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Proceedings of the
1993 Spring Meeting

April 29 - May 1, 1993
Seattle, Washington

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Industrial Relations Research Association Spring Meeting

April 29—May 1, 1993 Seattle, Washington

PREFACE

1993 Spring Meeting

Industrial Relations Research Association

The Spring Meeting of the Industrial Relations Research Association was held in Seattle, Washington, from April 29 to May 1, 1993. The Northwest Chapter of the IRRA served as the host for the meeting and for a reception at the Space Needle. The co-sponsors of the meeting were: The Allied Employers of Redmond, Washington; the Boeing Company; the Federal Mediation & Conciliation Service (FMCS); Group Health Cooperative of Seattle; the National Labor Relations Board (NLRB); the Port of Seattle; The Seattle Times; Simpson Tacoma Kraft Company; the United Food & Commercial Workers; the Western Conference of Teamsters; and the Weyerhaueser Corporation. This broad array of sponsors, as well as the excellent program, resulted in the highest attendance in years at the Spring meeting: more than 275 registrants, including some 100 from the union movement.

The Conference Planning Committee, to whom special accolades are due, included: the Conference Coordinator, Ben Youtsey of the FMCS; Mark Endresen of the Western Conference of Teamsters; Norman Lee of the FMCS; Jack Nelson of the NLRB; Beverly Reinhart of the FMCS; and John Swanson of the Port of Seattle.

There were many high points on the program. One example was the address by Thomas Kochan of MIT on "Principles for a Post-New Deal Employment Policy." Another was the examination of "New Approaches in Federal Labor Relations" by Jean McKee, Chairperson of the Federal Labor Relations Authority. A further example was the report on "New Developments at the National Labor Relations Board" by James M. Stevens, Chairman of the National Labor Relations Board. A final highlight was the address by William H. Wynn, President of the United Food and Commercial Workers, on "Collective Bargaining: Prognosis for the '90s."

Other sessions related to labor relations or labor law included papers on labor law reform, health care and collective bargaining, and state and local collective bargaining. Topics other than those related to labor relations or labor law were also examined at the meeting. These included presentations on confronting AIDS in the workplace and the Americans with Disabilities Act.

A series of three workshops were offered concurrently on the first morning and then a second set of three different workshops were offered on the second morning. The Saturday morning session included a live demonstration of a grievance mediation session. The workshops and the demonstration were designed to be of particular value to industrial relations practitioners and allowed sufficient opportunities for attendees to ask questions and share their own experience.

Most of the presentations at the workshops and the demonstration (and some of the papers in other sessions) did not involve written papers and thus are not included in these Proceedings. We are, consequently, printing the full program—including the titles of the unpublished presentations—in order to convey information on the plethora of valuable activities that occurred at the Spring Meeting. We hope this full disclosure will entice more members of the IRRA to attend future Spring Meetings of the Association. The next Spring Meeting will be in Philadelphia on April 20-23, 1994. Mark your calendar or risk intellectual obsolescence.

The IRRA is again grateful to the LABOR LAW JOURNAL for publishing the Proceedings of the IRRA Spring Meeting. I also wish to thank Kay Hutchison, IRRA Administrator, and Jeanette Zimmerman, IRRA Copy Editor, for preparing these Proceedings for the publisher.

John F. Burton, Jr.
IRRA Editor-in-Chief

IRRA Spring Meeting Program

Seattle, Washington — April 29—May 1, 1993

Collective Bargaining: Prognosis for the 90s
William H. Wynn

Principles for a Post-New Deal Employment Policy
Thomas Kochan

Beyond Litigation: New Approaches for Local Government Sector Labor Relations
Marvin Schurke

What They Don't Tell You About Sexual Harassment, But You Need To Know
Helen Remmick and Angela Ginorio

Labor Law Reform: Needs and Prospects
Paula A. Voos, Sheldon Friedman, Richard Prosten, Marvin Waters, and Greg Yuckert

More Alike Than Different: Human Factors of the Americans with Disabilities Act
Lee Bussard

New Developments at the National Labor Relations Board
James M. Stephens

Health Care as an Issue at the Collective Bargaining Table, No Problem: The Canadian Model
Robert F. Weston and Peter Cameron

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Ernest J. Savoie

A Neutral's Perspective on Improving the Arbitral Process
Janet Gaunt

Labor-Management Cooperation: In Need of an Implicit or Explicit Agreement
Richard Peterson

Needs and Application of Diversity Training in Organization
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No Solicitation Allowed: Union Organizers Access to Private Property
Kevin Conlon and Catherine A. Voigt

The Economic Environment for Collective Bargaining as We Enter the 21st Century
John Murphy

Use Change for Mutual Gains in Labor Relations
Gordon Graham

Beyond Litigation: New Approaches in Federal Labor Relations
Jean McKee

Grievance Mediation
Sylvia Skratek, Kenneth McCaffree, John Loihl, Matthew Lynch, John Gullion, Pat Steinburg, and Timothy D.W. Williams

Toward a Mutual Gains Paradigm for Labor-Management Relations[1]

By Thomas A. Kochan

Professor, Massachusetts Institute of Technology, Cambridge, Massachusetts

The U.S. labor-management relations system is at a historic crossroads equivalent to that of the 1930s. For the past two decades labor-management relations have gone down two contradictory paths. On the one hand American firms, workers, and unions experimented with a variety of innovations designed to transform workplaces in pursuit of improved productivity and employment outcomes. While these efforts vary across different settings, they generally include some aspects of employee participation, team-based work organizations or task forces, decentralization of decision making, quality improvement programs, compensation systems that reward skill attainment and/or performance, increased investment in training, and increased information sharing, consultation, and in some cases representation in managerial decision making and corporate governance. Where unions are present, these innovations often are governed by joint union-management committees or similar structures that supplement the formal collective bargaining process. Where employees are unorganized, groups of employees sometimes serve in an advisory capacity to management in these processes.

While showing great promise, these innovative practices to date have not diffused widely across the economy and remain fragile, at risk of being written off as just another in the long list of passing fads. Meanwhile, at the macro level labor market outcomes of the past decade were characterized by: (1) productivity growth rates that are approximately 1 percent below those needed to sustain the long-term rate of increase in American living standards; (2) declining real wage levels for nearly all classes of employees below the senior executive level; (3) increased wage inequality; (4) increased use of contingent workers in jobs that provide low wages and limited fringe benefits, training, or development opportunities, or job security; (5) high rates of unemployment and job displacement affecting both blue and white collar workers in large firms and good jobs; (6) declining rates of union membership; (7) increased adversarial tensions between business and labor over the basic labor policies governing industrial relations.

The strategies adopted by government, business, and labor representatives in the next few years will determine which of the above paths will dominate the future of U.S. labor-management relations and labor market outcomes. The question is whether our labor-management system will contribute to or inhibit efforts to reverse the negative trends in labor market outcomes and help to achieve the mutual economic and social gains envisioned in the term "a high skills and high wages" economy. To do so, the barriers to broader diffusion and sustainability of innovations like those listed above will need to be overcome.

Not since the eve of the New Deal have we faced as crucial a set of challenges and opportunities to achieve a fundamental breakthrough in labor-management policy and practice. Fortunately, there is growing recognition of this point both inside

[1] Funds for this research are provided by the Alfred P. Sloan Foundation. The views expressed here are solely those of the author.

government and in the larger labor-management community. As a result, the Secretaries of Commerce and Labor recently established a Commission on the Future of Worker Management Relations and charged this group with the task of recommending ways to update our national policies, in part by building on the experiences of those who have experimented with workplace innovations in recent years. Indeed, if history is any guide, it is largely out of these prior experiences and experiments that the principles for guiding a new policy will emerge.

This paper sketches out some preliminary thoughts on both the substantive and procedural issues facing the Commission, government policy makers, and private parties who share an interest in the future of worker-management relations. Although I serve on this Commission, I obviously cannot speak for it or for my fellow Commissioners. The views expressed here are solely my own, drawn in large part from the research my colleagues and I have done over the years.[2] I will discuss these views in relation to the work of our Commission, however, because I believe the process we follow will be as important to our ultimate success or failure as our substantive findings and ultimate recommendations. To be successful our Commission must engage in an open discussion with the full range of individuals and groups with experience and interest in promoting innovation and improvements in the American workplace. Only by doing so can we move the process of policy development out of its present label of "special interest politics" to one that reflects the voice of the American workforce and the future of labor and business leadership in this country. For these reasons I will comment both on the substantive challenges facing labor-management policy and the process by which a new policy is developed and administered.

Principles for a Mutual Gains Labor-Management Policy

The key substantive challenge for contemporary labor-management policy is to serve as a catalyst for innovation and transformation of American workplaces by encouraging both adoption and sustainability of mutual gains practices that can enhance the competitiveness of the American economy and individual enterprises while also improving the employment conditions of workers and the standard of living of the overall society. The need to get on with this task is one of the factors behind formation of this Commission and what I mean by the term "mutual gains" policy.

The Commission's Mission Statement reflects this broad objective and divides our task into three parts. First, we are asked to explore ways government can help to improve productivity and worker welfare through broader diffusion of workplace innovations and sustained labor-management cooperation. Second, our mission recognizes the positive contributions that collective bargaining has made to the workforce and the economy but asks us to explore ways to improve its performance and the performance of the laws and regulations governing this institution. Third, we are asked to explore ways to encourage the private parties at the workplace to take greater responsibility for administering and adapting the range of employment policies affecting them to fit their particular needs and circumstances and to thereby reduce reliance on litigation and government regula-

[2] See, for example: Thomas A. Kochan, Harry C. Katz and Robert B. McKersie, *The Transformation of American Industrial Relations* (New York: Basic Books, 1986); Thomas A. Kochan, "Principles for a Post New Deal Employment Policy," in Clark Kerr and Paul Staudohar, Editors, *Labor Economics and Industrial Relations: Markets and Institutions* (Stanford: Stanford University Press, forthcoming 1993); Thomas A. Kochan, "Crossroads in Employment Relations: Approaching a Mutual Gains Paradigm," *Looking Ahead*, Vol. XIV, No. 4, 1993, pp. 8-14. The ideas expressed here will be discussed in more detail in Thomas A. Kochan and Paul Osterman, *Human Resource Strategies and National Policies: Fulfilling the Promise* (Boston: Harvard Business School Press, forthcoming).

tory bodies. In short, our task is to explore ways for updating our public policies and the role of the government to provide workers with opportunities to participate and be represented at the workplace in ways that promote continuous improvements in productivity **and** an equitable sharing of the gains achieved.

I believe that for our Commission to be successful, and indeed for government to transform its role to serve as a catalyst for workplace innovations, will require a fundamentally new approach to the process of policy development and administration. Three key principles should govern this approach to developing and implementing labor-management policy.

First, labor-management relations policy needs to be better **integrated** with and be a part of the nation's macro economic and human resource development strategies. Labor-management relations can no longer be viewed as a stand-alone or separate domain. Over the past thirty years it has drifted farther and farther from the mainstream of economic policy making only to end up being marginalized and labeled as "special interests politics." If we are to be successful, we must demonstrate that labor-management relations in general and workplace innovations in particular are critical to the long-run success of the nation's economic performance and standard of living.

Second, these policies must rest on a strong **analytical foundation**—a clear set of theoretical ideas supported by equally clear empirical evidence that sets the terms of debate over these policies and thereby keeps the policy making process from devolving into a straightforward test of political power between organized labor and management interest groups. Ever since the disastrous 1977-78 congressional debate over labor law reform, labor policy debates have been dominated by rhetorical arguments about some abstract "balance of power" between organized labor and management rather than focused on the empirical realities of what is actually happening in American workplaces. As long as debate is allowed to remain at this rhetorical and ideological level, or as long as the outcomes of these discussions are governed by the balance of political power between business and labor interests, little progress can be expected. We must therefore structure the debate around the concrete realities of contemporary practices and the best empirical evidence of the effects of current policies and practices on the critical outcomes of interest.

Third, these policies must be **practical**. This can best be achieved by building on the experiences gained by the firms and unions that have led the way in introducing workplace innovations in recent years. In this way, public policy will be grounded in the practical realities of how real organizations make and administer their human resource strategies and practices and how government can facilitate the diffusion of those practices that have proven their value.

Our Commission has an opportunity to help reinvent the role of government, but we will only be able to begin the process. The first step is to engage those who will shape the future of worker-management relations in a constructive discussion of the options most likely to feature prominently in our deliberations. In the sections to follow I will raise a series of questions and options designed to begin this type of dialogue.

Links to Economic Policy

Labor-management policy should help to provide a solid micro economic and institutional foundation for macro economic and human resource development strategies that are designed to improve the nation's long run rate of productivity growth. Most productivity enhancing strategies call for tax or other incentives to encourage greater investment in research and development, investment in physical capital, or investment in human capital. This is one point where labor-management institutions at the workplace

might be integrated with macro economic and investment policies.

For example, there is considerable empirical evidence and experience demonstrating that capital investments are more likely to pay off when combined with investments in human resources and integrated with changes in organizational practices designed to speed the implementation and full utilization of the new equipment. This was one of the key lessons learned in the automobile industry in the 1980s. Thus, some have proposed linking tax incentives to invest in hardware and/or human resources to further incentives or requirements that they be combined with employee-management committees or other appropriate forms of participation to ensure these investments will realize their full potential. Where unions are present, presumably their participation and support would be required; however, where unions are not present or where they represent only a portion of the full workforce of an enterprise (as is almost always the case), nonunion employees would also need to be represented. In all cases, such a council would need to reflect the full diversity of the workforce employed in the enterprise.

Critics of the use of tax incentive worry about overusing tax policy to achieve different economic or social policy objectives. Whether this approach is ultimately adopted or not, the generic question in need of further discussion and analysis is: how do labor-management practices and institutions contribute to or constrain the performance of other economic or social policies? More specifically, how can labor-management relations provide the micro economic and institutional foundations that support continuous improvements in productivity and other performance objectives?

Encouraging Participation and Alternative Forms of Representation

The NLRA and related policies, such as the Railway Labor Act (RLA) that governs the airline and railway industries, will require fundamental updating and transformation if the government is to actively promote broader adoption and diffusion of the alternative forms of employee participation. Passed as part of the New Deal effort to lift the country out of the Great Depression, the NLRA served the American workforce and economy well in an era when the challenge was to build a stable collective bargaining process that could resolve peacefully the conflicting interests of workers and employers over wages, hours, and other employment conditions. While the law does not preclude joint problem solving or other innovations in labor-management relations, neither does it explicitly promote or encourage sustained cooperation at the workplace or use of alternative forms of participation or representation beyond collective bargaining. Indeed, over the years the law has been interpreted in ways that make it even harder for unions and employers to engage in modern forms of employee participation,information sharing, or partnerships in management and organizational governance, and with the recent *Electromation* decision, the NLRB has raised serious questions about the legality of some forms of employee participation and team work found in many contemporary nonunion settings. Thus, it is time to explore ways to supplement or modify the law to promote a wider variety of participatory, consultative, and representative forums in order to update labor law to conform to contemporary practice.

