

State of New Hampshire
Senate Committee on Commerce
April 5, 2011

Prepared Testimony of Prof. Karl E. Klare Concerning
House Bill 474-FN as amended by the House¹

May it please the Committee, my name is Karl Klare. I am Professor of Law at Northeastern Law School in Boston and a member of the Massachusetts Bar. I have spent most of my career in academic life specializing in labor and employment law. I am honored to appear before you today.

Whatever one's views on the emotive right-to-work issue, I respectfully urge you to set House Bill 474 aside because of the damaging and ill-considered side-effects it will have on other aspects of New Hampshire's labor-management legislation. HB 474 attempts to achieve its goal by altering a single, but critical component of New Hampshire's complex system governing labor relations, the principle of exclusive representation.² New Hampshire has carefully crafted its public sector labor relations system on the basis of the federal model. For generations, now, the exclusive representation principle has been integral to the systems that guarantee citizens uninterrupted continuity of production in the private sector and uninterrupted service and high quality in public service. Tinkering with a single component of the delicate institutional balance enacted by the Legislature will inevitably cause chaos over a long period of time as the rest of the system adjusts. Eliminating or watering down the exclusive representation principle will produce what the US Supreme Court described as the:

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² See, e.g., RSA 273-A:10(IV). The parallel provision of the National Labor Relations Act is NLRA § 9(a), 29 U.S.C. § 159(a).

“confusion and conflict that could arise if rival . . . unions, holding quite different views as to the proper . . . hours, . . . holidays, tenure provisions, and grievance procedures, each sought to obtain the employer’s agreement.”³

It is precisely to avoid that risk that both the federal and New Hampshire labor law systems are premised on the understanding “that labor stability [is] served by a system of exclusive representation.”⁴ The bill also cavalierly strips public employees who opt not to become union members of all of the protections they currently enjoy under the legally imposed duty of unions to provide fair and equal representation to members and non-members alike. At a minimum, HB 474 will provoke years of tedious, expensive, and unnecessary litigation to stabilize the other pieces of the system. The way in which HB 474 accomplishes its objectives is very much like removing the brakes from an automobile and hoping that it will still function properly.

The genius of the labor relations system established by Congress in 1935 is that the law specifies only the basic ground rules, but leaves it to the parties to grapple with and resolve differences and problems at the local level. Congress recognized the need, in order to achieve uninterrupted production, for an efficient, orderly, practical, and peaceful system for resolving workplace disputes. In Europe, governments often intrude themselves directly into dispute-resolution with a heavy hand. That approach is not congenial to American traditions and political culture, which favor a less intrusive role for government. It is a basic principle of our labor relations systems that “the Government does not attempt to control the results of negotiations.”⁵ Rather, it leaves it to employers and employees – not regulators or bureaucrats – to work out pragmatic and tailored workplace solutions by drawing upon local knowledge and

³ *Aboud v. Detroit Board of Ed.*, 431 U.S. 209, 224 (1977), rehearing denied 433 U.S. 915 (1977).

⁴ *Id.* at 229.

⁵ *NLRB v. Insurance Agents’ International Union*, 361 U.S. 477, 488 (1960).

expertise, save that the results must be consistent with the broad legal framework and, in the public sector, budgetary controls respecting cost items. Our law facilitates collective bargaining not for its own sake but as an alternative to the more heavy-handed governmental regulation that would be required in its absence in order to insure uninterrupted production and the free flow of goods in interstate commerce.

New Hampshire and virtually all other states that guarantee collective bargaining to non-NLRA employees and/or that authorize public-sector collective bargaining have adopted the same labor relations model, with minor variations. Of course, there is the critical difference between the private and public sectors that public employees in most jurisdictions may not resort to strike or job action. However, the fact that strikes are prohibited in the public service does not mean that the industrial relations challenges and problems that provoke strikes in the private sector magically disappear. As Congress determined was likely with respect to the private sector, the public sector will inevitably be plagued by diminished productivity and subtle (sometimes not so subtle) disruptions unless – as the people of New Hampshire have wisely chosen to do – an alternative to job action as a mechanism for resolving workplace issues is put into place.

All sophisticated employers know they must establish systems for generating rules and policies to govern the workplace and procedures for resolution of employee grievances. The only difference made by collective bargaining, where a majority of employees have chosen it, is that the employees gain a voice in fashioning the governing rule-system and in resolving disputes that arise in the workplace. As the US Supreme Court said years ago, collective bargaining “is an effort to erect a system of industrial self-government.”⁶ Long experience teaches that a rule-system that has been touched by employee participation gains legitimacy and respect and better

⁶ *United Steel Workers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580 (1960).

serves the public interest in uninterrupted private-sector production and continuity of public services.

The semi-autonomous system of workplace governance and labor relations that both Congress and New Hampshire have adopted cannot succeed without a minimum of institutional coherence and stability. To that end, and consistent with our democratic traditions of majority rule, federal and state law enshrines the principle of exclusive representation by the majority bargaining agent.

