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EMPLOYEE PARTICIPATION AND THE NEW INDUSTRIAL RELATIONS

Richard Edwards[†]

INTRODUCTION

The future of employee participation plans ("EPPs") in the United States can only be understood within the context of the ongoing demise of our contemporary industrial relations system. That system, sometimes called the postwar system, relied on two principal mechanisms: collective bargaining, which is now highly marginalized, and statutory regulation, which has proven to be extremely ineffective. The "free market," however, also is unlikely to be a viable alternative. Hence, the future of EPPs may be as clouded as that of the larger industrial relations system.

In order to be successful, a new system of industrial relations must provide employers with enough flexibility to be competitive in a global market, while simultaneously protecting the fundamental interests of workers. Employee participation plans may become an important part of our new system of industrial relations. If they do, they most likely will provide only one element of a complex web of labor relations that will exist with several different, perhaps overlapping systems. The development of this new situation renders obsolete our tendency to use a "one-size-fits-all" mentality in labor law and mandates that we begin serious consideration of alternatives to the National Labor Relations Act framework.

In Part I of this essay I discuss the collapse of the postwar system of industrial relations. In Part II I consider elements of the new system that likely will emerge from the collapse of the postwar system. Finally, in Part III I suggest a method by which employment participation plans may be incorporated into our new system of industrial relations.

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I. THE COLLAPSE OF THE POSTWAR SYSTEM OF INDUSTRIAL RELATIONS

The postwar system of industrial relations rested on the twin pillars of collective bargaining and statutory regulation.¹ An implicit capital-labor accord developed and, for a generation, offered a model for industrial governance. Corporations achieved the flexibility to introduce new technologies needed to develop their businesses, while collective bargaining and statutory regulations advanced workers' incomes and interests.² Unfortunately, the face of industrial relations has changed. The decline of the unions weakened the collective bargaining pillar, and ineffectiveness and burden undermined regulation, the second pillar. As a result, the postwar system no longer provides an effective mechanism for regulating industrial relations.

Unions became highly marginalized players in the first pillar of collective bargaining, which is based in the private sector. In 1992, the union share of non-farm, private sector employees was only 12.7%.³ This means that in 1992, seven out of eight private sector employees were outside the collective bargaining framework. Simply to maintain that share of employees, unions would have to recruit enough new members to keep up with the growth in the employed labor force (perhaps 1.5% per year), as well as compensate for normal attrition in the union sector (around 3% per year), and replace lost members through decertification efforts (less than 1% per year).⁴ Overall, unions would have to enroll approximately 500,000 new members each year just to maintain their present, anemic share.

In 1992, all unions combined won a total of 69,113 new employees through the election process established by the National Labor Relations Act.⁵ Unfortunately, decertification elections initiated by employers during 1992 deprived unions of

¹ Some would add a third: high-employment macroeconomic policies.

² For a discussion of the postwar capital-labor accord, see RICHARD EDWARDS & MICHAEL PODGURSKY, *The Unraveling Accord: American Unions in Crisis*, in UNIONS AND CRISIS AND BEYOND: PERSPECTIVES FROM SIX COUNTRIES (Richard Edwards et al. eds., 1986).

³ U.S. DEPT OF LABOR, EMPLOYMENT AND EARNINGS 241, 245 (1993).

⁴ See *id.*

⁵ N.L.R.B. Representation & Decertification Elections Statistics (BNA) Tables 1 & 2 (June 1993).

19,245 members.⁶ Accordingly, the net addition was only 49,868 new members — one-tenth of the number needed to maintain their current share. The figures from 1992, though worse than prior years, was not unrepresentative: during the preceding four years, unions won an annual average of only 67,259 net new private sector members — a tiny fraction of their "replacement" needs.⁷ These results simply extend a slide in union share that began in the mid-1950s; in fact, the last time unions won as many as one half-million new private sector members was 1953.⁸ Richard Freeman rightly called this shrinkage "the effective de-unionization of most of the U.S. labor force."⁹

The second pillar of the postwar system, statutory regulation, also is deficient, although some regulation clearly is effective and beneficial. While the Occupational Safety and Health Act¹⁰ aids in disseminating information and raising consciousness about job safety, it fails to achieve its ultimate objective of making the workplace safe. It is highly unsuccessful in reducing fatalities and job-related injuries.¹¹ Similarly, the Employee Retirement Income Security Act¹² brings some benefits, such as early vesting of pensions. However, with respect to its regulatory operations, it is difficult to discern substantial benefits for *workers*, as contrasted with accountants, lawyers, and corporate profiteers.¹³ In a similar vein, a recent analysis

⁶ *Id.*

⁷ *Id.*

⁸ NLRB ANN. REPS. (1953-92).

