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by Richard Martin Lyon*

I have been asked to explore the effects of U.S. labor laws and the labor environment on North American competitiveness. First, I have to agree with the writer of the Washington Post who stated that everyone favors competitiveness but no one really knows what it means.

Fortunately, Professors Bruce R. Scott and George C. Lodge of the Harvard Business School come to our help (in their recent compendium U.S. Competitiveness in the World Economy) by giving us a good definition of the concept:

"National competitiveness refers to a . . . [nation's] ability to produce, distribute, and service goods in the international economy in competition with goods and services produced in other countries, and to do so in a way that earns a rising standard of living."¹

They explain that the "ultimate measure of success is not a favorable balance of trade, a positive current account, or an increase in foreign exchange reserves . . .” but “an increase in the standard of living.”² “To be competitive,” they write, “means to be able to employ national resources, notably the nation’s labor force, in such a way as to earn a rising level of real income through specialization and trade in the world economy.”³

I am a labor relations attorney and have for the past thirty years represented companies seeking practical solutions to the demands made by unions at the bargaining table. As an aside, I should warn you that I will not read to you a law journal presentation; rather, my remarks are intended to be in the form of personal reflections on the issues which confront us.

When I hear the word competitiveness, my mind’s eye goes immediately to closed manufacturing plants in Canton or Akron, Ohio, but then turns quickly to thriving automobile assembly plants in Marysville, Ohio and Smyrna, Tennessee. The closed plants are American; the prosperous facilities employ Americans, but are built by Japanese investors who

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² Id. at 15.
³ Id.
have confidence that they can make money in industrial America. What has happened here? The successful operations seem to be propelled by the self-assured energy of its management style. Contrast this with the adversarial spirit of labor-management relations that has left its mark on the energies of American managements.

If we look at the record of the United States and Canada for the twelve years beginning in 1973, we find that "the poorest performance in manufacturing productivity . . . among the major countries, was Canada's. Having fallen into the habit of depending on its natural resources to generate its wealth, Canada has been careless about industrial efficiency. That carelessness had made its records even worse than those of the United States, the runner up for last place." 4

In March of 1987, an institutional television advertisement about competitiveness got a lot of play. Some of you may have seen it. Some time in the future, a skinny man sits with an old blanket draped over his shoulders; he looks down and out, but speaks articulately. The people in Washington, he says, had promised to make things better for Americans in 1987. But the problems had continued: farmers going under, industries disappearing, cheap goods dumped on our shores. Well, they muffed their chance to correct things, says the man, as he pulls the blanket close around him—obviously victim to an immense drop in standard of living. The message is we must do things differently.

Few of us believe that tariff barriers are the answer to the problem of international competition for a country that seeks to be effective in world markets. The same goes for nontariff barriers such as we find in the automobile industry. The cost of the voluntary restraint agreement on Japanese automobiles to the American consumer is estimated conservatively to exceed one billion dollars annually. The benefit to the U.S. producers is about $115 million annually. It was sad to see General Motors, Ford, and Chrysler urge Secretary of the Treasury James Baker to pressure Japan to make their cars more expensive for the U.S. consumer. Notwithstanding the 58% appreciation of the yen, Japanese prices increased only 17%. "The pricing mechanism just isn't working," a Chrysler representative commented.

Forcing us to buy American, if we are Americans, or to buy Canadian, if we are Canadians, by fiat rather than by price or quality competition, will surely doom each of us to higher prices and to lower standards of living. Besides, what happens when foreign competitors bring their factories to our shores and expatriate their profits? Will we bash them for that also? Competitiveness, not protection, is the key to our economic future.

If you don't take anything else away from my talk today, I hope you will remember this one point—it is in fact the key thought that I came here to deliver. We will not raise our productivity until we determine

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how our legal structure, and especially our labor laws, sets limits on what management and labor can do to influence competitiveness. Should we discover that our labor laws are not designed to deal with the competitive pressures experienced by American business, we must then change them. We know that the labor relations systems which prevailed for many years in the U.S. auto and steel industries, on the railroads, and in construction, contributed powerfully to the loss of efficiency of those industries. My belief is that the same is true nationally. The way we manage people has an effect on our competitiveness. The time may have come for a considerable federal deregulation of labor relations, as we enter upon a new and very different political era.