One way to lift the constraints on employee participation in nonunion relationships would be to repeal those sections of the law that pertain to employer domination of labor organizations. While this approach is worthy of consideration as part of a comprehensive reform, it would need to be accompanied by additional changes that speak to the role of these processes in unionized settings. Moreover, the use of teams can be abused as union avoidance devices by some employers. So the legal

issues here are not trivial and appropriate protection against employer abuse or domination of employee participation must be provided, an issue I will return to below.

Another option would be to follow the German approach and require work councils in all establishments over a certain size. This option would produce the most rapid diffusion of an *institutional form and structure* of participation that enfranchises the total workforce in an enterprise. Moreover, it would have the desirable secondary effect of elevating human resource issues to a higher level of decision making, and over time, would give all managers direct, practical experience with employee participation and representation, thereby making it clear that managers of the future need to be skilled in managing these processes and considering human resource issues in their decision making and managerial roles and styles.

Those opposing this broad brush approach raise two major concerns. First, while requiring enterprise councils would likely produce a rapid diffusion of new structures for employee representation, mandating these new institutional forms may also produce an adversarial reaction by managers and employee representatives who are not ready to shift their styles and strategies toward a more cooperative approach needed to make these councils work well. Thus the structure may not produce either the immediate or the gradual shift in attitudes and climate needed for works councils to produce mutual gains. Second, this is probably the least feasible option from a political standpoint. American business is adamantly opposed to more government mandates (especially of this broad a nature) for an institution that has yet to be tested in practice for its value or fit with American workplace institutions and practices. The question, therefore, turns to how might we better encourage experimentation and learning from broader enterprise councils?

This leads to consideration of a third option in which employee councils might be encouraged in specific substantive areas as part of an overall strategy for decentralizing and internalizing responsibility for administering or enforcing government policies. As suggested above, such an approach might be feasible in the occupational safety and health area or in the training area.

The advantage of this approach is that it allows for a certain amount of mutual "self-selection" on the part of firms and employees. Those inclined to believe they have the climate, management style, and labor-management relationships ready to make these structures work and to take this mutual gains approach to the workplace will opt for it. Those who do not believe this approach will work will choose to opt for more conventional relationships and enforcement regimes. In this way the process diffuses more naturally. If combined with an active information, research, evaluation, and dissemination program, this approach allows others to learn from the experiences of these early adopters. Because these lessons have broad social and economic value (i.e., externalities in the economic sense), government resources can be justified to support and encourage the efforts of these early adopters. While the task of evaluating and generalizing the results of these "self-selected" experiments poses challenges to social scientists, it is exactly the type of data and evidence that practitioners learn from best. This is the lesson of the Baldrige award for total quality management programs, one that is worth extending to other employment and labor-management practices.

One serious drawback of this more limited focus approach is that the macro economic benefits of these innovations will accrue more slowly since diffusion will be a more gradual process. But it has the offsetting advantage of helping to reduce

enforcement and administrative costs in critical areas of labor and human resource policy.

A fourth option would be to simply open up labor law to *allow* any of these new forms of participation to be adopted voluntarily by firms and employees and to encourage through appropriate incentives or administrative rules experimentation with different forms of participation in different federal and state jurisdictions. This option might take the approach of letting firms choose to set up employee or labor-management committees or councils for advisory purposes and let the agenda be open to whatever issues are of greatest concern to the parties. This option could be expanded to encourage information sharing, consultation, and/or formal representation in higher levels of managerial decision making and corporate governance as well. The options for doing so are again quite broad, ranging from formal representation on corporate boards of directors to participation or consultation in managerial structures and decision-making processes to the sharing of information on the state of the enterprise. The advantage of this approach is that it requires little more than elimination of the restrictions contained in the NLRA or other laws to such things as employee participation teams in nonunion workplaces, nonexclusive representation, limitations on the scope of bargaining, supervisory and managerial exclusions from coverage under the law, etc. This approach might also encourage champions for new types of participation and/or representation to develop within either the labor movement, some other employee groups that emerge to provide support for these new forms, or within the business community.

The disadvantages of this approach are quite obvious—slow diffusion to the point of producing macro economic benefits and little or no integration with other macro economic or labor policy objectives. But it is an option to get started that would allow all the parties to learn and adapt their institutions and practices as experience builds.

Any of the above options would need to be accompanied by provisions designed to ensure meaningful participation, protect against undue employer domination, and ensure that these new forms take on an integrative problem solving rather than a distributive bargaining character. The protections most often mentioned include the following.[3]

(1) There should be some equivalent to the German "peace obligation." That is, councils or committees should not be allowed to call a strike or other form of work stoppage since their primary function is to serve as an integrative mechanism.

(2) Council membership should be representative of the occupational distribution found in the enterprise or establishment. While it would be a mistake to set fixed proportional representation rules, some minimum requirements, such as representation of both exempt and nonexempt workers on the council and that council membership is open to individuals up to the executive ranks of the organization, seem workable. Council members should be elected by employees for fixed (perhaps two-year) terms.

(3) No individual should be discriminated against for exercising their rights to run for or serve on a council.

(4) Once established neither management nor employee representatives should be able to unilaterally abolish the council without some due notice. Only a vote of the workforce should be allowed to terminate the council.

(5) Council members should have access to the information needed to perform their functions but should have a corresponding obligation to respect the proprie-

[3] See for example Janice R. Bellace, "Electromation: The Dilemma of Employee Participation under the NLRA," in Bruno Stein, Editor, *Proceedings of the New York University Forty-fifth Annual National Conference on Labor* (Boston: Little Brown, 1993), pp. 225-44.

tary nature of information that if made public would harm the organization.

Perhaps other rules are also needed; however, it would be important to keep the requirements as simple as possible so that this new institution does not get bogged down in legal tangles that keep it from realizing the mutual gains it is charged with pursuing.

While the above options do not exhaust the ideas offered for opening up labor law to new, more varied forms of participation or representation, they are among those that I expect our Commission to discuss and therefore ones that would benefit from open dialogue with interested parties.

Improving the Performance of the Current Law

Not all employers will choose to compete or manage in ways that are consistent with the types of integrative processes discussed above. Distributive issues will remain a central part of employment relationships even in those firms that do choose to embark on a mutual gains strategy. Thus, labor law must provide employees with an effective right to join the type of labor organization that best suits their circumstances. Any opening up of the law to accommodate and encourage more integrative forms of participation or representation, therefore, needs to be accompanied by remedying any deficiencies that can be demonstrated to exist in the laws or enforcement procedures governing union representation and collective bargaining.

A large number of empirical studies conducted since the labor law reform debate of 1978 have identified a number of such problems.[4] One task of our Commission will be to carefully review the evidence presented in these studies and to structure the terms of the debate over this controversial issue on the facts rather than on the rhetorical arguments that have dominated previous legislative debates on this matter. Frustration over this aspect of the law and effects on workers and unions has been the single biggest argument some union leaders give for the deterioration in the climate of labor-management relations and for the limited diffusion of more cooperative relations between the parties. These concerns must, therefore, be addressed if we are to change the climate for labor-management relations and open up to more widespread innovation.

Minor reforms of the union recognition procedures are unlikely to do anything more than encourage the parties to discover new tactics and to escalate their rhetorical attacks on each other's motives and integrity and will not serve anyone's long-term interests. Instead union recognition procedures need to be transformed in ways that avoid starting the relationship off on a protracted and highly adversarial course. Various ideas have been suggested for a more comprehensive reform, including changes that would: (1) encourage the parties to establish their own procedures for extending recognition voluntarily when new facilities or work sites are being designed and planned; (2) reduce delays in elections and certification decisions where elections are held; (3) strengthen the penalties imposed on labor law violators so as to eliminate the economic incentives that now exist to violate the law; (4) provide for effective mediation, other forms of assistance by a neutral third party, and/or first contract arbitration in situations where the parties are unable to conclude these negotiations on their own following certification.

There is another aspect of the current law that no longer fits the diversity found in the current labor force or in organizational practices and needs. A significant number of labor force participants are

[4] For reviews of these studies, see John Lawler, *Unionization and Deunionization* (Columbia, SC: University of South Carolina Press, 1990) and Paul Weiler, *The Law at Work: Past and Future of Labor and Employment Law* (Cambridge, MA: Harvard University Press, 1990).

either excluded from coverage of the law or governed by legal doctrines that limit their access to effective participation or representation. For example, supervisors and middle managers are excluded from coverage under the NLRA, and while professional workers are allowed to organize, they are generally segregated into separate bargaining units thereby further dividing the labor force within an enterprise into narrow interest groups. Different varieties of contingent workers and independent contractors pose still different problems.

Supervisors and Managers

The NLRA excludes supervisors and managers from coverage under the law under the theory that a clear line of demarcation must be and can be drawn between those who perform managerial duties and therefore should be loyal to the company and those who execute those duties. Both the theory of behavior and the assumption of who does "managerial work" are outmoded, especially in organizations that encourage employee participation and/or semi-autonomous work teams, push authority down to the lowest possible level in the organization, and/or share managerial authority with union representatives. In team-based organizations, rank and file employees now perform much of what was traditionally supervisory and/or managerial work. This has led to rather perverse effects. In a decision involving the faculty of Yeshiva University, the faculty union was ruled to be outside the scope and protection of the law since the faculty was found to have a significant role in the governance and management of the university! Clearly it is not in the interests of the country to exclude employees or union officials from the protection of national labor law for taking on greater responsibilities and participating in organizational governance.

Aside from being able to exclude an increasing number of members of teams who manage their own affairs, higher level supervisors and middle managers face significant employment security risks in the current environment and hold the keys to implementing the organizational reforms needed to sustain mutual gains practices. To leave them disenfranchised is to continue to invite their subtle but effective resistance to these innovations. They need to be brought under the participatory umbrella but in a way that both addresses their concerns as employees and builds their support for mutual gains practices.

Professional and Technical Workers

Although not legally excluded from coverage under the law, the vast majority of professional, technical, and office workers are, for all practical purposes, left out. The types of participation these workers want and need cannot be satisfied by formal collective bargaining rights carried on in separate bargaining units as envisioned in the current labor law. Moreover, for problem solving to extend organization wide, these groups need to be part of cross-functional teams working hand in hand with each other and with production workers to design and implement new products, technologies, and organizational practices. To require engineers, technicians, and other professionals or office workers to form separate bargaining units and petition for exclusive representation so they can bargain over wages, hours, and working conditions only constructs further functional barriers that organizations are now trying desperately to remove in order to improve the innovation process. Thus these groups also need to be brought under the coverage of a policy that supports and facilitates mutual gains practices.

Contingent Workers and Independent Contractors

The number and variety of contingent workers has grown significantly in recent years. While their status under the NLRA varies depending on the specific type of employment relationship involved, con-

tract workers, temporary employees, independent contractors and consultants, and those working at home or in dispersed locations all pose challenges to the doctrines governing the definition of an "employee" under the NLRA as well as to the enforcement of various labor standards statutes and regulations governing such areas as occupational safety and health, wages, working hours, and overtime, etc. This is an area where the first task of the Commission may be to simply obtain better data on the number of labor force participants in these different categories and their conditions of employment.

Resolution of Employment Disputes

Our Commission is asked to explore ways of encouraging the parties to take greater responsibility for resolving employment problems or disputes that otherwise end up in litigation or government regulatory proceedings. The central question here is whether procedures can be devised that take advantage of the different forms of participation and/or representation discussed above, perhaps in conjunction with arbitration and or other forms of dispute resolution that labor and management have devised over the years to improve the efficiency and equity with which individual and/or collective disputes are resolved over safety and health, discrimination, unfair dismissal, or other labor standards now governed by the complex web of employment law and regulations. This is an area of debate that has not yet been joined to the debates outlined above over the institutions best suited to the future of labor-management relations. By joining these issues, our Commission can take a first step toward encouraging a more integrated approach to these interrelated domains of employment policy and workplace practice.

Government as a Catalyst for Innovation

New opportunities for employee participation and representation cannot stand alone as a panacea for all the limits of current labor and employment policy and practice. More than just changes in law are needed. A shift in philosophy, role, and style of government is also needed—a shift in which government serves as a facilitator, catalyst, and enabler of private initiatives and responsibility, rather than simply as an enforcer, arbiter, or regulator of private practice. Again, the tough question is how to go from this general statement of intent to specific actions. A number of options for moving in this direction have been proposed. Some of these are already being considered or acted upon by the Administration and therefore would benefit from broad discussion and input.

For the first time in history the Secretaries of Commerce and Labor, with the active support and involvement of the President, are considering hosting a showcase national conference on workplace innovation. Such a conference would serve as a highly visible symbol of the Administration's support for the type of innovations listed at the outset of this paper. It also would provide top government officials with an opportunity to listen to and learn from the diverse range of grass roots managers, labor leaders, and workers who have direct experience in implementing various innovative practices. Such meetings are useful symbolic and motivational events. They have a familiar limitation, however: they tend to attract and be limited to the "converted," to those already convinced of the need for innovation. The challenge is to design them and their follow-up activities in ways that widen the circle.

One proposal tool for following up on these public events is to use the field offices of the Federal Mediation and Conciliation Service (FMCS), the nation's agency charged with responsibility for mediating labor negotiations and strikes, to provide technical assistance to firms and employees interested in but inexperienced at setting up and managing employee participation efforts. FMCS has

played this role sporadically over the years. It has administered a provision of the Labor-Management Cooperation Act of 1978 to support formation of various industry, community, and in-plant labor-management committees. Resources have also been put into programs such as "relations by objectives," "mutual gains" bargaining, or similar programs designed to help labor and management to develop problem solving approaches to the issues facing them. Yet these programs have received only intermittent support from the FMCS, and limited budgetary support from the Congress and the Office of Management and the Budget. Moreover, some suggest that FMCS should provide these technical services not only to unionized workplaces but also to nonunionized workplaces, if the appropriate legislation is enacted to encourage new forms of employee participation. This would change the mission and role of FMCS in quite fundamental ways and therefore deserves widespread comment and reaction from those who have made the most use of this agency's services in the past and those small businesses that some believe may have the greatest need for the broader range of services suggested in this more expanded role.

The Department of Labor is also establishing a new Office of the American Workplace headed by an Assistant Secretary. Part of the mission of this office will be to coordinate the government's efforts to encourage and support workplace innovations. The key to this unit's ultimate success lies in its ability to form linkages to all other parts of the federal and state government bodies that either regulate or otherwise affect workplace practices and to encourage these units to follow the broad principles outlined here in their specific administrative or enforcement domains. This might help to encourage the type of broad scale experimentation with new forms of participation, representation, and dispute resolution called for above and to reduce the economic resources going into adversarial regulatory or adjudicatory proceedings. While working with OSHA and the Employment and Training Administration are the logical starting points, this office might explore opportunities for similar experiments with the full range of federal and state offices that administer and enforce our various labor standards.

