitration were an option, employers would be more likely to bargain in good faith so that collective bargaining would work without government involvement, and unions would do far better in representation elections.

7. The election process should be speeded up.

Shortening the time between petition and election could substantially reduce the advantage that the formal campaign gives to employers. Under current law an employer can often delay the holding of an election by raising questions about unit

determination and voting eligibility. Delay works against representation in the great majority of cases. Since both parties know this, employers have an advantage in negotiating election issues prior to the vote. It would be a useful change to require the Board to develop expedited procedures under which quick elections are routinely held and technical questions of eligibility and unit determined afterwards.

1. Julius Getman, Stephen B. Goldberg, and Jeanne Herman Union Representation Elections: Law and Reality, (1976)

2. The Board has also apparently assumed that appropriate balance of opportunity was assured by its Excelsior rule requiring employers to make available lists of names and addresses of eligible voters prior to the election.