Professor Walt Rostow in Austin, Texas, has described this new political era as one in which America will be preoccupied by increased economic competition from abroad, and the need for cooperation at home. Rostow writes:

I see this new political phase of global competition and domestic cooperation as the third definable phase of politics in the west since the late Eighteenth Century. The first phase focused primarily on issues of growth. The great debates were over measures to support industrial versus agricultural interest, over tariff versus free trade, over the role of government in building turnpikes, canals and railroads. The second phase was the welfare state. By the 1870s it was apparent that an industrial system had triumphed in Western Europe and the United States... The issue of whether resources should be allocated to welfare or to private consumption and investment remained at the center of politics... for a century. The third phase will be about maintaining our standards of living in an increasingly competitive world economy. The fate of the advanced industrial countries now depends not on the power of conservative versus liberal politicians but on how the political process responds to the new question of economic competition. Rostow seems to tell us that it is important not to forget our history, but to learn from it and to acknowledge that new realities require nonhistorical solutions.

When the Administration transmitted its major competitiveness policy to the Congress in the Trade, Employment and Productivity Act of February 1987, not a word was said about U.S. labor relations. Yes, the American worker is mentioned twice in the first two paragraphs of the President’s message, but only rhetorically.

Similarly, House and Senate trade leaders have so far avoided a direct reassessment of government regulation of labor relations. The competitive gap will, however, force leaders and business to recognize that we can no longer focus solely on unfair foreign trade practices and macroeconomic adjustments to solve the trade problem. We must also look at increasing our productivity.

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Examination of productivity surely invites reconsideration of legally required collective bargaining which we know has resulted in increased labor costs, inefficient work practices, and loss of jobs. It borders on the unpatriotic to ask, what went wrong here? Has traditional collective bargaining given a false sense of security to workers? Has collective bargaining given unions veto power over the viability of business enterprises under the guise of negotiating "terms and conditions of employment?" Should the special status of the unions be continued or should government regulation give more recognition to the union-free sector of the economy? Has the present form of regulation discouraged new approaches to human resource management? Has the scope of collective bargaining been sufficiently reshaped by the Labor Board and the courts so that hereafter managers can manage and not litigate? Or, does the right to manage continue to depend on the politics of the NLRB?

The U.S. Department of Labor is currently studying labor management cooperation and the law, but without a mandate from the White House. The Undersecretary in charge let it be known to management and labor that this is not law reform! We can agree that there never is a convenient time to make changes in this emotion-charged field. Interestingly enough, however, there are things happening out there which will never bring back employment law and labor relations as we knew it just a few years ago.

Let me describe to you several of the elements that make up this new situation. First, there is the fall from prominence of organized labor; second, the nonunion sector is booming; third, the courts and the judges are creating individual employment rights for all of society; fourth, the stream of new protective employment legislation continues unabated. The quickened spread of federal and state legislation produces new job security and employee benefit guarantees. And, fifth, a noticeable shift in legal power from the unions to business has occurred at the NLRB.

1. The Unions

The state of the unions in the United States is best illustrated historically and by comparison with developments in Canada. Before the National Labor Relations Act (NLRA) came into being, no more than 13% of the nonagricultural work force in the U.S. was unionized. In the first year of the NLRA, representation climbed to 35%. The last time that U.S. and Canadian union density was comparable was in 1957, when U.S. union membership, already on a downturn, stood at 32.8% of the nonagricultural labor force. In Canada the figure was 32.4%. By 1983 the Canadian percentage rose to 40.0 and the U.S. was down to 20.7. The United States this year is well under 19% while Canada still holds at