This last point suggests another approach for promoting innovation that may be worthy of exploring: encouraging individual states to serve as laboratories for experimentation and learning. The preemptive features of the NLRA have limited the ability of states to experiment with alternative approaches to labor-management relations. But just as selected states served as laboratories for experimentation with some of the labor policies eventually enacted in the New Deal, we are beginning to see the same type of development in selected states at the moment. Examples include the use of safety and health committees in Washington and Oregon; a new Manufacturing and Training Partnership in Wisconsin, and several small state initiatives supporting employee ownership programs in Washington, Ohio, New York and Massachusetts. The question for this new Labor Department office is likely to be whether and/or how to encourage these and other state level experiments. One traditional approach is to use federal matching funds or grants to states to support these experiments or programs. To fully capitalize on these innovations and experiments the federal government will need to provide an ongoing data collection, research, and dissemination effort that translates these experiments into interactive learning opportunities for both the private parties and policy makers.

Recently the Congress authorized funding for a National Center for the Workplace, a consortium of universities charged with responsibility for producing the data, analysis, and communications programs needed to support wider under-

standing and adoption of workplace innovations. This is another way for the government to work in partnership with universities and other private agents to facilitate and encourage learning and innovation and thereby help to insure that a stronger analytical and empirical base is provided to support ongoing policy analysis in this area.

These are among the ideas that have been discussed or are in the early stages of development for reinventing the role of government as a catalyst for workplace innovation. Whether these approaches are appropriate and strong enough to overcome the deep seated skepticism among business and labor regarding the role of government is an important question for us all to consider.

Concluding Comments: The Role of Our Commission

As mentioned at the outset of this paper, the Commission on the Future of Worker Management Relations can only serve as a means for promoting dialogue and discussion among the full range of parties who share an interest in and experience with contemporary workplace practices. But the Commission can only be successful if in return the business, labor, academic, and other interested professional communities respond with constructive comments and inputs that go beyond the general rhetorical arguments of past debates to focus on the facts, evidence, and real experiences of those on the front line of contemporary employment practice. Moreover, labor, management, and government may all need to experiment with new approaches and engage in an ongoing process of mutual learning. Only by doing so will we be able to update and transform labor-management policy by working our way out of its "special interests politics" label and bring it back into the mainstream of economic policy and private practice. In this way both the Commission and the professional communities from which we come will help prepare the way to the future rather than be mired in the rhetoric and constraints of the past.

[The End]

Beyond Litigation: New Approaches in State/Local Sector Collective Bargaining

By Marvin L. Schurke*

Executive Director, Washington State Public Employment Relations Commission

In the Washington State public sector, as elsewhere, the collective bargaining process suffered some setbacks during the 1980s. Having been invited to stick its nose under the tentflap, our Legislature imposed salary limitations that made it a silent player at the bargaining table in negotiations between school districts and their employees. Having speeded up state funding of the common schools in the late 1970s, the state faced a severe budget crisis and laid off large numbers of state employees in the early 1980s. The Public Employment Relation Commission's

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(PERC) annual case intake was generally low and reached its lowest point in agency history during the 1980s.

Things never got to be as bad here as I have heard from other states, however, and a resurgence of public sector collective bargaining began in Washington long before the election of Bill Clinton as President of the United States and Mike Lowry as Governor of Washington. In fact, I sensed renewed vitality in the collective bargaining process almost from the time that George Bush made his speech about a "kinder, gentler nation." PERC's case intake has been above-average for 3 of the last 4 years and was 7 above average last year. Based on hard data through March, PERC's case intake for the current fiscal year is projected at 671 cases, which would be 12.8 above our average (14% above average for past 5 years).

Favorable Judicial Environment for Bargaining

The collective bargaining process has received strong endorsement in a remarkable series of decisions by our state Supreme Court. PERC decisions have been unanimously affirmed (34 votes for affirmation, with *no* dissents) in four recent cases).

City of Yakima v. International Association of Fire Fighters and Yakima Police Patrolmens Association[1] dealt with two issues: (1) the interface between collective bargaining and civil service; (2) the interface between administrative dispute resolution and court jurisdiction in labor disputes.

The Supreme Court noted that the development of civil service systems around the country paralleled the growth of collective bargaining in the private sector, and that civil service fell into disfavor when it came to be regarded as an arm of management. In interpreting an arcane provision of Washington statute, the Court ruled that the "Commission's interpretation of the statute, while not controlling, is given great weight in determining the legislative intent of the statute." Overturning a lower court decision, the Supreme Court gave strong endorsement to collective bargaining as the preferred process for resolving disputes at the workplace.

Although the *Yakima* case will undoubtedly be remembered more for the civil service holding, the decision is also timely and apropos to this presentation because it contained a strong endorsement of nonjudicial dispute resolution. As with many states, our trial courts are of constitutional origin and are sometimes loath to cede jurisdiction of interesting cases to other forums. In *Yakima,* the employer asked a local judge to intercede while the case was before the Commission. Initially, the judge refused, but he later waded into the dispute on the excuse of an amended complaint having raised some new issues. The Supreme Court ruled that the trial court improperly involved itself in the dispute and that it should have permitted PERC to handle the case. While not absolutely slamming the door on judicial involvement in bargaining disputes, the Supreme Court's decision is, by any measure, a strong endorsement of labor dispute resolution outside of the courts.

Those familiar with the *H.K. Porter* decision under the National Labor Relations Act should take particular note of *Municipality of Metropolitan Seattle v. PERC.*[2] METRO runs the bus company and wholesale sewage operation in Seattle. It coveted a "commuter pool" being operated by the City of Seattle and prevailed on the city to transfer the operation in 1984 or 1985. The city met its bargaining obligations towards the union representing the commuter pool employees by putting language in the transfer agreement that required METRO to succeed to the bargaining relationships and contracts, but METRO refused to honor those obli-

[1] 117 Wn.2d 655 (1991).

[2] 118 Wn.2d 621 (1992).

gations at every turn. By the time an unfair labor practice case was ready for decision, the Commission had dismissed two unit clarification petitions and a decertification petition filed by METRO, a court had affirmed the Commission's decision holding that the bargaining unit continued to exist, and the same court had found METRO's actions to be so lacking in good faith as to justify ordering METRO to pay the union's attorney fees.

The Commission concluded that an extraordinary remedy was needed to normalize the parties' relationship, and it ordered "interest arbitration" on a one-time basis to assure that they would get a first contract. The Supreme Court; *unanimously* affirmed that PERC has authority to compel "interest arbitration" as an extraordinary remedy for flagrant and ongoing unfair labor practices. This may be related to the fresh air we breath here in the Pacific Northwest: British Columbia has interest arbitration for first contracts, and the Oregon Employment Relations Board has also used interest arbitration as a remedy for unfair labor practices.

As it had done in *Yakima*, the Supreme Court reversed an intermediate appellate court and gave strong endorsement in *METRO* to nonjudicial interpretation of the collective bargaining process, stating: "PERC's expertise in resolving labor disputes . . . has been judicially recognized and accorded deference . . . . PERC thus has authority to issue appropriate orders that it, in its expertise, believes are consistent with the purposes of the act, and that are necessary to make its orders effective . . . ." Employer claims that interest arbitration is contrary to private sector precedent and constitutional principles were rejected.

City of Bellevue v. PERC[3] curtailed litigation at the opposite end of the spectrum. We have statutory "interest arbitration" procedures to rule on the substance of contract negotiations involving fire fighters and certain police officers, but the Commission still asserts jurisdiction to determine and remedy unfair labor practices arising while parties are in interest arbitration. The employer in this case wanted interest arbitrators to determine "bad faith bargaining" claims as well, which certainly would add to the complexities of interest arbitration proceedings. The Supreme Court held, however, that PERC retains jurisdiction to regulate the duty to bargain during the pendency of interest arbitration proceedings.

The court said: "Because of the expertise of PERC's members in labor relations . . . the courts of this state give 'great deference' to PERC's decisions and interpretations of the collective bargaining statutes . . . . Because there is no guarantee that any member of the arbitration panel will have any expertise in labor relations, it would be improper for this or any court to give 'great deference' to an unfair labor practice decision issued by an arbitration panel."

Moreover, the Supreme Court again gave the strongest possible endorsement to the "duty to bargain in good faith" and effective communications through the collective bargaining process, stating: "Collective bargaining is a process of communication, not a game of hide and seek." The Supreme Court thus affirmed PERC's finding that the employer committed an unfair labor practice when it refused, during interest arbitration, to disclose information that it was required to disclose under the duty to bargain.

In *City of Pasco v. PERC*,[4] the Supreme Court preserved a broad scope of bargaining in another case where it *unanimously* reversed a lower court. Even after the *Yakima* ruling on civil service, this employer contended that contract provisions for arbitration of disciplinary grievances should not be bargainable because

[3] 119 Wn.2d 373 (1992).

[4] 119 Wn.2d 504 (1992).

they were not unique to the particular unit. The Supreme Court instead adopted PERC's interpretation that a union's meddling rights are unique (limited) to the wages, hours, and working conditions of the employees it represents.

The Supreme Court also used *Pasco* to endorse the nonjudicial resolution of labor disputes, repeating: "PERC's interpretation (of the bargaining statute) is entitled to great weight." Noting that the court did not have the benefit of PERC's expertise in an earlier case, the Supreme Court overruled that earlier case.

If It Moves, Labor Organizes It

Organizing activity has been strong in Washington, with a net addition of over 200 bargaining units in the local government sector during the last five years. Representation activity is projected at 27 percent of PERC's case intake this year, up from a 21 percent average over the past five years. This presents some immense new challenges, in that PERC is operating with less staff than it had in 1980.

This is the electronic age, even if PERC doesn't have a "fax" machine in operation. Responding to the influx of cases, PERC is making extensive use of telephone conference calls for pre-hearing conferences on representation cases. All indications are that the procedure has worked extremely well. We are also using mail balloting to speed up elections that would otherwise be greatly delayed by fitting cases into staff availability and travel time. Although mail balloting is almost unheard of at the NLRB, it is common in civil elections here and has worked well.

Favorable Executive/Legislative Environment for Bargaining

With a newly-elected "liberal" Democrat in the Governor's office and Democrats in control in both houses of the Legislature, many things happened this year. The Legislature endorsed collective bargaining for all employees in House Bill 1152, which encourages the Supreme Court to adopt a rule permitting employees of the Washington State Bar Association to bargain collectively under our local government bargaining law. Leaders of the Bar Association took a strong position in opposition to the bill, but one must wonder if the Supreme Court will turn its back on four consecutive decisions in which it unanimously supported collective bargaining. This bill was advanced by the UFCW.

Non-teaching employees of state colleges and universities can get full collective bargaining rights under House Bill 1509. They are now covered by a civil service system and have bargaining only at the institution level for the few matters controlled by the institution. The option will be exercised by agreement of the union and employer on a unit-by-unit basis. Once a "full scope" collective bargaining agreement is signed, the reform is completed by ending all application of the civil service rules to that bargaining unit. This bill was supported by both employers and the SEIU.

Senate Bill 5070 will require employers to report their expenditures on labor relations consultants. This compares to disclosure requirements which were part of the Taft-Hartley Act until replaced by the Landrum-Griffin Act. It was sought by the AFSCME council which represents local government employees in Washington.

A potential pitfall in the state's public employee retirement systems has been corrected by House Bill 1670. Employees will no longer be at risk of losing pension service credit for time spent on authorized leave for union activity. This bill sought by the IUOE has already been signed by Governor Lowry.

Several groups that already have full collective bargaining rights will have interest arbitration under bills passed this session: jailers in the largest 12 counties in the state (AFSCME); paramedics em-

ployed by public hospital districts (IAFF); dispatchers working within fire departments (IAFF); police officers in cities over 7,500 population and in counties over 35,000 population (formerly only cities over 15,000 population and counties over 70,000 population were covered); state patrol troopers; public transit employees (ATU).

Those unwilling to compromise fared poorly, and even with a generally favorable climate for collective bargaining legislation some important bills fell on hard times. The employees of state general government agencies are covered by a civil service system and currently bargain only at the agency level on the few things left to the control of the agency head. Wages have never been bargained. This year, a "Governor request" bill called for both "civil service reform" and "collective bargaining" for state employees. The House of Representatives and Senate each devoted considerable energy to the legislation.

Some "civil service" changes did pass, reflecting reforms of the federal civil service laws adopted late in the Carter administration. The director of personnel will now be responsible to the Governor and will adopt a set of simplified civil service rules for managers at levels traditionally excluded from bargaining. There will be a modest increase in the number of positions exempt from civil service.

As passed by the House of Representatives, House Bill 2054 included the following collective bargaining provisions. Employee rights were similar to Section 7 of the NLRA, except that a limited class of "essential services" personnel would be prohibited from striking. Unfair labor practice prohibitions were also similar to the those of the NLRA. Representation would be determined by elections, with customary certification bar, contract bar, and decertification provisions. Bargaining would be permitted on wages (for the first time), hours, and working conditions. The following would be exempted from the bargaining: pensions (controlled by statute), health benefits (controlled by health care reform legislation), the classification system, and affirmative action plans.

The bill required contracts to protect workforce diversity by considering both seniority and affirmative action when implementing layoffs and recalls. Decisions to contract out bargaining unit work were made a mandatory subject of collective bargaining. Grievance arbitration provisions were required in all collective bargaining agreements. Union shops could be negotiated in contracts. Collective bargaining would be administered by an impartial agency specializing in resolution of labor disputes.

There was controversy, however. Several unions (including the AFSCME council, which represents state employees, and a large independent) opposed the collective bargaining provisions as not being good enough, or the civil service reform "price" as too great, or presented some combination of objections. Collective bargaining was thus pulled out of the bill and sent off to committee land for "study."

The epitaph was also written for collective bargaining rights for farm workers in Washington. There was an effort to grant collective bargaining rights to agricultural employees, and both the House of Representatives and Senate devoted considerable energy to the legislation. As it passed the House and the Senate Labor Committee, House Bill 1287 included provisions similar to those of House Bill 2054.

Employee rights and unfair labor practices were similar to those of the NLRA. Collective bargaining would be administered by an impartial agency specializing in resolution of labor dispute. Bargaining units would be determined by the impartial agency. Representation would be determined by elections, with customary certification bar, contract bar, and decertification provisions. Bargaining on wages, hours and working conditions would be

permitted. Union shops could be negotiated in contracts.

The Senate committee even dabbled with additional provisions to require non-judicial dispute resolution. Grievance arbitration provisions were a required component of all collective bargaining agreements. Interest arbitration provisions precluded the possibility of strikes that would damage or destroy perishable commodities.

At the end of the legislative process, the United Farm Workers Union insisted on its original positions on several controversial or expensive to administer provisions within the legislation. Support for the bill then dissipated and died.

Conclusion

The judicial, legislative, and executive climate in Washington is very favorable to collective bargaining as the preferred procedure for resolving disputes at the workplace. Those who have been willing to communicate and compromise have done well in the latest session of the Washington State Legislature. Whether 1993 will go down in history as a time of "opportunity lost" for state employees and farm workers in Washington remains to be seen.

[The End]

Reforming Labor Law To Remove Barriers to High Performance Work Organization

By Paula B. Voos, Adrienne Eaton, and Dale Belman

University of Wisconsin in Madison, Rutgers University, and University of Wisconsin in Milwaukee, respectively.

