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**Edited Excerpts**

# Collective Bargaining and Individual Rights: The Changing Dynamics of Workplace Dispute Resolution

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In 1966, when labor law and collective bargaining were flourishing and at their peak, union density was 35 percent in the private sector, and the United States had a positive foreign trade balance. Manufacturing accounted for 70 percent of private-sector jobs, service accounted for only 30 percent of the jobs, and the most advanced piece of information technology in the workplace was an IBM Selectric typewriter. There was no Internet, there were no personal computers, and laser technology had yet to be adapted. Collective bargaining was thriving at the time, and nobody predicted the diminution of it. The force and the effect of the National Labor Relations Act, the Labor Management Relations Act, and the FMCS were vital in our workplaces. It was anticipated that this trend would continue, and grow moderately, if not significantly.

The birth of labor law came with the dramatic passage in 1935 of the Wagner Act and it replaced the Law of Master and Servant. The Master and Servant doctrine was an individual concept with some subservience connected to it. Employers and individual employees worked out their employment relationship one-on-one. The Wagner Act washed away what remained of the Master and Servant doctrine and gave us the law of collective bargaining, of majority interest in the workplace. Collective bargaining worked wonderfully; it is a system of workplace democracy where dispute resolution still works well, principally because the parties create living agreements, where dispute resolution procedures control all aspects of the workplace. The collective bargaining agreement was like a workplace constitution, giving life, practical definition, and application to the phrase "good faith bargaining."

## Collective Bargaining

The system of collective bargaining, unfair labor practices and the role of FMCS, has not changed. The system has, and continues to be adversarial because, when collective bargaining was created, it was believed that capital and labor would be eternal enemies or eternally in conflict. Thus, a system of law and regulations, and federal agencies like the FMCS, were created to take that conflict out of the streets and channel it into collective bargaining and lawful strikes, walkouts or economic pressure.

In Europe, they took a fundamentally different tack. Europe elevated labor over capital and determined that people must control the workplace, not capital. In the United States, we decided not to elevate labor over capital, but we determined it equally inappropriate to elevate capital over labor. We desired a balanced approach. Our laws, practices, and structure were designed to maintain the balance so that employees, in a collective sense, with union representation, would be able to bargain on a relatively equal footing with management. That balance can be struck, and maintained, if an employer and the union are able to control the factors or elements that affect the day-to-day operation of the company.

However, almost overnight, the balance seems to no longer be there. The parties are facing certain externalities that they are powerless to control. Certain external pressures burdens employers and unions alike and neither side has the capacity to control them. The most obvious and current external pressure is the crisis in health care costs. The parties are wrestling over that issue in all sectors of the economy. Labor and management are having a difficult time controlling health care costs because the escalating cost of health care is beyond either party's control. American employers are at a competitive disadvantage because our competition abroad has health care costs covered by the state. Until we have a comprehensive national approach that changes the health care delivery system, decides who pays for the delivery of it, and determines how it is distributed, it's going to be a constant problem at the bargaining table. The costs are going to continue to escalate and the parties at the bargaining table are going to continue arguing, pushing back and forth against

each other to see which side pays. This is an example of the parties lacking control over matters they are required to bargain.

The triumph of capitalism, the elimination of economic borders, and the revolution of technology have changed the entire landscape for bargaining as well. When competition is global, when jobs are so knowledge-infused, when technology makes it so easy to produce or supply or create here or there, only the most efficient and productive employers survive. This kind of competition forces companies to be more productive and more efficient, and it causes them to engage in what is now termed "lean production" or the "lean provision of services." Companies decide what goods or services to provide, based on their efficiencies and the profit that they can derive from lean production. Efficient production pushes traditional employment relationships aside and favors contingent workers, temporary, or part-time employees who supplement the core workforce for only a short period of time when the employer feels the pressure to increase efficiency. Thus, there is a growing component of skilled people roaming our economic landscape working for one employer today, but another tomorrow. Our laws, our structures, and collective bargaining don't deal well with this kind of temporary employment relationship, and we need to find a way to work within this new framework.

**Collaboration, a Key Element**

I submit that collaboration is the key element in a relationship between the employer and a union representing its employees. An employer that is plagued by strikes or lockouts is destined to be replaced by some other employer, whether that employer is across the street, across town, across the country or across the ocean. That puts great pressure on efficiency, and requires cooperation within the employer-union network to succeed in this competitive environment.