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The decline in the United States can be explained by the fact that unions are increasingly out of step with the marketplace; but then the Canadian marketplace is not all that different. Could it be that the union-supportive legislation of our neighbor to the North is maintaining an institution which appears to be doomed here? That seems to be the view of Professor Paul Weiler, a Canadian on the Harvard Law School faculty and an ally to the unions. Said Professor Weiler, "[c]ontemporary American labor law more and more resembles an elegant tombstone for a dying institution .... [T]he fraction of the workforce actually engaged in collective bargaining is steadily declining." He attributes this to "skyrocketing use of coercive and illegal tactics" by employers resorting to discriminatory discharges to prevent unionization of their employees. To redress the situation in the United States, he would take away the right to a union certification election, and where elections are held, deny the employer the right to campaign against the Union. He would want first contracts to be arbitrated by government in the absence of agreement, and force the union shop on the employers. In this way possible illegalities are precluded and the unions would be guaranteed a presence.

I can only say that in my 30 years of representing employers in all phases of union relations, I have not yet had one precertification election set aside because of illegalities by an employer, nor can I think of any situation where the Regional Director of the NLRB gave the employer more than three to four weeks in which to campaign. In fact, more often than not in recent years it was the unions who asked for extra time to electioneer. Also, recent industrial relations research shows that the labor law changes suggested by Weiler are unlikely to revive unionism.

2. The Non-Union Sector

This brings us to the second development affecting the work environment. A recent study by three M.I.T. scholars offers an illuminating analysis of the emergence and growth in the United States of an alternate nonunion system of industrial relations. This system, which encompasses about 25% of the industrial workforce, is more than a response to the way Japan and some leading European companies operate. This is a native American development, going back 20 to 30 years in companies

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8. Id. at 1769.
10. Id.
11. Id. at 1776.
such as IBM, Motorola, Texas Instruments, Hewlett Packard, and others. These companies developed personnel management innovations that made union representation less necessary, and also less likely. The M.I.T. Research Group predicts that, with the continuation of competitive pressures and in the absence of change in labor laws, these alternate nonunion management systems may cause private sector unionism to decline to less than 15% within the next three years! This decline will be yet steeper as more foreign owned industrial operations, as well as American companies, give greater priority to new, experimental structuring of work and non-adversarial personnel management techniques. The M.I.T. report notes that, notwithstanding union difficulties with representation election processes and sometimes illegal employer behavior during the election and initial bargaining phases, “taken together, the effects of these problems with the law . . . have been small compared to the larger forces affecting declines in union membership.”

They emphasize “that the decline of unionism and the growth of the alternate nonunion system is due to the larger environmental changes and fundamental values and strategies . . . [rather] than management’s specific tactics in opposing unions in certification and decertification elections.”

3. The Role of the Courts

Let us turn to a third trend affecting the work environment. If you consider the National Labor Relations Act of 1935 as the first revolution in employee rights in industrial America, then the events now taking place in courthouses all over the country can properly be called America’s second revolution in employee rights. The first revolution created collective rights; the second revolution is all about individual rights.

In this, the second revolution, the beneficiaries have been factory workers and office workers, salesmen and nurses, vice presidents and general managers, cashiers and accountants. What these people have in common is that they believe they have been wrongfully terminated by their employers for a bad reason or for no reason at all, and at times in violation of a commitment made to them when they were hired. This commitment may range from a remark made during an interview to promises contained in an employee handbook.

The courts apply several different formulas in fashioning a new code of individual employment rights and ask questions such as: was there an

13 See generally id. at 30-37. Given the steady decline of private sector unionism over the last 30 years, and the continued reluctance of Congress, the NLRB or the unions themselves to effect a reversal of this trend, the process seems likely to continue at a rate close to its average yearly drop.
14 Id. at 78.
15 Id. at 79.
17 The reasoning behind this assertion is delineated in the following textual material.
implied contract of employment protecting the employee? Did the termination violate public policy? Was there in the employment relationship an understanding of good faith and fair dealing? Did the employer have a good and proper reason for terminating the employee? Occasionally a court will simply inquire whether the employer's action can be morally justified. This is a very long way from the old common law principles of employment which was mutually terminable at will.