This is not an unalloyed benefit for unions – the principle imposes difficult and costly responsibilities on them. At the same time, while an employer might prefer to have no duty to bargain with a union at all, if bargaining is going to take place, almost all sophisticated employers agree that the principle of exclusive representation serves their best interests. Exclusive representation presents the employer with a single counterpart with whom to address workplace issues, a negotiating partner that is responsible to and can make lasting agreements on behalf of the bargaining unit. In the absence of exclusive representation, employers potentially face the chaos of multiple bargaining agents, formal or informal, responding to different constituencies and minorities in the bargaining unit and quite possibly pursuing conflicting agendas. We should pay attention to the fact that New Hampshire public sector employers have negotiated and agreed to union security arrangements precisely for these reasons. Service-fee clauses are not imposed by law. In New Hampshire, this is a non-mandatory topic, so public employers can easily avoid union security agreements. They enter such agreements because it is in their interests as managers to do so and therefore in the long-run interest of the people of New Hampshire.

Nothing so powerfully symbolizes the half-baked nature of this bill than its attempt to accomplish the miraculous feat of simultaneously retaining and abolishing the principle of exclusive representation.

- According to the bill, a union that has demonstrated its majority remains the exclusive representative but is no longer required to represent bargaining unit members who opt not to join the union. Years of litigation will transpire before we learn for sure whether the exclusive representative is even *permitted* to represent such employees, as they may have representation rights on their own.

- The bill provides that members of the bargaining unit who are not union-members are not covered by the collective bargaining agreement, but it gives us no clue as to how the terms and conditions of employment of such employees is to be determined. Assume that the exclusive representative negotiates favorable terms and benefits for its members. One possibility is that the employer may or perhaps must extend these terms to all in the bargaining unit. If it does, we are back to traditional exclusive representation with nothing changed except that the free-rider problem is exacerbated. But if the employer does *not* extend negotiated terms to all members of the bargaining unit, it might be guilty of discrimination against employees who decline to join the union and quite possibly a violation of the Equal Protection Clause of the 14th Amendment of the US Constitution.

- May an employer meet with and consider the concerns of bargaining unit members who are not union members? It may or may not be under a duty to treat with such employees – the bill leaves this vague – but as a practical matter, all prudent managers want to be aware of and sensitive to potentially disruptive employee concerns, so it would be natural for an employer to receive grievances, formally or informally, from the non-union-members. However, doing so

might well violate the duty to bargain with the exclusive representative.⁷ But if the employer declines to meet with such employees while responding to the grievances of employees who are union members, it probably violates the non-discrimination principle.⁸

This returns us to the free-rider problem. Our system seeks light-handed governmental regulation, respect for the autonomy of the bargaining parties and their capacity – subject to basic ground rules regarding process and cost-items – to develop superior, win-win solutions than can be expected from centralized regulators. This system imposes obligations and costs on the parties. The US Supreme Court long ago affirmed that:

“[t]he designation of a union as exclusive representative carries with it great responsibilities. The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones. They often entail expenditure of much time and money The services of lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel, may be required.”⁹

The costs referred to are not primarily incurred for the benefit of unions. These costs are generated by the role the federal government and New Hampshire, respectively, have assigned to employee organizations in its system of workplace governance. In raising revenue to cover the costs of negotiating the collective agreement and processing employee grievances, private and public sector unions face the ever-present problem of free-riders. Those who do not contribute their fair share receive all of the benefits that the union obtains for bargaining unit members, and they will most likely continue to do so if this legislation is enacted. The only alternative would

⁷ See RSA 273-A:5, § I(e).

⁸ See e.g. *Black Grievance Committee v. NLRB*, 749 F.2d. 1072 (3d Cir. 1984), cert. den., 472 U.S. 1008 (1985) (once employer receives grievances from one employee group, it may not refuse, without substantial business justification, to accept grievances from the second group).

⁹ *Abood*, supra, at 431 U.S. 221.

be to interpret the law to permit the employer and employee organization to discriminate against those who don't pay dues. More than likely employee organizations will continue to bargain fairly and equally for all bargaining unit-members, both those who do and those who opt not to become union members. In that event, service fee dissenters receive not only contractual benefits but also the benefits of our semi-public system of industrial relations without paying any of its costs and at the same time avoiding the taxation that would otherwise be necessary if our labor relations system did not wisely leave workplace governance primarily to the parties. This makes as much sense as requiring New Hampshire to provide a special by-pass lane at every highway toll-booth to cater to the wishes of those who would prefer not to pay tolls.

Service fees do not compromise employees in any matter of conscience. The Supreme Court has made clear beyond a shadow of doubt that service fees may only be tapped to defray costs "of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative."¹⁰ Dissenting employees are fully protected with respect to any expenditure outside this narrow category. Strict legal and accounting requirements guarantee that not a penny of a dissenter's service fees will be spent on controversial activities such as union statements on issues of the day or even union statements supporting other workers engaged in an industrial dispute.

If enacted, this legislation will upset the delicate institutional balance crafted by federal and New Hampshire law; it will cause inefficiencies and disruptions in production and in public services; and in particular, it will do grievous damage to all of the citizens of New Hampshire who depend on public employers and employees for quality police protection, quality schools, quality public nursing, and all of the other services provided by state and local government.

¹⁰ Ellis v. Brotherhood of Railway, Airline & Steamship Clerks, 466 U.S. 435, 448 (1984).