Author: Joseph R. Grodin
Source: Comparative Labor Law Journal & Policy Journal
Citation: 20 Comp. Lab. L. & Pol'y J. 29 (1999).
Title: Some Thoughts on the American Model

Originally published in COMPARATIVE LABOR LAW JOURNAL & POLICY JOURNAL. This article is reprinted with permission from COMPARATIVE LABOR LAW JOURNAL & POLICY JOURNAL and (University of Illinois at Urbana-Champaign) - University of Illinois College of Law & International Society for Labour Law and Social Security.
SOME THOUGHTS ON THE AMERICAN MODEL

Joseph R. Grodin†

To what extent would Britain be well advised to follow the American model? The answer depends upon two further inquiries.

The first has to do with differences between Britain and the United States—differences in legal history, differences in the institutional roles of government, employers, and unions, as well as differences in the political environment. Even if American labor law worked perfectly in the United States (however we define working perfectly to mean), the question would still exist: whether the similarities between the two countries provide sufficient basis for believing that it would work optimally in Britain. That is a question I would leave to persons more familiar than I with how the two countries currently compare.¹

The second inquiry is one on which I claim greater competence, and that is the extent to which the American system works well in the United States. Many American commentators (including Professor Gould) have strongly criticized aspects of the American model, and our British colleagues would be well advised to consider and evaluate that criticism before they leap to apparently greener pastures.

There are several levels of critique. One accepts the fundamental premise of exclusive representation on the basis of majority vote expressed through secret ballot elections, and focuses upon the procedures which implement that premise. The Commission on the Future of Worker-Management Relations, appointed by the Secretaries of Commerce and Labor and chaired by the distinguished labor economist and former Secretary of Labor, John T. Dunlop, (the eponymous “Dunlop Commission”), noted in 1994, that managements had in-

† John F. Digardi Distinguished Professor of Law, University of California, Hastings College of the Law; former Associate Justice, California Supreme Court.
¹ Like Professor Gould, I spent some time at the London School of Economics, working on a PhD in Labor Law and Labor Relations, but that was eons ago, and while I am familiar with historical differences between the two countries I cannot claim to be knowledgeable as to more recent British developments.
vested so heavily in campaigning against worker representation that initial bargaining relationships, where established, often commenced in an atmosphere of heightened hostility and that fully a third of new bargaining relationships failed to result in a collective bargaining agreement.\textsuperscript{2} In this arena, one finds the following typical complaints, all of which, in my judgment, have considerable merit:

(1) The elections process is too slow, allowing employers opposed to unionization too much time in which to campaign, and perhaps to intimidate;

(2) Access by unions to workers, which have been shaped by legal rulings based on rigid deference to employer claims of property rights, is far too limited;

(3) Remedies for employer unfair labor practices are too slow in coming and woefully inadequate when they arrive.

The National Labor Relations Board, at least in recent years, is not primarily to blame for these deficiencies. Under Gould’s chairmanship, and with the cooperation of an active General Counsel, the Board has managed to speed up the election process somewhat and to seek interim injunctive relief in a greater percentage of unfair labor practice cases. But the Board’s hands are tied by a statutory scheme, and by court interpretations, which make it difficult even for a sympathetic agency to expedite elections to the extent that expedition is needed, or to allow for access by union organizers except in the most extreme situations, or to provide remedies that are adequate for the purpose of either compensation or deterrence. Proposals have been made for reform, but in the current political climate they have little chance of success.

A second, and deeper, level of critique questions the adequacy of reform measures to offset the coercive effect of anti-union campaigns waged by determinedly anti-union employers, and on that basis questions the desirability of relying upon secret ballot elections as the exclusive method for ascertaining majority support. Instead, these critics urge modification of the American system to require recognition on the basis of other evidence, such as a neutral check of written authorizations signed by employees. In this respect, the White Paper, in its proposal for automatic recognition where over half the workforce are in union membership already,\textsuperscript{3} is an improvement over the current situation in the U.S.


\textsuperscript{3} Transformation of Labour and Future of Labour Law in Europe, Final Report, Sec. 4.18 (1998). Insofar as “union membership” is taken to include the obligation of financial support,
1998] SOME THOUGHTS ON THE AMERICAN MODEL 31

It is the third, and deepest level of critique, however, which deserves to provoke the most thoughtful consideration before Britain buys into the American plan, and that has to do with the premise that recognition, and bargaining, should take place only where a union has been selected by a majority of employees as their bargaining representative.4 In the United States, this premise has resulted in a situation in which roughly 90% of the private sector work force are entirely without meaningful representation. It might be argued that this state of affairs merely reflects the degree of contentment which American workers have with the status quo, but such an argument is quite clearly contrary to available evidence showing that a great many workers would prefer some form of representation in the workplace.5

A number of American scholars, responding to this problem, have advocated institutionalizing some form of representation in the non-exclusive workplace, either on the basis of unions representing and bargaining on behalf of those workers who choose to be union members,6 or on the basis of some form of mandatory worker participation programs.7 Against the background of American labor law history, such proposals are generally viewed as eccentric if not radical, but given Britain's quite different history, and its present posture of considering a new direction, neither the criticism of the American experience nor the suggestions for reform should be ignored.

the White Paper proposal may impose a greater burden upon unions than solicitations for signatures upon authorization cards, but to the extent that is so it is arguably a more reliable indicator of support.

4. Where a union has been selected as bargaining representative, whether the principle of exclusivity which attaches should be as near-absolute as it is under the American system, barring any meaningful discussion of working conditions by individuals or groups within the bargaining unit without the presence or consent of the union, (see, e.g., Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1975)) is a different question, and one that has been raised by a number of American critics.

5. The Dunlop Report, supra note 2, at 17, noted survey data indicating that 32% of workers surveyed would vote for a union if an election were held at their workplace.