⁹ Richard Freeman, *Contraction and Expansion: The Divergence of Private Sector and Public Sector Unionism in the U.S.*, 2 J. ECON. PERSP. 65 (1988).

¹⁰ 29 U.S.C. § 651 (1988).

¹¹ See, e.g., W. Kip Viscusi, *The Impact of Occupational Safety and Health Regulation, 1973-1983*, 7 RAND J. ECON. 567 (1980).

¹² 29 U.S.C. § 1001 (1988).

¹³ For a discussion of the Employee Retirement Income Security Act's failings, see RICHARD EDWARDS, *RIGHTS AT WORK: EMPLOYMENT RELATIONS IN THE POST-UNION ERA*, 113-17 (1993). The Act is designed to safeguard the pensions of workers enrolled in private-employer pension plans. Employers who do have pension plans must administer them in accordance with certain standards and must register such plans with the Labor Department. However, the Act is long, complicated, and presents a system that only highly specialized experts can understand. The costs of administering and registering pension plans are extremely high. Thus, an unintended side-effect of the Act is that it may deter employers from starting pension plans and may even

of the 1988 Worker Adjustment and Retraining Notification Act¹⁴ found that the implementation of this law resulted in almost no increase in notification of workers. Indeed, "the major change in notice apparently took the form of shifting workers from informal notice to no notice at all."¹⁵

The record of regulation, especially *workplace* regulation, is remarkably bare of beneficial changes to workers at the shop-floor or job-site level. Workers' advocates enjoy more power in Washington, D.C. and the nation's statehouses than they enjoy in factories and offices. This creates the peculiar situation in which democratic forces can impose new regulation that is irritating and burdensome to employers but not very helpful to workers.¹⁶

II. THE NEW INDUSTRIAL RELATIONS SYSTEM

The collapse of the postwar system of industrial relations system does not necessarily herald a return to an unregulated free labor market. In order to be successful, a new system of industrial relations must both provide employers with the flexibility they need to compete in a dynamic economy and protect the fundamental interests of employees. In other words, a successful system must provide a framework for industrial relations that fosters some degree of union-management cooperation.

The parties involved have misunderstood both parts of this relationship. Unions and workers' advocates often misperceive the need for employer flexibility, which all parties agree results in employer abuse of power if granted in the extreme. For example, in the 1930s, foremen in the Ford plants had the power to fire workers on the spot — an exercise not of "employer flexibility" but of industrial tyranny.¹⁷ Nonetheless, after

induce employers to abandon them.

¹⁴ 29 U.S.C. § 2101 (1988).

¹⁵ See John T. Addison & McKinley L. Blackburn, *The Worker Adjustment and Retraining Notification Act*, 8 J. ECON. PERSP. 181, 187 (1994) (noting that from 1983-1988, before the implementation of the Act, workers had a 47.5% chance of receiving no notice. With the Act's implementation in 1991, that percentage increased to 53.0%).

¹⁶ Republicans then capitalized on the real burdens created. This curious impasse helped revitalize the Republican Party but failed to create a record of benefits for workers.

¹⁷ It was a tyranny that, in my judgment, lives on in the doctrine of

witnessing the recent down-sizing of GM and IBM, the success of teaming at Toyota, and the dynamism of the new high-tech industries such as software or biotechnology, who can doubt that employer flexibility is an essential ingredient for modern industrial survival? Unions that advocate systems of industrial relations that do not permit such employer flexibility are misguided, because they are consigning their enterprises to stagnation and loss.

Alternatively, employers and business advocacy groups often misunderstand the second part of the relationship, the protection of workers' interests. Presumably, workers' primary interests are reasonably secure employment at adequate wages in safe working conditions with decent treatment by management and some opportunity for occupational or professional advancement. Employers argue that the free market provides adequate protection for these basic interests. Although the free market will play a part in the new system of industrial relations, our society never has accepted for long the idea of markets as the final arbiter of labor conditions. A return to the unregulated market is no more likely than is a revival of the postwar system of industrial relations.¹⁸

To what extent can employee participation plans provide employers with the flexibility they need to compete in a dynamic economy while simultaneously protecting the fundamental interests of individual employees? In the face of the collapse of the postwar system, employee participation may become an important part of a new industrial relations system. However, it will be only a part of that system, and our thinking about employee participation plans must be geared toward ascertaining how they will fit into the larger regime.

