Some anxious thoughts on the future of labor arbitration

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As a labor-management arbitrator for more than 60 years, I have witnessed the practice change from an informal problem solving conference to a formal lawyered adversarial combat where winning preempts compromise. The contrast reflects the changing nature of the workplace and workforce, the altered priorities of the parties, the rising cost of bringing cases to arbitration, the changes in balance of power between the unions and employers and the shrinking role that unions have struggled to maintain in the increasingly antagonistic political and legal warfare of the current labor management relationship. All the players cite the external pressures that have hit the diminishing yet still respected venue of labor arbitration; there have been abundant proclamations of the value of the process, but it continues under siege at a time when the workplace is restructuring, when the workplace pressures on workers continue to accelerate and when there is little guidance or direction as to how to protect or salvage the process in our brave or brutal new economic world. We know the workplace is changing, we know the workforce is changing, we know the 1935 model of the NLRA is outdated and we know that workers increasingly demand “voice”, but we have little guidance as to how we can preserve, let alone expand the protections and benefits long accepted within the structure. We recognize that despite earnest commitments to cooperate to mediate and to settle conflict there remains need for a final decision maker to hold the parties to their agreed upon contractual commitments. And all proclaim that grievance arbitration has done that. But can it be preserved? Can we adapt or correct the old system? Should we start from scratch on a replacement? Can we learn from systems in other countries? Or can we craft a structure that will preserve the mutuality, the problem solving goals, the constructive role of arbitration as a continuation of the negotiating process to achieve greater workplace stability and harmony in an ever more fractured/fissured economy?

Whether or in what form arbitration survives depends on many variables.

The Changing Workplace

When the NLRA was enacted in 1935 the organizable workforce was concentrated in factories where automobiles, tires, garments, steel products were manufactured on assembly lines under the direction of supervisors with skilled specialists who kept the machines running. Workers with these diverse skills now had the statutory right to bring in their preferred union to vie for designation as their exclusive representative to negotiate with the employer over wages, hours and working conditions including a private arbitration to bring finality to workplace disputes. That model of a big factory with humming assembly lines, so common prior
to World War II was soon facing competition from more efficient factories arising elsewhere in the world closer to resources and new markets using workers paid at lower prevailing rates. Managements enhanced their profits by making their products abroad or by purchasing them from foreign vendors for sale in the US. The result has been totally changed US workplace. The gig economy, franchises, subcontractors, smaller shops, start-ups have replaced most of those assembly lines and mega factories of which we were so proud. At the same time, the growing service and high technology sectors of the U.S. economy were largely (not totally) unorganized. And with the decline in the portion of the workforce unionized has come the decline of access to arbitration to achieve and assure union management tranquility.

The Changing Workforce

With the decline in assembly line factories and manufacturing employment has come a decline in union membership. The number of organized private sector employees has dropped from 34% in 1954 to 6.4%, and with the infusion of public sector unions since the 1960’s results in a 10.5% unionized percentage of the workforce1 (compared to an average of 23% in European Union countries, and 79% in Norway)2.

Currently 59.7% of the US population is employed, 71% of those working are in service providing industries. More and more are self-employed or working in small enterprises or “startups”3.

With the decline in US industry and in union membership employees lost access to union negotiated benefits such as paid vacations and holidays, seniority, leaves, and grievance and arbitration procedures to assure enforcement of their collective bargaining agreements and protection of a just cause standard when disciplined or discharged. The majority of workers without unionized benefits has skyrocketed to nine out of every ten workers.

In the United States the statutory protections afforded to these non-union employees are minimal compared to benefits accorded workers in EU countries. We provide protections against various forms of discrimination, assuring minimum wages, and setting maximum work hours, but without union protection US workers are deprived of benefits that are guaranteed in most industrial countries. They also lack just cause protections against unfair discipline and discharge under our Employment at Will standard which grants employer far greater termination authority than in most other countries. Thus contractual benefits for many workers have been slashed since the days when unions were more robust and operating in a much more vibrant manufacturing sector. Now most workers lack the workplace benefits that

1 https://www.bls.gov/news.release/union2.nr0.htm
2 https://www.worker-participation.eu/National-Industrial-Relations/Across-Europe/Trade-Unions2
are the norm in other industrialized countries. Perhaps the most harmful impact of the drop in union membership has been their loss of recourse to grievance arbitration.