Labor law reform has returned to the political agenda with the recent appointment of the Commission on the Future of Worker Management Relations. As we prepare this paper, that Commission has not yet met. However, it appears that its deliberations and recommendations are likely to be only the beginning of a long political process involving widespread public debate about the appropriate structure of law for the contemporary workplace. Here we make a preliminary contribution to that discussion.[1]

It is already clear that the goals of this reform effort will be more wide ranging than the one which occurred under the Carter administration. The Labor Law Reform Act of 1978 focused primarily on improving enforcement of the NLRA, on improving workers' opportunities to form and join unions within the fundamental structure of existing law. The goals of the current effort are broader.

The Commission is charged with examining three issues. (1) What (if any) new methods or institutions should be encouraged, or required, to enhance workplace productivity through labor-management cooperation and employee participation. (2) What (if any) changes should be made in the present legal framework and practices of collective bargaining to enhance cooperative behavior, improve productivity, and reduce conflict and delay? (3) What (if anything) should be done to increase the extent to which workplace problems are directly resolved by the parties themselves rather than through recourse to state and federal courts and government regulatory bodies?

[1] The views expressed here are personal and not necessarily those of the commission or any other organization.

Clearly, current labor law reform is not only about guaranteeing workers' right to organize or about increasing workplace democracy, although these goals, too, are important. It is also about fostering a high wage, high productivity economy through what is increasingly being called high performance work organization.[2] This paper is focused on that aspect of reform.

High performance work organizations are ones that raise productivity and flexibility through the effective use of a highly trained, highly skilled, dedicated work force involved in all levels of decision making.[3] High performance work organizations require a mutual commitment between employers and employees. Employees in this type of firm are involved in their jobs, willing to undertake training, and committed to enhancing the productivity of the organization. They are given considerable leeway to make decisions. This allows them to respond rapidly and creatively to ever-changing consumer demands, to maintain high quality, and to increase efficiency. Often, formal programs that involve unions and/or employees in decision making are used in high performance organizations toward these ends.

In return, the high performance employer makes a reciprocal commitment to the work force by providing employment security insofar as possible, along with a good standard of living. These are prerequisites for employee commitment to the firm. We view union representation as highly compatible with high performance work systems for both reasons and note that "just cause" provisions in union contracts provide employees with considerable individual employment security.[4]

High performance work organization, where technologically and economically feasible, provides the basis for a high wage, yet internationally competitive, economy. And yet, while many companies have implemented some type of participative or cooperative programs, only a small number of U.S. workers are believed to be now working in high performance work environments—no more than 5 percent according to the Commission on the Skills of America's Workforce.[5] Today there are many barriers to the establishment of high performance workplaces. A number of barriers can be found in existing labor law, although labor law is by no means the only or even necessarily the chief impediment. This paper will consider how labor law reform efforts might remove some of those barriers to high performance work organization, many of them rooted in the "Taylorism" that has long dominated management practices and assumptions in the United States.

Belief That Management Alone Should Make Certain Decisions

One barrier to high performance work organization is the presumption that management alone should make certain decisions. Beliefs about management's inherent authority and "right to manage" run deep in the business culture of the U.S.[6] According to this view, management should decide what product or service is to be produced, how it is to be produced, how

[2] *America's Choice: High Skills or Low Wages*, The Report of the Commission on the Skills of the American Workforce (Rochester, NY: National Center on Education and the Economy, 1990).

[3] Ray Marshall, "Work Organization, Unions, and Economic Performance," in *Unions and Economic Competitiveness*, L. Mishel and P. Voos, Editors (Armonk, NY: M.E. Sharpe, 1992).

[4] The greater individual security in union firms may be one reason we now see more employee involvement, work teams, and gain sharing in the union sector than in the nonunion sector; see Adrienne Eaton and Paula B. Voos, "Unions and Contemporary Innovations in Work Organization, Compensation, and Employee Participation," in *Unions and Economic Competitiveness*,L. Mishel and P. Voos (Armonk, NY: M.E. Sharpe, 1992). Unionization aids employee participation in a number of ways: by legitimating programs in the eyes of an often skeptical work force, by insisting that programs are appropriately balanced between quality of worklife and productivity goals, and by providing employee input into the overall design and operation of the program.

[5] "America's Choice," cited at note 1.

[6] Reinhard Bendix, *Work and Authority in Industry* (New York: John Wiley & Sons, 1956).

work is to be organized towards that end, what machinery or equipment is to be employed, where production is to be located, whether or not a given facility is to be sold, and so forth. The right of employees or their representatives to participate in such fundamental decisions has in fact been a source of struggle between labor and management in the U.S. One chapter of this struggle ended with a management victory in the 1940s.[7] This victory has been embodied in the legal distinction between mandatory and permissive subjects of bargaining and in many management rights clauses. While unions may demand to bargain over wages, hours, and working conditions, and over the impact of the fundamental strategic decisions on employees, they have no right to bargain over the decisions themselves.

This legal doctrine corresponds to the division of labor in the Tayloristic corporation. Under Taylorism, management decided the "one best way" for work to be performed and made jobs as "idiot proof" as possible by removing decisions from workers. But in a world in which we are calling upon workers to exercise judgment and responsibility, the legal distinction between mandatory and permissive subjects of bargaining is increasingly anachronistic. In a high performance work organization, workers make suggestions that continuously improve production. Workers and their representatives must be accorded input into basic decisions. At present, companies can ask for this input, but until our law recognizes that workers and their representatives have the right to be involved in these decisions at their own request, we will have a serious barrier to the spread of high performance work organization.[8] Accordingly, we would advocate eliminating the mandatory/permissive distinction.

Lack of Information

A second barrier to high performance work organization is the lack of access to financial information about the enterprise on the part of employees or their representatives. At present the law requires employers to provide only limited financial information to unions and only when triggered by a claim of employer inability to pay for a union bargaining demand. Employers don't have to provide information about forthcoming business plans or about non-bargaining unit employees, unless the union can establish relevancy to its role as a bargaining agent. Information is regarded under current law as a legitimate source of bargaining power and indeed is guarded jealously for that very reason.

Of course management today may share more information than the legal minimum, and many companies, union and nonunion, do so. However, the absence of widespread and automatic information sharing taints voluntary information sharing. Because managers don't readily share good news lest the union ask for a bigger piece of the pie, the bad financial information that is more likely to be communicated is suspect. And firms considering extensive information sharing face a serious externality when competitors do not provide similar information. This occurs because information that is shared with workers may leak out to competitors, suppliers, or to the public. This latter consideration suggests that it might be important to require that nonunion companies as well as union corporations provide certain financial information to their employees.

In a high performance work organization, employees and their representatives are expected to participate in business decisions that enhance the firm's performance as well as their own security. Such decisions are impossible without adequate

[7] Howell Harris, *The Right to Manage: Industrial Relations Policies of American Business in the 1940's* (Madison, WI: University of Wisconsin Press, 1982).

[8] Donna Sockell, "The Scope of Mandatory Bargaining: A Critique and a Proposal," *Industrial and Labor Relations Review* 40 (October 1986), pp. 19-34.

information. A reformed labor law should mandate periodic disclosure (without a request) of plant-level cost and profitability data; of future business plans for investments, advertising, products, etc.; and, indeed, of any information needed by employees for meaningful participation in business decisions.[9]

Rigidity of Job Definitions

A third barrier to high performance work organization is an overly rigid definition of individual jobs which limits the flexibility and responsiveness of the organization. High performance work organization typically involves wide job definitions and a degree of self-supervision. For instance, a work group may be responsible for work assignments, covering for absentee team members, allocating vacations or overtime, and providing immediate quality control. In the union sector, union members may participate in strategic business decision making.[10] Thus, the roles of management and non-management can become blurred.

Our current law provides a definition of supervisor that conflicts with what is needed by the high performance work organization. The law considers persons with a very low degree of managerial responsibility to be supervisors. They are not protected by labor law should they desire union representation. Under the *Yeshiva* decision, professors in private universities were deemed to be supervisors because they participate in some administrative decisions through their faculty senates and other bodies of faculty representation. This aspect of our current law is increasingly outmoded. Bargaining unit employees must be able to make "management" decisions and self-supervise without losing their rights to collective representation. Removing barriers to the organization of lower and perhaps mid-level supervisory employees would have a further desirable outcome discussed below.[11]

Opposition of Some Supervisors and Support Staff

It is now widely recognized that first-level supervisors and technical support staff (e. g., engineers) often undermine efforts to create high performance workplaces. Increased self-supervision, employee involvement, and responsibility have the potential to strip authority and/or jobs from these employee groups. For instance, opposition by lower level supervisors to recent work reorganization efforts at USX's Gary Plant contributed to frictions between team leaders in the bargaining unit and supervisors and has created difficulty for the new flexible manning effort.[12] Even the Saturn model, which provides very extensive union and worker participation in management, does not provide that participation to its unrepresented white collar workers.[13]

Presumably if individuals are involved in making decisions (for instance, the decision to realign supervisory authority), they will be less likely to undermine those decisions and instead will implement them in constructive ways. First-level supervisors and support staff are presently a group of unrepresented and forgotten individuals lacking much input into managerial decisions affecting their own jobs,

[9] William B. Gould, IV, *Agenda for Reform: The Future of Employment Relationships and the Law* (Cambridge, MA: MIT Press, forthcoming).

[10] See Saul Rubinstein, Michael Bennett, and Thomas Kochan, "The Saturn Partnership: Co-Management and the Reinvention of the Local Union," in *Employee Representation: Alternatives and Future Directions*, B. Kaufman and M. Kleiner, Editors (Madison, WI: IRRA, forthcoming 1993).

[11] Supervisory and non-supervisory employees may not have a sufficient community of interest to always be in the same bargaining unit. This might be handled in a fashion that parallels provisions for professional employees in the NLRA.

[12] Jeff Arthur and Suzanne Konzelman Smith, "The Transformation of Industrial Relations in the American Steel Industry," in *Contemporary Collective Bargaining in the Private Sector*, P. Voos, Editor (Madison, WI: IRRA, forthcoming 1994).

[13] Rubinstein et al., cited at note 9.

responsibilities, and authority.[14] It is not surprising that they should attempt to undermine efforts to create high performance workplaces.

A changed definition of supervisors in the NLRA would reduce this barrier, but it is unlikely that managers and support staff would rapidly unionize and achieve representation in this fashion. Hence, it may be worthwhile to provide all employee groups with a representation forum in all companies, union or nonunion. How such an American "works council" or "employee council" would or should operate is an open issue at present. Such a forum could provide a multilateral vehicle of voice in corporate decisions for all types of employees, regardless of their interest in traditional union representation.[15]

Uncertainty about Section 8(a)(2) of the NLRA

In light of the *Electromation* decision, there is some uncertainty regarding the particular types of participation or representation efforts that might run afoul of Section 8(a)(2)'s prohibition of employer domination of labor unions. Some employer groups have called for legal reform that would remove all barriers to current participation or involvement efforts in the nonunion sector. Several academics have also raised the issue of what, if any, legal barriers to employee representation in nonunion companies are appropriate, and indeed whether or not labor law should be revised to promote vehicles of representation other than collective bargaining.[16]

The logic of these proposals varies. Proponents typically argue that not only is enhanced workplace democracy a desirable end in itself, but also that employee representation would improve economic outcomes by promoting high performance work organization. They argue (1) that contemporary employees often desire some input into workplace decisions while not necessarily desiring traditional union representation; (2) that "employee councils" would improve the flow of information within firms; (3) that councils could be given responsibility for monitoring corporate compliance with health and safety or protective labor laws, hence improving the enforcement of those laws; (4) that councils could play an important role in administering training programs which would meet the needs of both workers and firms; and (5) that councils could facilitate labor-management consultation. At the same time, an effective barrier to employer-dominated labor unions must be maintained, both because dominated unions are undemocratic and because they cannot provide the independent voice needed to accomplish the tasks listed above.

Several things are critical in this regard. Clearly employee representatives must be chosen by the work force, not the employer. Moreover, employee representatives cannot be independent unless their speech is protected; nonunion employers cannot be allowed to discharge them at will or discriminate against representatives with regard to compensation or job assignment. Similarly, the councils themselves must have some independent status; employers cannot be allowed to dissolve them unilaterally. Councils which have independent legal status, which are charged with enforcing health and safety standards or other public policy objectives, and which have a legal right to consult with the employer over certain

[14] Indeed, the insecurity of lower and middle level supervisors reduces their effectiveness in those firms where participative and cooperative efforts include them.

[15] This is in contrast with the bilateral forum of collective bargaining. For other roles such councils could play, see below.

[16] See Richard B. Freeman and Joel Rogers, "Who Speaks for Us? Employee Representation in a Nonunion Labor Market," in *Employee Representation: Alternatives and Future Directions*, B. Kaufman and M. Kleiner, Editors (Madison, WI: IRRA, forthcoming 1993); Paul C. Weiler, *Governing the Workplace: The Future of Labor and Employment Law* (Cambridge, MA: Harvard University Press, 1990).

issues are not likely to devolve into employer-dominated company unions.

Employee Insecurity

Some employment insecurity, that associated with declining demand for products or services, may be inevitable in a market economy. However, employment-at-will makes many employees personally insecure. It limits their willingness to criticize existing practices or supervisors. Hence it reduces the potential of participation or involvement processes.[17] Lawler, Mohrman, and Ledford[18] point out that 47 percent of the top 1000 corporations provide no employment security whatsoever to any of their employees.[19] Only 27 percent provide some security to more than 40 percent of their employees, and surely many of these corporations do so because they have negotiated collective bargaining agreements providing just cause dismissal policies. Employment-at-will is still the norm in American nonunion companies, and it limits current employee involvement efforts.

We might consider explicitly protecting speech in participatory or cooperative ventures, making such speech an illegal reason for discharge or employment discrimination.[20] The main drawback of this approach is that it would spawn more employment litigation. Alternately, in a context of employee representation councils, it would be possible to provide general modification of employment at will in nonunion work environments. A legislated "just cause" dismissal standard could be backed by mandated grievance arbitration nationwide. In nonunion situations, employee representation bodies would be available to process grievances at lower steps and represent employees before outside neutral arbitrators.[21] Such a system would have the advantage of reducing the current volume of wrongful discharge litigation because it could potentially remove most disputes over the reason for discharge from the courts.

Union Insecurity

We have long known that if unions are not institutionally secure, they will not be cooperative.[22] Many unions are insecure today because of dwindling membership and reduced bargaining power. Unions often view their decline as resulting from a number of problems in the organizing process, including lengthy delays before representation elections, lack of fair access to employees during organizing campaigns, and high numbers of management unfair labor practices. Managers often contend that declining union fortunes are more the result of a fundamental lack of appeal of unions to many nonunion employees than the result of deficiencies in current organizing law.[23] Be that as it may, it is apparent that the current system for the establishment of new collective bargaining relationships is both highly legalistic and provides anti-union employers with many weapons for frustrating the desires of employees who do desire representation.

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[17] See Eaton and Voos cited at note 3 for a full discussion of this issue.

[18] Edward E. Lawler, III, Susan Albers Mohrman, and Gerald E. Ledford, Jr., *Employee Involvement and Total Quality Management: Practices and Results in Fortune 1000 Companies* (San Francisco: Jossey-Bass, 1992).