In my own state, Illinois, the State Supreme Court recently held that employee handbooks and other personnel policy statements can create enforceable contractual rights so long as the language of the policy statement contains a promise clear enough for an employee to accept; the promise has been disseminated to the employee to make him or her believe it to be an offer; and the employee accepted this offer and acted in reliance on the offer. 18

Some courts go so far as to award damages on the theory of negligence. In a Montana case last year the court described the employer's negligence as his failure to review the employee's prior performance and work history. 19

How much further this new common law will expand individual employment rights is difficult to predict, but I can offer the following:

1. The creation of an administrative mechanism to take these cases off overloaded court dockets is likely;
2. The creation of new workplace rights to a smoke-free environment and protection against exposure to AIDS can come soon.

Judges have accepted the task of ruling on individual workplace disputes, a function previously performed only by arbitrators in the contest of union grievance procedures in a labor agreement and by the court when asked to enforce employment agreements.

4. Proliferation of Federal/State Employment Standards Laws

A fourth noteworthy trend is the proliferation of federal and state legislation which protects the individual against discrimination in employment and provides the assurance that employee benefits of those employed and of retirees are secure.

No employer with legal savvy would today discharge or discriminate against an employee on the basis of race, color, age, religion, sex, national origin, physical handicap, mental limitation not affecting job performance, military service, garnishment of pay, marital status, pregnancy, work-related injury, in some states refusal to take a lie detector test, political activity, sexual preference or complaining about unsafe

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working conditions.\textsuperscript{20}

The entire area of pension and welfare benefits has undergone substantial revision in recent years and will continue to change for the foreseeable future. The policies behind these changes include: providing employee benefit security for older workers; providing protection for women and spouses; and assuring broad coverage and equitable benefits, not only for key employees.

5. \textit{The Shifting Balance of Legal Power}

There is the shift which has occurred in the balance of legal power from the unions to management in the application of the National Labor Relations Act. This trend can be somewhat ephemeral because it is tied to our prevailing political atmosphere. The scope of collective bargaining has been debated since the 1930s. In recent years, however, the NLRB has clarified how far collective bargaining can intrude into business decision-making. If we revisit the crucial \textit{Jones & Laughlin} decision which fifty years ago upheld the constitutionality of the National Labor Relations Act,\textsuperscript{21} we find Chief Justice Hughes writing that the NLRA does not "impose collective bargaining upon all industry regardless of the effect upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce ..."\textsuperscript{22} The theory of the Act was that the opportunity for negotiations with representatives of employees would promote industrial peace, and bring about the adjustments and agreements which the Act itself did not compel. Yet it took until 1981 for the Supreme Court to fashion a definitive test for determining whether a business decision is a subject of bargaining.\textsuperscript{23}

The Court in \textit{First National Maintenance Corporation v. NLRB}, devised a three-pronged test. First, the subject must be amenable to resolution through the bargaining process. Second, the business decision must have a substantial impact on the continued availability of employment. Third, the benefit, for labor management relations, must outweigh the burden placed on the conduct of the business.\textsuperscript{24} If any one of these three elements is missing, the business decision is not a mandatory subject of bargaining.

The Court identified typical considerations which exempt business decision-making from the requirements of bargaining:

- the need for certainty;
- the need for speed;

\textsuperscript{20} Due to the abundance of legislation enacted to protect workers from discrimination, the willingness of courts to entertain workers' complaints in this area and the litigious nature of modern society, employers are increasing less able to evade legal consequences resulting from their discrimination against their employees and prospective employers.

\textsuperscript{21} NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1936).

\textsuperscript{22} \textit{Id.} at 31.


\textsuperscript{24} \textit{Id.} at 681-83.
- the need for flexibility;
- the need for secrecy in meeting business opportunities;
- significant tax or securities consequences that hinge on confidentiality such as the timing of a plant closing or a reorganization of the corporate structure;
- where publicity could injure the possibility of a successful transition or increase economic damage to the business, and
- the lack of any feasible alternatives, so that even good faith bargaining would be futile and cause additional loss.25

Unfortunately, you may not know where you stand in any particular situation until after you have litigated your case.