Even if there is no union representing an employer's employees, inefficiencies caused by poor employee relations can result in the employer falling into disfavor among the network of other employers, to whom

it wants to sell or provide its goods or services. Technology makes it so easy for a customer to go some place else, if necessary. The whole world is the venue from which the replacements can come in the event of a work stoppage. Unions have to figure out with employers a way to be efficient and productive, or neither will be in business any longer. At FMCS we become counselors and consultants to organized employers so that they and their unions, together, find a way to collaborate and survive in this new economic landscape.

It is an irony that we began the 20th century with the individual master-servant relationship, but by the middle of the 20th century, the collective took over, through the Wagner Act. And by the 21st century, individual interests and rights are proliferating in the workplace, and it is those rights that are causing the most problems in the workplace. FMCS was created to deal with collective disputes, but the greater harm to the economy in this new century might well be the millions of pin pricks caused by individual employee claims (such as employment discrimination claims under Title 7). They are much less measurable, but they are very harmful in the aggregate, and they are much more elusive and difficult to prevent or to resolve. Unions have stayed out of the individual employment dispute world, unless a collective bargaining agreement or grievance procedure is involved. For the most part, unions have sat on the sidelines since 1964 with respect to employment discrimination under Title 7.

Litigation involving individual employee claims is exploding, and the court system is the venue for enforcement of these non-collective disputes. Employers spend enormous sums of money in deterring, responding to, losing, or winning these lawsuits. A claim that goes through trial in the federal courts can involve defense costs in the neighborhood of $250,000, win or lose. Only employees whose claims are valuable enough, dollar-wise, can attract a good lawyer. Accordingly, the vast majority of workplace claims, good or bad, simply have nowhere to go. At the FMCS, we would like to do something about that.

We know that a successful organization is one that doesn't avoid or shun conflict. It doesn't

necessarily revel in it, but recognizes that conflict is a human condition that can't be eliminated. It is produced by our diversity, by our different interests, and it derives from who we are. In an organization, it can be adapted and managed to be helpful instead of hurtful.

**Dynamic Adaptive Dispute Systems (DyADS)**

At the FMCS, we have created something called DyADS, Dynamic Adaptive Dispute Systems, designed to manage conflict in the workplace, as it relates to employment discrimination claims. A DyAD, in the lexicon of organization development, is two independent entities working together as a pair. At FMCS, our DyADS pair is labor and management. A dispute resolution system can be complex, but it should also be adaptive. Any such system cannot be effectively controlled by fiat or by centralized commands. Centralized command economies don't work, and centralized commanded employers don't work either. The work environment, and dispute resolution systems, should change incrementally and non-linearly.

Conflicts occur every day between employers and employees. We would like to assist, encourage and develop pilot programs for employers and unions to develop their own adaptive dispute resolution system. The DyADS system will have a number of foundational elements:

(1) We will use an inclusive process to develop it. The system has to allow for conflicting parties to decide how they want to resolve workplace issues that fall outside the scope of collective bargaining. They should have more than one option in resolving disputes, but whatever option they chose, it must have a neutral quality to it. There can be an ombudsman or an office of neutrality within the employing organization. That neutral function will be critical and key to the development of this system.

(2) Another foundational element is the requirement that the parties "adapt" it; they have to continually review it and refine it.

(3) And, because we're doing this in an organized setting, a DyADS program must stay away

from interfering with the grievance procedure or the rights established by collective bargaining agreements. It must also avoid violating employees' statutory rights to redress in the courts.

(4) In my view, employers who set out to develop an internal dispute resolution procedure with an eye on avoiding court litigation are focusing on the issue wrongly. If you develop a system that is adaptive in your own organization, and it is well-functioning, employees and managers alike will ultimately grow to revere it, and it will have an effect of eliminating the grotesque aspects of our enforcement system in federal litigation. But, at the outset, it shouldn't be adapted or adopted simply to avoid the courts.

The FMCS's role is to provide counseling services to the management and labor to assist them in developing a DyADS program. We will train our personnel for it and we will help the parties evaluate the effectiveness of their program. If it's successful in pilot projects between unionized employers and their employees, we might consider taking it to the non-unionized sector, but only if we can do so without it becoming a union-avoidance program. Adopting this program to avoid unionization is the wrong approach. DyADS should be adapted simply because it is the right thing to do in the workplace, and not to avoid something else.

**Law Students**

Where does that leave the lawyer, those of you who will be lawyers? The best service a lawyer ever gives to his or her client is to be a wise counselor. The primary function of the lawyer is as wise counselor. In collective bargaining, that means you move your union client or your management client away from the adversarial fight and move them into a collaborative mode. Convince them that is the way they will survive. At Georgetown, you're getting an outstanding introduction and a send off into the law and its critical role in our society and in our economy and all of those ramifications.

Thank you.