[19] This is based on survey data received from 313 of the corporations in 1990.

[20] The current protection of the right to engage in "concerted activities" for the purpose of "mutual aid or protection" in Section 7 of the NRLA could be applied to these activities.

[21] There has been rapid growth of nonunion grievance systems in recent years, but these often suffer from lack of credibility, inhibited use, and other problems. We regard grievance systems as being more effective not only when they end in binding arbitration using an outside neutral, but also when the individual employee has an effective advocate, drawn from the workplace and knowledgeable about it. In a union situation, this role is played by the local union. In a nonunion situation, employee councils could provide similar assistance.

[22] Clark Kerr, "Union and Union Leaders of Their Own Choosing," in *Labor and Management in Industrial Society*, C. Kerr, Editor (New York: Anchor, 1964).

[23] We note that the employers who make this argument nonetheless resist legal changes that would make it easier for employees to organize where they so desire. Their behavior is inconsistent with their argument.

We need to sharply reduce the legalism of the current representation process, curtail unfair labor practices, and reduce delays so as to increase the ability of workers to choose union representation if they so desire. We might avoid many of the abuses currently associated with representation elections by returning in part to a nonelection system of certification.[24] Certification could proceed once a labor organization had received authorization signatures from more than 50 percent of the bargaining unit. If Congress believes such a system would be open to abuses (for instance, if some individuals sign authorization cards while truly not desiring union representation) it might require that authorization signatures must be accompanied by a dues payment and/or by requirement of a larger threshold of signatures (e.g., two weeks dues and signatures of 55 percent).

Alternatively, expedited representation elections with legal challenges to be decided after the election would be helpful. The shorter the period of the campaign, the fewer the unfair labor practices or other abuses that are likely to occur. If elections were held within 14 days there would be fewer problems than if the standard were set at 30 days. If a longer campaign is permitted, unions should have increased access to employees in public areas where this would not be disrupt production. Unions should be able to reach employees as they exit from buildings, in the public part of shopping centers, and in parking lots. These changes should be coupled with increased penalties for violations of labor law. Weilerl[25] has suggested that "front pay" and other tort damages similar to those used in employment discrimination litigation would more effectively deter discriminatory discharge of union supporters than would triple damages, simply because it would more sharply raise the cost/benefit ratio of illegal employer behavior.[26] We also should encourage the NLRB to implement expedited processing of serious unfair labor practice charges. However, it is important to note that in a context of certification on authorization cards or very rapid elections, we would expect many fewer labor law violations, and hence the issues of access, penalties for ULPs, and expedited processing become less significant.

High Levels of Union-Management Conflict

Hostile labor relations are almost inevitable where unions perceive their existence to be endangered. In particular, the use of permanent replacements during strikes threatens the very existence of labor organizations and violates the reciprocal obligation of employer to employee necessary to a high performance work system. The recent events at Caterpillar illustrate the costs of this particular management tactic. Caterpillar employees, threatened with permanent replacement by management, went back to work without a contract after a bitter strike. As a result of this attack on each employee's personal security as well as on the union's institutional continuation at the company, Caterpillar's highly successful employee involvement program is no longer in operation.[27] Productivity at Caterpillar has fallen below pre-strike levels.

Nor is this an isolated instance. Since 1980 we have seen many destructive uses of permanent strike replacements including those at Phelps Dodge, International Paper, and Eastern Airlines. Neither unions nor employees are likely to commit

[24] Weiler, cited at note 15.

[25] *Ibid.*

[26] Currently, we assume that the employee who is illegally discharged for union activity will return to the workplace and hence is only entitled to be "made whole" for earnings lost in the period of discharge, minus any amount earned from other employment. For various reasons, most employees are not able to successfully return to work in the discriminatory situation. Front pay would compensate them for reduced earnings over their future lifetime of employment occurring as a result of a discriminatory discharge.

[27] *Wall Street Journal*, "Strife Between UAW and Caterpillar Blights Promising Labor Idea," by Robert L. Rose and Alex Kotlowitz (November 23, 1992).

themselves to improving corporate performance where they have been threatened with permanent replacement. This possibility needs to be eliminated in order to encourage cooperation in the union sector and reduce the adversarialism of contemporary labor relations. Temporary strike replacements give employers sufficient bargaining leverage to say "no" to unreasonable economic demands.

First contract negotiations also present problems. They can be plagued with very adversarial labor relations, following as they do on the heels of an organizing campaign. Often employers continue their opposition to labor organization in this stage of the unionization process, making it clear that employees will not get a "contract" without a strike.[28] Indeed, at present a large portion of persons who vote for representation never achieve a collective bargaining agreement, either because they are unwilling or unable to carry out a successful economic strike.[29]

One proposal would be to provide for interest arbitration of first contracts in the event of impasse. Interest arbitration, in several variants, is widely utilized in the public sector in many states; we especially like final offer arbitration because of the incentives it offers for settlement by the parties. Interest arbitration could be imported into the private sector for first contract impasses. First contract interest arbitration doesn't solve all problems: the second agreement still must be negotiated in the future. It also has some drawbacks for those who value the resolution of problems by the parties themselves or who regard arbitrated contracts as less innovative. For these reasons and also because it is likely to be widely unacceptable to the parties, we do not advocate a system of interest arbitration for all contracts in the private sector. Nonetheless, first contract interest arbitration would move us further away from an adversarial, strike-based system of establishing collective bargaining relationships and would thereby increase employee free choice.

Conclusion

In order to facilitate a high wage, high productivity economy, we need to consider modifying our basic labor law in ways that would remove existing barriers to high performance work organization. Important first steps would be the elimination of the mandatory/permissive distinction, increasing information sharing requirements, including some supervisors as employees under the NLRA, and clarifying the meaning of the current prohibition of employer domination of labor organization. Furthermore, we might encourage alternatives to union representation by fostering the growth of "employee councils" in all workplaces with appropriate rights for representatives. This might be paired with a "just cause" discharge policy for all employees, backed by grievance arbitration.

To be successful, labor law reform must make it possible for workers to organize (should they so desire), must make unions more secure, and must reduce the adversarialism of current labor relations. Here we would suggest returning in part to a nonelection system of certification based on authorization cards. We also should increase union access to employees, change the cost/benefit ratio of ULPs to discourage law-breaking, reduce election delays, provide for arbitration for first-contract impasses, and permit temporary, but not permanent, strike replacements.

[28] Although the Wagner Act was intended to do away with a strike-based system of organizing, to some extent the overt conflict has simply been disguised as it has shifted from the recognition process to the initial collective bargaining process.

[29] Estimates of the problem vary. Weiler, cited at note 15, estimates that almost half of all persons in units voting for representation in the early 1980s did not obtain a first contract. William N. Cooke, "The Failure to Negotiate First Contracts: Determinants and Policy Implications," *Industrial and Labor Relations Review*, 38 (January 1985), pp. 163-178, estimates that unions fail to secure first agreements in approximately one-quarter of all units won in representation elections.

This is a wide agenda, but it is only a partial list of needed changes.[30] A comprehensive package of reforms is needed if we are to modernize our increasingly anachronistic labor law in a way that facilitates a high wage, high productivity economy.

[The End]

How Come One Team *Still* Has To Play With Its Shoelaces Tied Together? [1]

By Sheldon Friedman and Richard Prosten

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It is not mere hyperbole to assert that freedom of association for American workers is in greater peril today than at any time in the last seventy years, since trade unions were freed from the concept that their activities were illegal restraints of trade. Freedom of association is a basic human right. ILO Conventions #87 and #98, ratified by 102 countries and 117 countries respectively, guarantee freedom of association and the right to organize and bargain collectively. According to ILO Convention #87: "Workers . . . shall have the right to establish and . . . to join organizations of their own choosing . . . . The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention . . . . Each Member of the ILO for which this Convention is in force undertakes to take all necessary and appropriate measure to ensure that workers . . . may exercise freely the right to organize."

Strong support for workers' rights of self-organization is also deeply rooted in the Judeo-Christian religious tradition. According to the 1986 pastoral letter on *Catholic Social Teaching and the U.S. Economy:* "The Church fully supports the right of workers to form unions or other associations to secure their rights to fair wages and working conditions. This is a specific application of the more general right to associate . . . . No one may deny the right to organize without attacking human dignity . . . . We firmly oppose . . . efforts, such as those regrettably now seen in this country, to . . . prevent workers from organizing . . . . U.S. labor law reform is needed to meet these problems as well as to provide more timely and effective remedies for unfair labor practices." [2]

Despite widespread employer opposition, the importance of respecting workers' rights of self-organization has also become widely recognized, if not so widely acted upon, in the American political system since the New Deal. As Franklin D. Roosevelt put it: "If I were a worker in a factory, the first thing I would do would be to join a union . . . . Trade unionism has helped to give everyone who toils the position of dignity which is his due . . . . I believe now as I have all my life in the

[30] There are many other possible elements of reform other than the ones discussed here, for instance, the issue of how to foster the growth of occupational or craft organization where appropriate. See Dorthy Sue Cobble, "Organizing the Post-industrial Work Force: Lessons from the History of Waitress Unionism," *Industrial and Labor Relations*, 44 (April 1991), pp. 419-436.

[1] This title harks back to an earlier paper by one of the authors, Richard Prosten, Research Director, Industrial Union Department, AFL-CIO, August 30, 1978, "The Longest Season: Union Organizing In The Last Decade, a/k/a How Come One Team Has To Play With Its Shoelaces Tied Together?"

[2] *Economic Justice For All: Pastoral Letter on Catholic Social Teaching and the U.S. Economy*, 1986, pp. 53-54.

right of workers to join unions and to protect their unions." [3]

According to John F. Kennedy, a boyhood hero of President Clinton: "Those who would destroy or further limit the right of organized labor—those who would cripple collective bargaining or prevent organizing of the unorganized—do a disservice to the cause of democracy." [4]

Promise of the Wagner Act

The Wagner Act clearly states that workers should have self-organization rights. According to Section 7 of the Act, described by its author, Senator Wagner, as an "omnibus guaranty of freedom," for American workers: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." [5]

Yet the Wagner Act's basic guarantee of the right of self-organization rings increasingly hollow when measured against the actual experience of workers who attempt to exercise that right in the current environment. Workers' rights to organize and bargain collectively have become severely limited in the U.S. as a result of widespread employer practices fostered by poor statutory language, worse court interpretations and numerous restrictive administrative rulings and procedures. The resulting climate is extremely permissive of employer opposition to worker self-organization and collective bargaining.

As AFL-CIO Secretary-Treasurer Thomas R. Donahue noted recently: "It is an unhappy truth that a large number of American employers have never accepted the right of employees to freely choose a union representative and establish a system of collective bargaining. These employers have fought bitterly to preserve unilateral employer control of the workplace. And, as anyone knows who engages in union organizing, participates in collective bargaining, or observes American industrial relations, employer hostility to employee free choice and to free collective bargaining is growing rapidly, not declining." [6]

Fifteen years ago, one of us was privileged to appear before this Association's annual meeting to offer a trade union perspective on the question of why union organizing success was in decline in America. Planned far in advance of the 1978 legislative debate over labor law reform, that paper was presented shortly after a Republican-led filibuster sent it back to committee—an inside-the-Beltway euphemism for death. Although the final cloture attempt fell only a single vote short, America's workers were effectively told that their time in the wilderness was not about to end.

The 1978 paper, based on the examination of virtually every union representation election decided between 1962 and 1977, led to a disturbing conclusion: the guarantees promised to workers by the National Labor Relations Act had been gutted by years of abuse and neglect. The paper suggested that American employers had "grasped the wisdom of our national axiom that 'justice delayed is justice denied, and combined it with Woody Guthrie's observation that 'some men'll rob you with a pistol and some with a fountain pen,' and fashioned an approach to frustrating worker self-organizing that is largely invisible, making it much more aesthetic than armies of goons and Pinkertons—and a lot more effective. In essence, the strategy is to do whatever is necessary to generate as much delay as

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[3] *Quotations of Social Significance to Union Leaders*, UAW, undated, p. 4.

[4] Ibid., p. 6.

[5] *Legislative History of the National Labor Relations Act of 1935*, Vol. I, page 1414 (1949), as quoted in Testimony of AFL-CIO Secretary-Treasurer Thomas R. Donahue on H.R. 5, March 30, 1993, p. 6.

[6] Testimony of Thomas R. Donahue on H.R. 5, March 30, 1993, p. 4.

possible. Delayed hearings, delayed meetings, delayed elections, appeals, appeals of appeals, stalled negotiations and the like are not news," the paper concluded.

The paper noted that 35 percent of the units that unions somehow managed to win were not under contract five years later. Twenty percent never achieved even a first agreement. Typically, the employer had dragged the process out long enough to decimate the union's majority. Alas, as we approach the first national reexamination of workers' rights to organize in almost two decades, we discover that none of the adverse trends reported in 1978 have abated or reversed. In this paper, we update the earlier results and their impact on workers' rights of free association and choice regarding workplace representation.

The National Labor Relations Act provides that once a union satisfies certain statutory requirements—and they are hardly trivial—the stage is set for a representation election. Five possible formats for such elections exist. If the parties agree to conduct the election as a "consent" election, balloting occurs reasonably quickly and the regional director settles any issues that may arise in the course of the campaign or the actual election. Other formats for representation elections almost always take longer to reach the balloting stage, and as business has discovered, such delay, in and of itself, is likely to undermine the workers' efforts.

There are many ways to drag out the election process. Detailed inspection of the elections referred to in this paper suggests that a pervasive source of increased delay is an apparently purposeful shift in election format in recent years. If management does not consent to a consent election, another type must be utilized. Management has not been consenting.

Analysis shows that each month of delay between the filing of an election petition and the actual conduct of the election increases an employer's potential for thwarting the organizational hopes of its employees. As shown in Figure 1, the union win rate drops off steadily through the first six months of delay.[7]

These figures probably understate the impact of delay. As will be discussed shortly, nearly a third of all petitions filed are withdrawn before a representation election is ever held. We believe employer delay is a major cause for many of these withdrawals.

Keep in mind that these are pre-election delays. Post-election proceedings, which must be disposed of before the certification of the results of the election and the onset of actual bargaining, are a separate matter and tend to exert their own chilling effect on the potential for unionization.

Almost every aspect of an NLRB election now takes longer—much longer—than ever before. We do not wish to be unfair to lawyers, but *corporate* labor lawyers feel that when the union knocks on the door, the interests of their business clients hinge on maintaining the nonunion status quo for as long as possible. During the 30 years of activity that were examined, 74 percent of all consent elections were completed within two months of the petition. By comparison, stipulated elections were only 49 percent complete within two months.