Since the Supreme Court spoke, the NLRB has fairly consistently adopted the view that all decisions which affect the changing scope, direction or nature of a business are exempt from bargaining. The NLRB now recognizes that if the business decision is of the kind that a union cannot offer useful alternatives, negotiations are not necessary. But the employer must still deal with the union concerning the effects of such business decisions on the employees, for example whether to grant severance pay, offer employment elsewhere, etc.

The NLRB has also extended the options available to an employer when agreement cannot be reached, and the union engages in a strike. In the United States an employer faced with a strike can continue to operate and hire new workers as strike replacements. As of last year, the NLRB approved the use of temporary replacements to continue business operations during a lockout. The Board agreed that the use of temporary employees serves precisely the same purpose as the lockout—that is, to bring economic pressure in support of the employer's bargaining position.

In one important area, the Labor Board and the Court have not made any movement and have in fact reiterated the restrictions of the lawmakers of the 1930s.

Joint employer-employee committees, quality-of-worklife programs, and various other forms of participative, cooperative management continue to be discouraged by the NLRB. They are still treated as old time "company unions" and "employee representation plans" and subjected to dismantlement as employer-dominated labor organizations. All this is because of a definitional, but intentional, quirk in the NLRA. Implementation of such programs, particularly when unilaterally established by a nonunion employer, turn on an interplay of the definition of the term "labor organization" in the Act, and the unfair labor practice provision which prohibits employers from dominating or interfering with the formation of any labor organization. The Act defines "labor organization" sufficiently broad to include employee involvement plans, even

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25 Id. at 682-83.
though these have few of the attributes of traditional unions. The Board then proceeds to equate employer initiatives with unlawful domination and support of these labor organizations. Only in a few exceptional cases has the Board looked the other way. More frequently, the record of the Labor Board and the courts is not encouraging and I am not aware of any case in which the Labor Board promoted the cause of the new cooperative programs.

I find it particularly difficult to understand why the present Administration has not made any efforts to address this question. In 1947, when the Taft-Hartley debates took place, the bill which evolved into the first major revision of the NLRA would have excluded employee representation plans from the unfair labor practice prohibitions of section 8(a)(2). This is the section which deals with employer domination of the broadly defined "labor organizations." The effort failed in 1947 because of strong union opposition. Yet here we are 40 years later with an Administration espousing free enterprise and deregulation, yet manifesting not the least interest in articulating a national labor policy which would advocate productivity enhancing employment practices. As was noted by a federal judge:

> To my mind an inflexible attitude of hostility toward employee committees defeats the Act. It erects an iron curtain between employers and employees, penetrable only by the . . . bargaining agent of a certified union, if there is one, preventing the development of a decent, honest, constructive relationship between management and labor. The Act encourages collective bargaining . . . The Act does not encourage compulsory membership in a labor organization.26

Would it not have been easy to resume the unfinished task of 1947, and bring the law into line with the competitive world of the 1980s?

Professor Richard Epstein of the University of Chicago Law School was correct when he noted that "[m]aking employer sponsorship of worker participation an unfair labor practice protects not the workers in the plant but rather the unions that might want to organize the workers."27 We have yet to hear from the White House.

As we enter the new political era of global competition and domestic cooperation, the hard question that must be asked and examined is whether cooperation can be achieved through outmoded laws or whether new ways, including a partial deregulation of labor relations, is more likely to lead to the attainment of competitiveness.

I believe that in the final analysis the success of any enterprise will depend on the human relations skills, on the technical abilities and on the plain hard work of its managers, and on the philosophy of its leaders. The law will catch up sooner or later.

If it does not, I have another, and more cheerful note upon which to

end. A few weeks ago the financial correspondent of the London Financial Times characterized Prime Minister Thatcher's most important achievement as an accident. Anthony Harris wrote: "Mrs. T. never meant to push the private sector to the very brink of bankruptcy in 1980 . . . and it was obstinacy as much as anything which inspired her to leave companies to work out their own salvation."\(^{28}\) It worked though. Defeat seems to provoke economic miracles.