The new industrial relations regime likely will consist of several distinct or parallel sub-systems. These sub-systems will not neatly partition the economy into separate sectors. Rather,

"employment at-will."

¹⁸ SAMUEL BOWLES & HERBERT GINTIS, *DEMOCRACY AND CAPITALISM: PROPERTY, COMMUNITY, AND THE CONTRADICTIONS OF MODERN SOCIAL THOUGHT*, 3-27 (1986) (noting that modern society is governed by both the rules of capitalism and the rules of democracy, in a changing dialectic of conflict and accommodation. The postwar capital-labor accord was a specific institutional accommodation between the rules of capitalism and the rules of democracy, and its unraveling can be traced to the underlying dynamism of both). For a discussion of the erosion of the postwar system, see EDWARDS & PODGURSKY, *supra* note 2, at 14-60.

they will overlap and intertwine in regulating different aspects of the employment relationship. These sub-systems will include private-economy unions, unionized public sector employment, civil service, a casual ("sweat-labor") sector, non-union employment, and national and state regulation. This system also is likely to include a much-enhanced definition of individual rights in the workplace.¹⁹

The new industrial relations regime likely will include other elements as well, but my point is that it will be highly diverse. Any tendency to use a "one-size-fits-all" rule to organize all labor relations will be counterproductive. Unfortunately, it is precisely this procrustean mentality that dominates current labor law.

III. EPPs AND THE NEW INDUSTRIAL RELATIONS SYSTEM

A consideration of the future of employee participation schemes should anticipate the context of rapid transformation of the overall system of industrial relations. A discussion of the value of employee participation only in terms, for example, of its relation to unions, or to current National Labor Relations Act rules, surely is far too narrow an approach. While I doubt if anyone wants to see employee participation become another weapon employers might use to defeat unionization, the fact is that, for the overwhelming majority of private-sector workers, unionization simply is not likely to be at issue.²⁰ We should, for example, think about the recent decision in *Electromation, Inc.*²¹ from a broader perspective: how can we situate employee participation so as to contribute to a new and effective industrial relations regime?

This broad approach carries important implications for EPPs. First, a successful resolution of the legal and political issues must be acceptable to employees as well as to employers. This outcome corresponds to the long-term interests of employ-

¹⁹ For further discussion of this theory, see EDWARDS, *supra* note 13. Recent legal developments will produce some important changes in this area of the employment structure. In my judgment, if the courts are left to define and supervise these rights, the results, from an industrial relations perspective, will be very unfortunate, especially since superior alternatives are possible.

²⁰ See *supra* notes 3-9 and accompanying text.

²¹ 309 N.L.R.B. 990 (1992), *enfd.*, 35 F.3d 1148 (7th Cir. 1994).

ers, because the alternative appears to be increased regulation. Second, significant employee participation for seven out of eight private sector workers should not be held hostage to the National Labor Relations Act-derived bargaining rights of the one out of eight workers represented by unions. Third, the National Labor Relations Board is not the proper venue for these decisions, and courts are equally bad; rather, this is preeminently a legislative issue. Fourth, we probably need *different* sets of rules about employee participation for different employment situations.

Probably the most promising and challenging path to effective labor relations is to use the openings created by democratic forces in our society to create systems, including employee participation, that reproduce or mimic the collective bargaining framework. The original operation of the National Labor Relations Act was *stimulative* and *permissive*; it required or stimulated some actions, such as bargaining in good faith, and permitted diverse final outcomes, such as the content of the contract. The Act fostered decentralized agreements tailored to the specific circumstances of the industry, employer, and workers involved.

IN RIGHTS AT WORK: EMPLOYMENT RELATIONS IN THE POST-UNION ERA,²² I provide an example (that of employees' workplace rights) of ways to avoid the one-size-fits-all formulation. The "Choosing Rights" proposal would utilize employee handbooks to guarantee rights to employees, while preserving maximum flexibility for employers. The basic idea is simple. Every firm over a threshold size, for example, twenty employees, would be required by statute to have an employee handbook, or handbooks, stating the rights and privileges extended to the firm's employees. This handbook would be distributed to employees and job-seekers and would be on record as a public document. It would be recognized in law as a binding and enforceable employment contract.