In 1962, 46 percent of all NLRB elections were conducted as consent elections. In 1991, only 1 percent of NLRB representation elections were conducted under consent conditions. Stipulated elections almost always take longer to complete than do consents. They require the NLRB to decide election-related questions at the national level. In 1962, stipulated elec-

[7] Based on approximately 200,000 NLRB elections administratively closed between January 1, 1962, and December 31, 1991, for which data were available. Slightly less than one percent of elections analyzed had insufficient data and were not included in this calculation. Unless otherwise specified, the election-related figures in this paper flow from our analysis of these cases.

tions accounted for one-fourth of all elections. They accounted for a full three-quarters of elections closed in 1977 and have accounted for more than 80 percent since 1982. Figure 2 depicts the drastic decline in consent elections over the last thirty years. The three other election formats are utilized less frequently; taken together, they accounted for less than 15 percent of the elections held in 1990, a proportion that has remained relatively stable for many years.

In the early 1960s, more than 10 percent of all NLRB elections were completed within the same month as the filing. By 1977, the figure was down to 2.2 percent, and in 1991 it was only 0.8 percent. In the early 1960s, nearly 60 percent of all NLRB elections were completed by the end of the month next following the month in which the representation petition was filed (see Figure 3). In the 1970s, this figure was consistently in the 40 percent range and is now in the low 30s as a percentage. In short, the completion rate for elections is less than one-tenth of what it was in the early 60s at the one month mark, and only half as many are completed within two months of the filing.

Withdrawals

In many cases, unions feel compelled to withdraw petitions after they have been filed. In fiscal year 1990, 31 percent of all petitions filed (1,771) were withdrawn. This proportion, moreover, has been increasing. In 1970, the withdrawal rate was 22 percent and in 1980, it was 24 percent (see Figure 4).

More investigation is needed before it can be proven conclusively that the high and increasing petition withdrawal rate, in and of itself, is yet another indicator of employer opposition to worker attempts to form a union. It is difficult, however, to conceive of any other explanation. At least 30 percent of the workers must sign authorization cards before a petition can be filed; the actual proportion who sign cards is thought to be substantially higher in most cases. Subsequent withdrawal of a petition before an election presumably reflects a judgment that the likelihood a majority of workers will vote for the union is remote. Such large scale changes of heart presumably reflect employer opposition.

Employer Opposition

The shift in election format away from consent elections and the related increase in time elapsed between petition filing and election dates has greatly increased the scope for employer opposition to union organizing. There is every indication that most employers have been aggressively utilizing this increase in scope to oppose workers' organizing efforts.

Employer opposition to union organizing is widespread in the U.S. As Richard Bensinger, Director of the AFL-CIO Organizing Institute, put it recently, employers have a captive audience; union organizers have no access to the work site. "During every union campaign, workers are bombarded with speeches and one-on-one arm twisting by supervisors in an attempt to get them to vote against the union." [8]

While employers require workers to attend anti-union "captive audience" meetings on company time, union organizers are barred from company property and have no access to the workers during working hours. These restrictions on union access are not the result of the NLRA itself but stem instead from court decisions overturning NLRB decisions that gave unions greater access. Justice Clarence Thomas, in the first decision he authored for the majority after his appointment to the Supreme Court, tightened the noose even further. In his *Lech-*

[8] *When a Democracy Isn't A Democracy: Organizing Unions under the National Labor Relations Act*, by Richard Bensinger.

mere decision, employers were permitted to deny union organizers access to portions of company premises to which even the general public has access, such as shopping center parking lots.[9]

Union supporters face constant fear they will lose their jobs. One in ten is fired, according to Professor Paul Weiler. The only penalty against these illegal discharges is reinstatement with back pay, long after the election is over. Employer threats during organizing drives (such as job loss or plant closure) are unfair labor practices, but the only penalty is to require the employer to post a notice, long after the election, that it will not do this again. Union supporters are isolated from the rest of the work force and barred from attending employer anti-union meetings, which present a one-sided, biased view of unions.

Employers encourage workers to campaign actively against unions; union supporters are disciplined for campaigning in favor of the union. The representation election itself is held on company premises under the noses of company officials.

If the union wins despite all this, the employer often refuses to accept the result. Employer appeals result in lengthy delays. By the time the employer is ordered to bargain, union sympathizers have quit or been fired; the new hires who replace them are screened carefully to weed out prospective union sympathizers.

Kate Bronfenbrenner, in a recent survey of organizers, found employer opposition was widespread and often effective in thwarting organizing.[10] She found that 70 percent of employers used a management consultant for their campaigns; an additional 15 percent used an outside law firm. More than 75 percent of employers conducted active anti-union campaigns. Tactics used included: discharges, captive audience meetings, supervisor one-on-ones, wage increases, promises of improvements, promotion of union leaders, anti-union committees, small group meetings, letters, and leaflets. Lower union win rates were associated with most of these tactics. Stipulated or board-ordered units that were different from units requested in the petition also had a negative impact on election outcomes.

A glance at recent human resources literature reveals that employers routinely are advised to resist unionization and given specific information on how to go about it. An article in *New England Business* advising that "the adoption of a preventive employee relations program can help avert potentially disruptive unionization efforts" [11] is typical. So is an account in *Human Resources Focus* in which "labor relations attorney Steve Cabot recommends the regular use of employee attitude surveys as a means of countering unionizing efforts .... Cabot stresses that the use of employee attitude surveys could significantly minimize the impact of union organizing campaigns ...." [12]

Personnel advises its readers as follows: "The National Labor Relations Act allows management to inform employees about its opinions regarding employees' decision to join a union ... The steps that management can take to prevent workers from seeking out union representation include developing an open-door policy for employee communication, establishing two-way communication, implementing a no-solicitation policy, and restricting the types of notices workers are allowed to post on bulletin boards." [13]

[9] See also K. Conlon and C. Voight, "Distinguishing *Lechmere*: Union Organizers' Access to Employers' Property," *Labor Law Journal*, this issue.

[10] Kate Bronfenbrenner, *Successful Union Strategies For Winning Certification Elections and First Contracts: Report To Union Participants*, "Part I: Organizing Survey Results, Summary of results from 1986-1988 survey of 261 lead organizers" (Penn State: New Kensington, PA).

[11] H. Bloom, *New England Business* (April 1992).

[12] *Human Resources Focus* (December 1991).

[13] Robert J. Nobile, "Yes, We Allow No Solicitation Today," *Personnel*, Vol. 68 (March 1991).

According to *Personnel Journal*, a "company faced with the possibility of a trade union organizing its employees should, within the limits of the law, actively oppose the attempt. A company is guaranteed the right to present its views, arguments, and opinions opposing the union . . . . A company may present to its employees statements referring to the general downward trend in trade union membership, that union membership does not guarantee employment, and that a company is required only to bargain in good faith and is not required to accept any union demands" [14]

First Contracts

The election, moreover, is not an end in itself. In 1975, the Industrial Union Department attempted to determine the frequency with which NLRB election victories are converted into collective bargaining contracts and what happened to initial contracts as they expired. At that time, based on extensive analysis, it was determined that if a group of workers overcame the odds and succeeded in forming a union, there was a 22 percent chance that they would never secure a collective bargaining agreement. An additional 13 percent enjoyed the protections of a contract only briefly.

The 35 percent of the units that were not under contract five years after elections were won included some which succumbed to natural disasters, did not survive retirements by owner-operators, or for some other credible reasons were no longer in business. In most of the situations where there was no contract five years after the election, however, the absence of an agreement reflected an employer who had exploited the weaknesses of the National Labor Relations Act to frustrate the results of the election.

Often the employer had dragged the process out long enough to decimate the union's majority. The effects of pre-election delays tended to linger on long after the election in those cases where workers succeeded in achieving union certification. In the cases where no agreement was ever reached, pre-election time delays had been substantially greater than for all elections held in that year. While it would be useful to update the 1975 survey that gave rise to these results, the difficulties of obtaining a first contract surely have increased since then.

Employer Opposition and Economic Competitiveness

Employer opposition to worker self-organization is not rooted in concerns about economic competitiveness. Several other industrial democracies do a far better job of protecting workers' rights than the United States, yet they have not suffered economically. On the contrary, a number of those countries have grown faster, raised real wages faster, and have been more internationally competitive than the U.S. in recent years.

According to Richard Rothstein: "As late as 1970, 31 percent of all American and 37 percent of West German workers belonged to unions. Yet by 1987, U.S. membership had shrunk to 17 percent while West Germany's grew to 43 percent. During this time, West Germany sustained a trade surplus with the U.S. While its unions gained strength, Germany's economy grew at an average per capita rate of 2.4 percent a year.

"Switzerland, like the U.S., had union density of 31 percent in 1970. By 1987, Swiss union membership was 33 percent. Swiss growth averaged 4.6 percent, nearly triple the U.S. rate, and as a result, Swiss per capita income rose to $30,000 by 1989, compared to $21,000 for the U.S.

"Canada's economy grew at an average 4 percent rate while unionization went from 32 percent to 36 percent. Japan expanded by 4.3 percent (its per capita in-

[14] Paul S. McDonough, "Maintain a Union-Free Status," *Personnel Journal*, Vol. 69 (April 1990), p. 108(5).

come now exceeds the U.S. by about $4,000) while its union density dropped only slightly from 35 percent to 28 percent.

"On the other hand, while American unions declined, our economy grew at only a 1.6 percent annual rate. Clearly there is something missing from the facile assumption that non-union industry is more competitive than industry that operates in a unionized environment." [15]

Indeed, while it is beyond the scope of this paper to demonstrate it in detail, employer opposition and the legal/administrative framework which permits it not only frustrate the ability of workers to organize and engage in collective bargaining, but also the nation's ability to create a high wage, high productivity future is seriously compromised as a result.

Conclusion

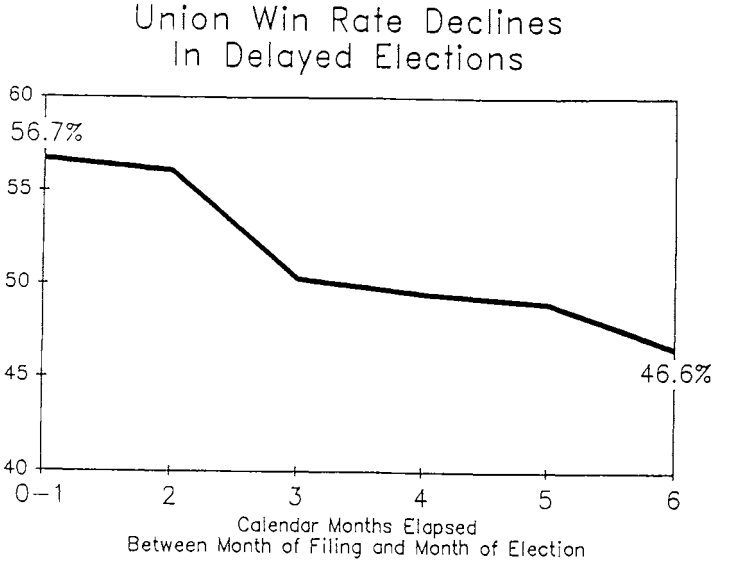
Given the overwhelming evidence, it is not surprising that the House of Representatives and a majority of the Senate agreed back in 1978 that reform was in order. On the merits, the case for labor law reform is even stronger today. Consider again, if you will, the relationship between pre-election delay and election outcome. Assess the evidence as to how these delays are being engineered. Note that employers are permitted to avoid contracts, even where their employees have voted to form a union. Reflect on how employers willing to expend huge sums of money—we guess they'd call it an investment—can make a mockery of the workplace democracy we would like to believe exists in this country.

We do not rule out the possibility that there are some groups of workers who, for one reason or another, actively reject the concept of having union representation, nor do we blame each and every loss in a representation election on management chicanery. Nevertheless, it seems clear to us that workers seeking to exercise their right of self-organization for purposes of collective bargaining are required to operate with, pardon the cliché, their hands tied behind their backs.

For millions of American workers, the progress achieved in the nine decades between the infamous Triangle Shirt Waist fire and the much more recent tragedy in Hamlet, North Carolina can best be measured by the degree to which they are truly free to self-organize. While it is beyond the scope of this paper to spell out the specific reforms that are needed, it is clear that the nation's working people need and deserve an overhaul of U.S. labor laws to restore the fundamental promise of the Wagner Act. Such an overhaul is a matter of basic fairness and social justice. It is also essential if the U.S. economy is to compete on the basis of high and rising living standards for the broad majority of its population in the years ahead.

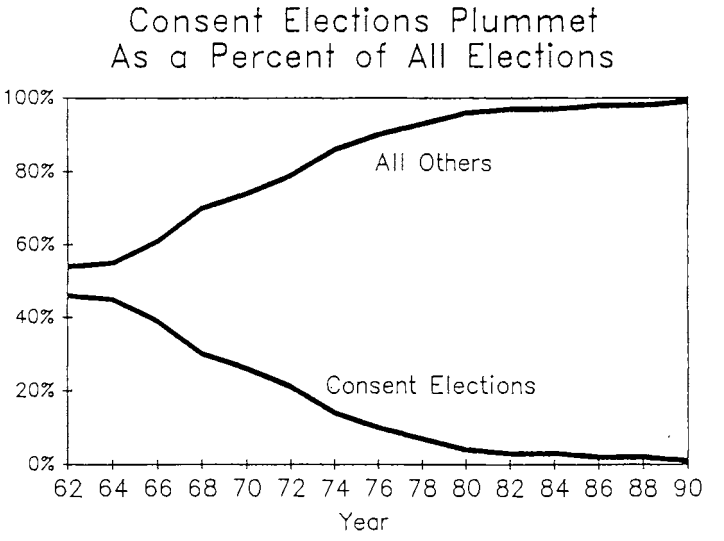
[15] Richard Rothstein, "Unions and the New Administration," *Dissent*, (Spring 1993), p. 161.

igure 1



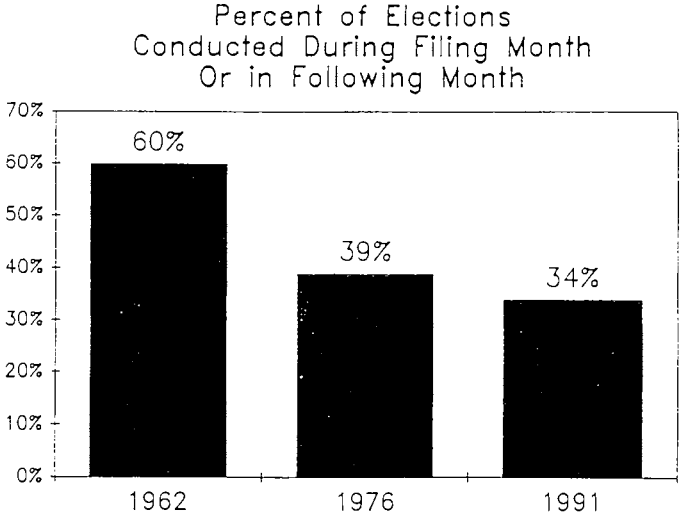
Source: NLRB

Figure 2



Source: NLRB annual reports

Figure 3



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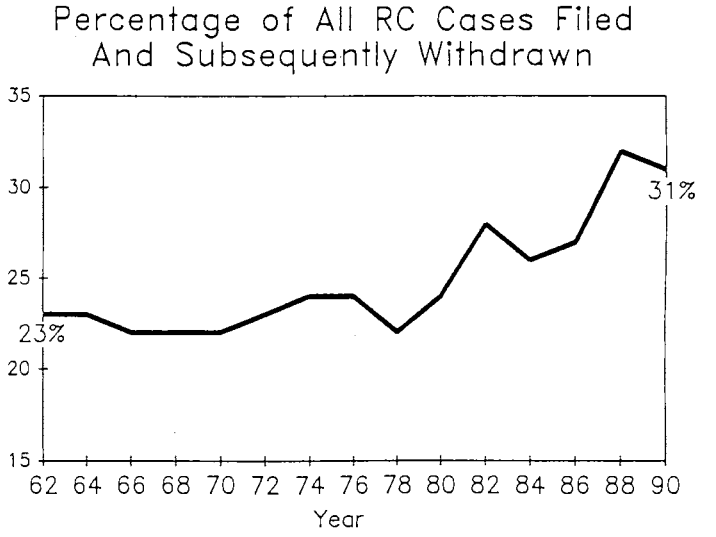


Source: NLRB annual reports

[The End]

Recognition and Revitalization: Fundamentals for Sustaining Change

By Ernest J. Savoie

Director, Employee Development, Ford Motor Company

Rapid change is the order of the day. This is particularly so in the field of industrial relations, where change seems to be coming at us from all directions and usually at high velocity. Most of the practitioners of our profession have long since concluded that to survive and prosper in these strong winds of change they must do more than just respond: they must, in fact, *create* change, be an active agent of change. They know they must reshape, restructure, and re-engineer their organizations.