Political and Legal Pressures

The NLRA became our “National Labor Policy” in 1935 despite strong management opposition. Collective bargaining achieved credibility and respect when the US Supreme Court in the Textile Workers v. Lincoln Mills⁴ recognized the right of the parties to negotiate a system of binding arbitration. A viable system of labor arbitration to providing final and binding resolution of disputes as the substitute for wildcat strikes and workplace disruption benefited the whole society. But conservative forces have continued the fight to restrict the role of unions as the voice of the workforce by opposing unionization, resisting the negotiation of collective bargaining agreements and fighting back when unions seek to exercise their rights through the arbitration process. Conservative forces have been particularly successful in utilizing the judicial system and in recent decades, harnessing the their allies on the US Supreme Court in their campaign to impose mandatory individual employment contracts on those working in non-unionized enterprises forcing them to surrender access to statutory protections.

The Outdated NLRA model

It is clear that the NLRA model no longer fits our new employment landscape, five times larger that it was back then. Organizing is no longer done by handing out flyers on shift breaks at factory gates. Foremen of old are now as likely to be victimized by Board Room bosses as are rank and file employees. Grievance processing and arbitration have become adversarial warfare rather than the joint problem solving effort of early industry “umpires”. The cost of taking a case to arbitration has become so great that it is reserved for only the most contentious of cases. The US Supreme Court’s canonization of mandatory employment arbitration after Gilmer v. Interstate Johnson/Lane⁵ has empowered employers to impose employer controlled arbitration on an estimated 60,000,000 non-union employees⁶, more than four times the number protected by unions. The success of conservative employer groups in the political and legal realm has focused anti-union forces on collective bargaining and in particular of grievance arbitration as annoyances and as impediments to managements assumed inherent authority.

But Workers still want a Voice

Despite the decline in unions, numerous surveys show that workers do not subscribe to this imbalance and that they still demand a voice at work. The 2018 Pew Center survey on views of unions showed that 55% of Americans surveyed had a favorable view of unions compared to

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⁴ 53 U.S. 448 956, (1957)
⁵ 500 U.S. 20 (1991)
⁶ https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/
33% who had an unfavorable view. A 2018 Gallup poll showed that 64% of the public approve of unions, the highest level in last fifty years since that figure has been reported.

Tom Kochan and his colleagues at MIT in detailed surveys on the current state of voice at work. have found that a majority of workers believe they have less influence than they are due on benefits, compensation, promotions, job security etc., topics that are traditionally covered by collective bargaining. In seeking to alleviate this gap workers traditionally turn first to their supervisors and co-workers, but the research shows that in smaller numbers they also turn to joint committees, unions, grievance procedures, ombuds, or advocacy groups for support in protesting or seeking protection. While only 16% of that surveyed body chose unions as the preferred channel for their voice to be heard, Kochan’s survey of workers shows an increase of non-union workers interested in joining a union from 33% in 1977 to 48% in 2017, which with 83% of current union members preferring to continue their membership, shows a majority of workers prefer union membership. Although mutual resolution of disputes is certainly preferable, arbitration provides a binding and enforceable decision when negotiations fail. The 83% endorsement of unions by their current members shows their satisfaction with having access to finality in contractual disputes with employers.

These surveys, and the recent real life demonstrations of workers and supervisors walking off their jobs at Market Basket, and of professionals and executives ceasing work at Google, Uber and Amazon show that the demand for voice is real and far more pressing than mere survey results. The new activism undertaken by Uber drivers and tech workers demonstrates the release of pent up rage over many issues that are beyond the economic demands of traditional collective bargaining. Their global protests over sex harassment, retaliation, mandatory employment arbitration show a preference for solidarity unionism or “bargaining for the common good” over business unionism. Such an approach underscoring periodic direct action on societal as well as workplace issues portends continued disruption to keep employers from feeling too comfortable, but it also anticipates a level of perpetual widespread dissatisfaction that begs for effective channels of resolution enforceable through binding agreements. The inevitability of disputes, if only over issues of individual standing or survival in the employment of the future makes it crucial that that capstone of the dispute resolution structure be somehow reinvented. But can it be? Is there a future for arbitration as we struggle through the

decline in collective bargaining relationships in the face of ever greater evidence of the need for worker protection in our upcoming workplace landscape?

Crafting a new workplace dispute resolution model

If a new NLRA-type statute is to meet the societal needs we seek including binding arbitration, it will need to expand beyond coverage of 10% of our workforce to have all workers share in its benefits. It would need to include individual workers scattered around the nation, or the world. It should recognize the harm done by the concept of majoritarianism in individual enterprises when employers are relieved of contractual obligations if they can beat the union in organizing/ Perhaps it should consider the multiple union structures of European countries with collective agreements embracing all workers within an industry or sector to replace the competitive disadvantage of a single employer negotiating greater benefits than its industrial competitors. Perhaps it should recognize the commonality of interest between workers and their local low level supervisors and managers when drawing lines as to who is to be eligible to join unions and benefit from negotiated agreements now that management is increasingly concentrating power in far off board rooms. The community of interest standards should recognize that workers in our new economy have similar employment needs whether blue or white collar and whether in high tech or in manual labor. The debate over classifying employees as independent contractors because they work in disparate locations ignores their community of interest regardless of where they do that work. If industry wide agreements could be legalized it might provide the basis for a much broader worker protection by expanding arbitration to an entire industry and with it the assurance of just cause standards for discipline. It might also permit the invocation of statutory protections through sectoral bargaining with arbitrators handling more efficiently and promptly, statutory enforcement issues that could wind endlessly through courts and administrative agencies.