An employer could adopt a handbook in one of two ways. First, the employer simply could choose and implement a "standard" handbook. For this purpose, a special public-private commission would be chartered to develop a set of perhaps ten or more prototype handbooks. Each handbook would provide basic workplace protections and rights while offering a distinc-

²² For a more detailed discussion of this proposal see EDWARDS, *supra* note 13, at 188-230.

tive and diverse combination of specific rights. Each type of handbook would provide a common, overall *level* of protections while offering its own distinctive *mix* of rights. Thus, for example, regarding employment security, one handbook might offer substantial severance pay, while another permitted dismissal for just cause only. A third might guarantee continued employment over a specified period and include the possibility of reduced hours or pay if the company sustained a loss. The employer could choose whichever standard handbook was most compatible with its enterprise's circumstances or philosophy.

Alternatively, the employer could write its own, specially-tailored handbook, which could be put into effect if the firm's employees ratified it. This option would allow the employer to specify those conditions, rules, terms, procedures, and rights the employer believed would be most helpful to the enterprise. Beyond the employer's knowledge that the handbook could be put into effect only upon the employees' approval, no restrictions would be placed on what the employer included or omitted from the handbook. Approval would be implemented by a simple National Labor Relations Board-supervised election asking workers to choose between the employer's tailored handbook and one of the standard handbooks selected by the employer. Thus, while free to write any specific provisions, the employer would be required to make its total package more attractive to its employees than at least one of the standard handbooks. On the other hand, the most adverse outcome for the employer would only be the imposition of the standard handbook the employer otherwise would have chosen.

Under "Choosing Rights," the locus of rules and rights formulation would move away from regulatory bureaucracies and into the decentralized private sector. It would allow for greater flexibility on the part of employers. Thus, the system would permit infinite variations in workplace protections, consistent with the extraordinarily diverse nature of American workplaces. This variation and flexibility could accommodate the diverse demands of various management philosophies, regional customs, production technologies, workplace cultures, and market conditions. It also would ensure basic workplace protections for workers. The employer's handbook in effect would become the workers' bill of rights.

Implementing "Choosing Rights" would call for further operational considerations. For example, one standard handbook could be designated as the "default" option; it would prevail in workplaces in which a recalcitrant employer, after a

reasonable period, failed to promulgate a handbook by either of the methods outlined above. The system would require rules about when and how an employer could change handbooks. In addition, enforcement procedures would need to be defined. It would be highly desirable to have available an independent arbitration service that emphasized getting disputes resolved quickly, simply, inexpensively, legitimately, and with the aim of getting the parties back to working together.

This new approach might open significant new opportunities for unions. "Choosing Rights" would not directly enhance the unions' ability to win over new plants for which they would be the exclusive bargaining agents. However, it would offer unions new ways to work on behalf of individual employees, thereby indirectly increasing unions' fields of operation. For example, unions could provide advice and assistance to individual workers in non-union plants concerning resolution of their grievances, they could lend their expertise to workers in writing employee handbooks, or they could assist workers in mediation and arbitration proceedings. Each of these opportunities might give greater substance to the concept of associational unionism, and unions could find their memberships growing *outside* of the National Labor Relations Act framework. It also would be surprising if, after having tended successfully to the interests of individual workers, unions did not find themselves in a stronger position to seek exclusive bargaining agent status.

CONCLUSION

In charting a course for the socially beneficial use of employee participation plans, we should follow an approach similar to that outlined above for "Choosing Rights." The introduction of stimulative but permissive rules to encourage employee participation — just as the National Labor Relations Act sought to encourage collective bargaining — would expand the possibilities for constructing an effective, new type of industrial system. The framework of the National Labor Relations Act is desirable, but its approach is not. Adjudicating the limits of employee participation plans through the Act's lens, as in *Electromation*, makes no sense.

Appropriate regulation of employee participation plans, then, would allow for substantial, firm-specific diversity. For example, regulation could provide standards for accountability and independence. Employers would decide whether to implement such plans. If they chose to do so and thereby obtained

the productivity benefits of a more engaged and committed labor force, they would need to abide by simple guarantees of representativeness and accountability. Rather than attempting to resuscitate the old National Labor Relations Act system, or to impose further "one-size-fits-all" substantive regulation, workers' advocates could choose between various methods depending on the specific purpose and circumstances of the intervention. To borrow from the old adage about British national interests, labor's advocates should have no permanent strategy, only permanent interests. Perhaps then we would see real progress concerning employee participation.