To accomplish this, the truly successful leaders in the best organizations have recognized that they must reshape themselves as individuals too. They must work in different ways; they must set off in new personal directions; and they must innovate within their own roles in the organization.

At Ford, we have been in a state of steady transformation for more than a decade, and our journey is far from over. Indeed, we need to do more, faster, and more deeply. Throughout our transformation, we have been guided by the belief that every employee has the capacity and the willingness to contribute in important ways to the business and is willing to do so if given the opportunity.

This belief was the foundation for all our efforts at participative management and employee involvement. It guided us also in creating a new labor relations with the UAW, including a widely heralded and often imitated series of UAW-Ford joint programs. Participation and involvement, we discovered, are powerful change creating activities. Participation breeds more participation. As it grows, it embraces more people, more subjects, and more relationships, and it keeps fostering more and more change. For us, participation is a powerful tool that has made it possible to achieve our business strategies more quickly and more fully.

Two key lessons of our transformation should be of great value to individuals, leaders, and organizations that want to sustain major improvement efforts over long periods of time. They are recognition and revitalization. These two dimensions, of course, are only part of the change process. There are many other important ingredients of change, and it is always dangerous to look too intensively at parts of a system to the neglect of the broader system. Still, there are times when especially powerful parts of the whole need to be isolated and carefully examined. This is one of those times.

Recognition and revitalization can contribute in major ways to improved performance. They do it principally by strengthening employee commitment, by drawing individuals and the organization together, and by motivating people to effective action. They make people care, and they make people want to do more.

Let us first isolate and examine the subject of recognition. We will not, however, be looking at it in its broadest sense. Our examination will be limited to what can be called *interpersonal* recognition. This is the kind of recognition that occurs when supervisors or managers personally acknowledge someone's effort, or when

they make it clear that they respect their employees as individuals. It is also the kind of recognition that happens when individuals acknowledge each other's contributions—up, down, and laterally. Such interpersonal recognition needs to be distinguished from recognition programs designed around formal awards or incentives. Obviously, merit pay, promotions, profit sharing, gifts, mementos, or similar reward mechanisms all have their place and need to he used. But interpersonal recognition is more fundamental and, quite probably, much more powerful. It deals with the way we think and the way we interact with people. It addresses one of our most fundamental human needs: our self-esteem.

At Ford, we have been convinced of the value of interpersonal recognition for several years. Yet for a long time we lacked the hard evidence to prove our conviction to the Doubting Thomases. Then, as part of our search for solid evidence, we asked our statisticians to look at our company's salaried employee survey, which covers all 45,000 U.S. employees—from mail clerk to engineer to senior executive. In this survey, we ask employees if they believe they are getting recognition in their work setting. Their answers enabled us to identify the two key groups for our purposes: the group made up of employees who say they are recognized and the group made up of the employees who say they do not receive recognition. Then we looked at how the people in these two groups answered a series of questions relating to supervision and to their jobs. The results were startling. Following are just a few examples.

Eighty-three percent of the employees who receive recognition say they are satisfied with Ford as a place to work. Only 27 percent of those who do not receive recognition say they are satisfied with the company. If we had no other evidence, this is a remarkable spread—from 83 percent to 27 percent—that would vividly underscore the value of recognition.

Of the people who receive recognition, 73 percent say their supervisor inspires high performance. In the group that does not receive recognition, just 31 percent say their supervisor inspires high performance.

Eighty-three percent of the employees who receive recognition agree with the statement: "My supervisor treats everyone fairly." Only 43 percent of those who do not receive recognition say their supervisor treats people fairly.

This one is especially significant: 87 percent of the people receiving recognition say their supervisor requires high quality work. Only 57 percent of the people who do not receive recognition report their supervisor demands quality work.

Eighty-two percent of the people getting recognition say their supervisor encourages continuous improvement. Just 47 percent of the people who do not get recognition say their supervisor strives for continuous improvement. This is an area, we know, that is critical for organizational improvement and for the implementation of all business strategies.

Two-thirds of the employees who receive recognition say that departments cooperate to get the job done. Of the employees who do not get recognition, only 37 percent say they see interdepartmental cooperation.

Here is the one that most caught our eye: of the people who receive recognition, 78 percent say they look forward to coming to work; of the people who do not receive recognition, just 34 percent look forward to coming in.

The chart at the end of the article summarizes the examples just given. The correlations are consistent and so is the wide gap between the people who get recognition and the people who say their efforts are not recognized. We made a lot of other correlations, but these are sufficient to demonstrate the point. We are spreading these facts throughout the company, and we are looking at the things we can do to

improve interpersonal recognition practices. A series of dialogues is being developed now that will focus on supervisors and managers. We will use these dialogues to make it clear why interpersonal recognition is critical to employee commitment and performance and how it can be best practiced.

In the dialogues, three points will be emphasized. First, we will make it clear that interpersonal recognition is not simply the occasional "Way to go!" There are a great many different and effective ways that a supervisor or manager can use to acknowledge an employee's worth or contributions. Second, we will point out that the practices are really not as important as the mind-set of the supervisor or manager. True interpersonal recognition is a deep way of life, of internalized values that then manifest themselves in outward actions. Third, we will discuss the enormous credibility factor involved in the recognition process. This credibility issue surfaces in a couple of ways. For one thing, recognition efforts that are perceived by employees as insincere or perfunctory will do more harm than good. And for another, to effectively practice recognition, supervisors and managers must truly know the tasks and responsibilities of their employees. If the employees believe the supervisor does not understand the work well enough to know what really constitutes superior effort, any attempt to give recognition will fall flat.

Underlying the credibility factor is the matter of fundamental respect. Interpersonal recognition flows from the well of deep and sincere respect. We looked at this matter of respect more carefully in a separate survey. We asked 2,000 Ford people to identity the characteristics of the people who are considered successful in the organization.

First, the survey participants told us, the successful people in the organization work long hours. Second, they said the successful people have mentors or godparents. Third, they said our successful people are willing to work beyond normal limits, and so on. Some solid characteristics showed up—and some not so solid ones, too.

One characteristic was conspicuous by its absence. Sadly, "respects people—treats them well" did not make the top ten list. It did not appear, in fact, until number 17. In other words, the survey participants said the successful people in their organization demonstrate 16 other characteristics more frequently than they do respect for others.

Then we asked the question a different way. We asked the participants to list the characteristics that they believe *should* characterize the successful members of the organization. This time, "respects people—treats them well" was first on the list. It is considered the most important of all, the characteristic that people want to see most in their organizations and their leaders.

Having and showing genuine respect and creating a climate of recognition and respect are absolutely basic to making organizations effective and to making leaders successful. They clearly are spurs to performance, and their effects ripple far beyond a company's boundaries. The force of recognition and respect extends to customers, dealers, suppliers, communities, and all the other stake holders we come in contact with. To us at Ford, the hard facts of our two surveys are convincing proof.

Now we can turn to revitalization or more simply to renewal. Revitalization needs to be carefully considered right from the start of any change process. The best way to assure this consideration is to design it right in as a planned step of the process. Should that statement strike some people as strained, they do not fully understand the way change occurs.

Any change process has various, rather predictable states, conditions, and problems. There may be too few resources;

people may try to go too fast; some efforts may stall; some others may be false tries. It is important, therefore, to consider right from the beginning how these hurdles will be handled. It is regrettable, but far more workplace changes are started than are carried through.

At first, there are almost always some early benefits because of novelty and because the most visible opportunity areas are selected. As expansion occurs, however, confusion or doubt sets in. Time and resources consumed seem to be excessive. There can be a dry period of no measurable benefits. The effort may be directed to the wrong problems. There is a danger of backsliding, apathy, or cynicism. The temptation is to walk away, to blame someone else, and to harden attitudes against future progress. It is a big mistake to underestimate the needed commitment and the required leadership to sustain a major change effort. That is why attention to revitalization and renewal must he part of the implementation process.

Varied organizational efforts for change, under all kinds of labels, are advocated: participative management, employee involvement or empowerment, labor-management cooperation, customer focus, fast cycle, total quality management, total quality excellence, organizational learning, visioning, team concepts, new paradigms. The Tower of Babel must have been a condominium of consultants.

By whatever name we know it, any change effort is almost certain to need revitalization at some point. Unfortunately, revitalization is often perceived as a symbol of failure. It implies our efforts to achieve change have misfired, bogged down, or swerved off course. As a result, when revitalization is suggested for an organization, the atmosphere is often heavy with the potential for blame and recrimination. The whispered claim, "I told you so," is frequently heard.

Actually, revitalization of a change process is perfectly normal and logical. It is painting your house, tuning your engine. It is nothing more than application of the principles of preventive maintenance or of acreage renewal or of exercise and diet. Revitalization, in other words, is not a sign of failure. Far from it. It really works to create success because it is a method of helping assure that a process functions the way it is supposed to.

Leaders of the organization have a special obligation toward renewal and revitalization. The most important leadership tool is a conviction that revitalization is, in truth, a source of vitality. The effective leader sees revitalization as a force that invigorates values and gives the change process a tune-up.

How do we know when our change process needs revitalization? There are some telltale signs. Tensions may erupt among key people, or they may assert they do not have time for meetings that are important to effecting change. Perhaps there is less and less communication. There may be fewer celebrations and other special events honoring the change agents in the organization. Or people will make comments such as: it isn't worth the time and effort; we don't need it anymore; nobody cares; times have changed.

There are still other clues available to an organization's leaders. Good managers and union leaders can usually "feel" the atmosphere of an office or a plant. They will probably have a sense of when they need to open the hood and start a major overhaul of the change process. In addition, the employees themselves—by their actions and their statements—will alert a listening management to a need for revitalization. A simple but well designed survey, perhaps with some supplemental focus groups, could be very helpful in identifying particular problem areas.

What revitalization methods should be employed? There are many proven techniques available, but whatever methods or tools are used, the most effective way to design a revitalization effort will come

from involving people in this process. At Ford, we ask the people whom we want to revitalize what they think and what they suggest. And we ask people who have gone through revitalization for their views and experiences. This not only provides all the power and other avantages of participation, it also gives us a very "tailored" revitalization effort.

Why is revitalization worthwhile? It can be especially valuable to an organization because it provides a reason and an opportunity to "get back to basics." In the course of the renewal, we can review purposes and goals, and reassess values; we can take a fresh look at the whole and see if we have things pointed in the right direction; and we can re-examine relationships, communication, feedback, recognition, and vision. Revitalization gets an organization back in motion and keeps it there.

There is yet another reason for "institutionalizing" revitalization: new people are always coming into the organization, and others are continually taking on new jobs and responsibilities. These people must be made aware of the value system, and they must be given the guidance and tools they will need to work in it. A well designed revitalization effort is an excellent way to achieve these objectives.

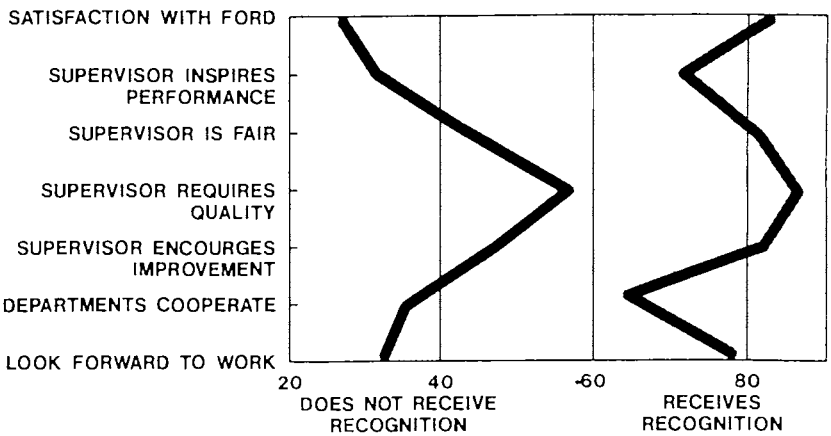
Because revitalization is often so obvious and so logical, management sometimes tends to believe it can be achieved with little more than administrative effort. That is a major misconception. Revitalization cannot be delegated and it cannot be accomplished just with memos, reports, newsletter articles, and bulletins. It must be accepted as a function of an organization's leadership, and it must be an activity that touches and involves the participants.

Revitalization is about goals and striving to reach them. It may produce some tensions and strains, but all growth produces tensions and strains. Revitalization gives organizational leaders the opportunity to fine tune their relationship and to eliminate any differences between their principles and their practices.

On the surface, revitalization may not seem to have much of a link to recognition and respect, but it does—a strong link. When we revitalize the change process, we show people we recognize their importance as contributing members of the organization and that we respect their concerns about progress. We show them we care deeply about the way things are going. We show them we want to help them make good things happen. We show them we are determined to give them the tools and the power they need. We show them we respect their hopes and aspirations. And we show them we want to work together to make things better.

Revitalization and renewal, recognition and respect: these are the four Rs. They are interlocking and mutually supportive. Effective leadership keep the four Rs at the forefront of consciousness and practice. Effective leadership provides the spirit and the tools. Recognition and revitalization are fundamental, and they work.

THE POWER OF RECOGNITION



[The End]

Labor-Management Cooperation: In Need of An Implicit or Explicit Agreement

By Richard B. Peterson

School of Business Administration, University of Washington, Seattle, Washington

Lane Tracy (Ohio University) and I have been engaged in the study of labor-management cooperation for the past twenty years. Our interest in the field was based on the attention given to integrative, or problem-solving, bargaining by Dick Walton and Bob McKersie in *A Behavioral Theory of Labor Negotiations.*[1]

We began in 1973-4 by testing Walton and McKersie's four models of bargaining in private sector negotiations taking place throughout the United States at the time.[2] We found strong support for the presence of distributive bargaining, integrative bargaining, attitudinal structuring, and intra-organizational bargaining. A general replication of that study covered private and nonprofit sector bargaining in the Pacific Northwest.[3] Cabelly, one of my doctoral students at the time, provided even stronger support for our models of collective bargaining in his study of public school negotiations in the State of Washington.[4]

In 1985, Lane Tracy and I summarized what we had learned about labor-management cooperation programs during the postwar period.[5] Three years later, we wrote an article on lessons learned from the America experience of individual unions and employers working on common or overlapping problems.[6] I strongly encourage union and employer officials, as well as third party representatives, to read that article in the California Management Review.