Such industry or sectoral bargaining as in Europe with multiple unions within an enterprise and industry would provide uniform terms of employment that would bind even the most recalcitrant employer; With working conditions established by industry wide negotiations there would even be an incentive for both labor and management to codify such benefits into statute to assure that no employer has an unfair advantage in competing for work with lower labor costs. It would assure an entire industry competing on a level playing field, and more importantly might be able to shift enforcement of those universal working conditions by a government funded system, perhaps even replacing private arbitrators by government funded judges in some form of labor court which would assure compliance with the statutes without imposing the cost of such justice on the employer and union.

All of the ideas mentioned above are now in active play—in debates and discussions not just among labor employment policy scholars but also among candidates for political office, in bills introduced in Congress, and among labor leaders and worker advocates operating outside of
the constraints of the NLRA. So it is time to bring similarly bold options for adapting arbitration to whatever world of work emerges out of these debates.

Our legal workplace protections are sparse compared to those provided by European countries, and while some might protest that workplace protections in wealthy coastal regions of the US are too expensive for adoption in our rural regions, the European Union has managed to develop basic or minimal workplace protections for the wide economic diversity of its member countries, while leaving room for negotiating even better conditions in various industry councils. Even though I suggest the dispute resolvers could be most efficiently provided through a labor court system, individual industries or even single enterprises might prefer to continue with a private system of arbitration by their preferred arbitrators than risk decisions by designated and unknown government judges.

Such expansion from the traditional enterprise or even sectoral bargaining over economic issues would permit unions to focus on many of the societal issues currently raised by the solidarity unionism of recent Uber and tech worker strikes. Integrating economic issues and those raised by solidarity unionists is far more likely to succeed when unions are in a strong position to initiate protective legislation and to use their power to challenge governmental and political power in legislatures and, assuming statutory success, through the courts.

Any new system must also include a system recognizing an employee’s right to be protected from discharge unless there is a showing of just cause. Our employment at will tradition runs contrary to practices throughout the world which require showing of standard reasonableness or fairness in the employers disciplinary actions. In the US unionized sector that standard is routine with employees having the right under their collective bargaining agreements to grieve disciplinary penalties up to a mutually selected arbitrator for final determination. In South Africa the Commission for Mediation and Arbitration has undertaken to provide that just cause standard for all employees, whether or not unionized with the government providing experienced mediators and arbitrators to resolve disputes over such actions. Government funding of such disciplinary challenges would extend the benefits of just cause determinations to many unionized as well as all currently non-unionized employees to achieve a benefit currently unavailable to most U.S. workers.
Conclusion
Many of the elements of “voice” which Kochan and others have highlighted as crucial for the future, need to be supported and enforced by a modern and binding dispute resolution system. The availability of a final decider is vital if there is to be finality when negotiations, group discussions, petitions and the like are unsuccessful in achieving closure. In our workplace of the future, the diversity of interest, location and skill and the need to remedy the failure of our current system to provide adequate protection to 90% of the workforce argues for extending just cause for dismissal to all workers enforced by either a system of specialized labor courts adapted to fit with the U.S. economy and/or the development of a new system of private arbitration that can adjudicate both just cause and alleged violations of statutory rights that is overseen and enforced by labor courts or the general judiciary system. Such a system would extend fair workplace conditions throughout the economy, enable all employers to compete on equal footing, and bring us to the higher standards of workplace protections that have long been extended to employees in the countries with which we trade.

But we cannot achieve any of these “improvements” unless we face up to the biggest obstacle in endeavoring to achieve such monumental changes. The political profile of the United States at present reflects the growing divisions across various societal and economic blocks. Gaining cooperation between the liberal forces that seek to improve the lot of the working electorate and the conservative forces that have long rejected even minimal progress in legislation and practices, has and will continue to be difficult, but, if the recent growth in interest in worker voice, support for unions, and direct actions of workers are an indication, perhaps not insurmountable. The need for a thriving economy and our leadership in the world dictate that this topic be subject to wider discussion and broad public debate. We are all to be participants in that uncertain economic future. Let’s talk now about how we can get there with the least disruption and conflict, for get there we must.