More recently, we reported on a study of QWL/job enrichment between two unions and one of the former Baby Bell companies.[7] In late 1992, we wrote a paper based on a survey assessment by key union and employer officials engaged in some 130 different collaborative efforts.[8]

Having established some credibility with the audience that I have knowledge about the America experience with labor-management cooperation, I wish to share with you my assessment of cooperative programs and present-day U.S. labor-management relations. Before doing so, I should state that before returning for my doctorate in the mid-1960s, I worked in personnel and labor relations for a private

[1] R. Walton and R. McKersie. *A Behavioral Theory of Labor Negotiations*, (New York: McGraw-Hill, 1965).

[2] R. Peterson and L. Tracy, "A Behavioral Model of Problem-Solving in Labour Negotiations," *British Journal of Industrial Relations*, Vol. 14, No. 2 (1976), pp. 159-173; "Testing a Behavioral Model of Labor Negotiations," *Industrial Relations*, Vol. 16, No. 1 (1977), pp. 35-50.

[3] R. Peterson, L. Tracy, and A. Cabelly, "Problem Solving in Labor Negotiations: Retest of a Model," *Relations Industrielles* (ANAPA), Vol. 36, No. 1 (1981), pp. 87-104.

[4] A. Cabelly, *An Empirical Test of a Behaviorally Oriented Negotiations Model in the Public Schools in the State of Washington*, Doctoral Dissertation, University of Washington (1980).

[5] R. Peterson and L. Tracy, "Problem Solving in American Collective Bargaining: A Review and Assessment," D. Lipsky, Editor, *Advances in Industrial and Labor Relations*, (Greenwich, Connecticut: JAI Press, 1985), Vol. 2, pp. 1-50.

[6] R. Peterson and L. Tracy, "Lessons from Labor-Management Cooperation," *California Management Review*, Vol. 31, No. 1 (1988), pp. 40-53.

[7] R. Peterson and L. Tracy, "Assessing Effectiveness of Joint Committees in Labor-Management Cooperation," *Human Relations*, Vol. 45, No. 5 (1992), pp. 467-488.

[8] L. Tracy and R. Peterson, "Experiences in Labor-Management Cooperation in the United States: A National Survey," Working paper, Ohio University (1992).

sector employer. I felt very comfortable at the time in representing the management side in grievance handling and negotiations. We dealt with representatives of the IAM and an independent union formed from Teamster dissidents. Our company recognized their legitimacy to represent our employees, and they dealt with us in a professional manner as well.

When I was a doctoral student in Industrial Relations at the University of Washington in the mid-1960s, the prevailing paradigm was pluralism in the workplace and in society generally. Sumner Slichter, as early as 1947, had likened the American system of labor relations to the separation of power in our federal government. Management acted as the executive branch at the workplace by making most of the decisions. Negotiations between the employer and union(s) served the legislative role, while the grievance arbitration process was likened to the role of the federal court system in carrying out the judicial process.

Another important point is that during the early postwar period a number of employer, union, government, and academic members connected with the field of labor-management relations strongly believed that the American system of industrial relations was worthy of selling to the world. The fervor was not too unlike the Woodrow Wilson belief after World War I of spreading the American ideal of democracy to Europe.

Quite frankly, one of the last things that both the industrialized and developing world would want to borrow from America today is our system of labor-management relations. Unions in the private sector are about as weak as they were in the period from 1919-1932. Union organizing activity is increasing, in part, because of the labor movement's hope that President Clinton's administration will be more sympathetic than the Reagan and Bush teams were. They still face an uphill battle because of (1) the employee's perception and the reality that most employers will resist efforts of their work force to gain representation and (2) because of the misguided view of too many Americans that they have the individual power to negotiate with their employer over issues of pay, benefits, working conditions, and job security. This perception flies in the face of continuing industry restructuring that has resulted in major layoffs, early retirements, and pay freezes and reductions. Hence, they do not see the need for collective representation in the employment setting.

Let me briefly elaborate on both of these points. First, there is no question that between 1960 and about 1980 unfair labor charges filed by unions during organizing drives increased fourfold. While some of the increase may be accounted for by unions using the filing of such ULPs as a campaign tactic, much of it must have been due to more aggressive use by many American private sector employers of firing of union activists and other heavy-handed tactics.

Second, anti-union and nonunion consultants flourished throughout many parts of this country during the 1980s. Many of them found a friendly home base in states like South Carolina. They could sell a variety of strategies and tactics to increase the likelihood that the employer would win the certification election or would be successful in the outcome of a union decertification election. At its worst, the NLRB encountered some employers who were not adverse to violating the law if the outcome for them was positive, since the punitive damages imposed by the NLRB and courts were not as costly as being unionized (e.g., the *J.P. Stevens* case). Interestingly enough, when employer consultants tried to sell their package in Canada and Great Britain, they found most employers less than supportive of their goals and tactics for weakening their labor movements.

Third, the NLRB recently announced that the total monetary charges levied by their agency during fiscal year 1992 were

$246 million—a record. It is not difficult to conclude that many of the charges were due primarily to employers who chose not to play by the "rules of the game."

Fourth, in my view, the past ten to fifteen years can be characterized as the most selfish and greedy in the postwar years. Unbridled individualism (e.g., deregulation, executive compensation packages) has too often manifested itself in "winning at any cost," to the loss of our nation's values and the sense of loyalty to and by organizations.

Fifth, and perhaps most importantly, the reality of the employment setting seems at odds with the perception of many of our citizens and work force that they have much power as individuals to affect workplace relations. Since 1980, the Fortune 500 corporations have shed one of every four jobs—many are lost forever. Unemployment is at the 7 percent level, and would be higher if all people whose jobs were bought off through early retirement packages were included in the unemployed category.

Finally, some of you in the audience might mention in defense of current collective bargaining that strike levels are at all time lows for the period since statistics were collected after World War II. While there is no way of proving it, there are many indications that the ability (and willingness of some) employers to replace economic strikers and the impact of the last four recessions have played major roles in the reluctance of both unions and their members to strike. Hence, a potentially healthy avenue for expressing employee discontent and empowerment is not a realistic option for the organized work force, and the nonunion segment even has less recourse in a stagnant labor market.

What have we learned from our research on labor-management cooperation in the United States during the past 35 years that may be helpful to management and union officials in light of recent experiences in labor-management relations? I believe that there are a number of insights that would increase the success rate of labor-management cooperation projects.

(1) Union-management cooperation will be more successful if the employer accepts the legitimacy of unions as representing the collective interests of their membership. The work of faculty and doctoral students at the Sloan School at MIT provides strong evidence that some unionized employers had a conscious strategy of placing new plants in those areas of the country where the threat of unionism was not a real issue. Such a strategy provides a very mixed message both to union officials and the members of the firm's work force.

(2) Union and employer officials need to see a real need for addressing important problems that face both parties. Furthermore, the cooperative ventures need to deal with both side's needs. That means that the employer agenda that tends to concentrate on such issues as productivity, profitability, and quality needs to be counterbalanced with union and employee concerns for fair pay (or equitable sharing of pay loss), provision for medical insurance and pension coverage, fair disciplinary procedures, reasonable working conditions, and job security. It won't work if most members of the joint committee (and the work force in general) perceive that employer officials are largely defining the problems, issues, and solutions.

(3) It is preferable that management and union officials develop either implicit of explicit identification of the major problems facing one, or both, parties, as well as fairly explicit goals to be reached. As an example, both parties would agree that poor labor productivity and job insecurity are serious problems. The parties would then specify short term and long term goals in each area and deadlines. For instance, labor productivity needs to increase by 6 percent within twelve months, and 10 percent within eighteen months.

However, the company commits itself to finding new work so that the higher productivity does not translate into layoffs, unless business conditions deteriorate to the point that the firm cannot afford the labor costs. This pairing of legitimate goals and the even more complex intermixing of union and employer goals, work much better than addressing one party's goal at a time.

(4) International union staff will need to provide more training and expertise to their local union officers if they are to operate on a level playing field with many employers who have access to internal staff and consultants (industrial engineers, accountants, lawyers, and so forth). Otherwise, management is seen as the dominant party, with a strong likelihood that both definition of the problem and possible solutions will dominate the agenda.

(5) A trusting relationship is absolutely crucial to the success of the collaborative effort. We have found evidence of one or both sides "shooting themselves in the foot" by giving vague or contradictory messages, such as stating a commitment to maintaining employment levels and subsequently laying off union or nonunion staff at other plants. A more common problem occurs when the firm pleads the need for pay freezes or concessions and then implements an enriched management bonus plan or stock option improvement for executives. The clear message of these examples is that what we are asking of the rest of the work force doesn't apply to management.

(6) Bill Cooke's recent research[9] on joint union-management programs nationwide suggests that: (a) product quality improvement was more likely when the program was jointly administered than when there was no union participation; (b) programs administered solely by management fared no better than those with no programs; and (c) the product quality gains associated with jointly administered programs in union firms were at least equal to the experience with participation programs in nonunion firms. The clear message is that participation increases the likelihood of reaching the goal of product quality. The same situation may hold true for productivity as well.

(7) Finally, I would argue that American business and union leaders need to be far more willing to take risks and try new approaches in dealing with one another than we find in American industrial relations in recent years. However, these collaborative programs must take place within the parameters of acceptance of union and employee voice, the need for the employer to be profitable, the employer's willingness to accept both jointness and legitimate disagreements between the parties, and two-way loyalty and commitment. In my view, freedom of the employer to operate in the workplace has neglected the equal need for responsibility and stewardship towards its own human resources. Union officials, at times, have also lost sight of the responsibility dimension through corruption or power plays. Honest differences of opinion will continue to exist in the field of labor-management relations, but more attention needs to be given to mutual gain bargaining and fair resolution of grievances.

[The End]

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[9] W. Cooke, *Labor-Management Cooperation: New Partnerships on Going in Circles?*, W.E. Upjohn Institute (1990); "Product Quality Improvement Through Employee Participation: The Effects of Unionization and Joint Union-Management Administration," *Industrial and Labor Relations Review*, Vol. 46, No. 1 (1992), pp. 119-134.

Distinguishing *Lechmere*: Union Organizers' Access to Employers' Property

By Kevin Conlon and Catherine Voigt

District Counsel for the Communications Workers of America; Loyola University of Chicago School of Law Student

Union attorneys have described the recent United States Supreme Court decision in *Lechmere, Inc. v. NLRB*[1] as an "unmitigated disaster" and "the legal equivalent of a drive-by shooting." Although, at first glance, this case seems to indicate that the Supreme Court has foreclosed almost all future union opportunities to organize on an employer's property, the decision has left union organizers with several remaining options for obtaining access.

The seminal case involving the right of employees to organize on an employer's property is *Republic Aviation Corp. v. NLRB*[2] in which the Court held that employers must allow off-duty employees to solicit union membership and to distribute union literature at the work place so long as this activity does not interfere with production or discipline.[3]

The seminal case involving the right of *nonemployees* to organize on a employer's property is *NLRB v. Babcock & Wilcox Co.*[4] In *Babcock*, the Court held that an employer may bar nonemployee union organizers from company owned property if the following conditions are met: the employer has a nondiscriminatory rule against solicitation, and the union can contact the employees through other reasonable alternative means.[5] The Court qualified this holding, however, with the statement that nonemployee union organizer access depends on an "*accommodation* between [employee organizational rights and employer property rights] with as little destruction of one as is consistent with the maintenance of the other."[6] The *Babcock* Court distinguished *Republic Aviation* on the basis that, in *Republic Aviation*, the Court had decided the access rights of employees, not *non*employees. The *Babcock* Court reasoned that, while a employer may not interfere with the organizational rights of employees, it does not owe such a duty to nonemployees, because nonemployee access rights are limited to those derived from the targeted employees' right to learn about self-organization.[7]

In subsequent cases concerning the access rights of nonemployee union representatives, the Court focused on the *Babcock* accommodation principle.[8] In *Hudgens v. NLRB*,[9] for example, the Court reaffirmed the *Babcock* accommodation analysis as the proper method for determining access rights. The *Hudgens* Court cited *Babcock* for the principle that union access depends on the relative strengths of the employee's and employer's competing rights.[10]

[1] *Lechmere v. NLRB*, 295 NLRB No. 15, 1989-90 CCH NLRB § 15,687, enf 914 F2d 313, 116 LC § 10,299 (CA-1, 1990), reversed 112 SCt 841, 120 LC ¶ 11,066 (1992).

[2] *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), 9 LC ¶ 51,199.

[3] *Id.* at 803-4, n. 10.

[4] *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), 30 LC ¶ 69,911.

[5] *Id.* at 106-7, 112-13.

[6] *Id.* at 112 (emphasis added).

[7] *Id.* at 112-13.

[8] See *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978), 83 LC ¶ 10,582 (holding that a state court's jurisdiction over a trespass charge against a union is not preempted by the National Labor Relations Act because "the balance struck by the Board and the courts under the *Babcock* accommodation principle has rarely been in favor of trespassory organizational activity"); *Hudgens v. NLRB, 424 U.S. 507 (1976), 79 LC ¶ 11,278 (remanding for determination under the Babcock* accommodation analysis); *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972), 68 LC ¶ 12,782 (remanding for determination under the *Babcock* principle, which the *Central Hardware* Court described as the "accommodation between organization rights and property rights").

[9] *Hudgens*, supra.

[10] *Id.* at 522.

In light of *Hudgens*, the National Labor Relations Board held in *Jean Country*[11] that, in all access cases, the Board would weigh the employees' Section 7 rights against the employer's property rights; the Board stated that the availability of reasonable alternative nontrespassory means would be an especially significant, but not determinative, factor in this balancing process.[12]

The *Lechmere* Decision

In *Lechmere*, the Court rejected the Board's *Jean Country* analysis by holding that, as a general rule, an employer may lawfully exclude nonemployee union organizers from its property.[13] The *Lechmere* Court recognized only a very narrow exception to this general rule: nonemployee union organizers may gain access to a employer's property when "the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them." [14] According to the *Lechmere* Court, when employees do not reside on the employer's property, they are presumptively not beyond the reach of reasonable union efforts to communicate with them.[15]

Applying this reasoning to the case before it, the *Lechmere* Court held that nonemployee United Food and Commercial Workers organizers had no right of access to the Lechmere property. The Court concluded that the Lechmere employees were not inaccessible to UFCW organizers because the employees did not reside on the Lechmere property and because there were no "unique obstacles" to the union's communication with the employees. The Court decided that the Union organizers' ability to contact some Lechmere employees through signs and advertisements demonstrated the absence of any such obstacles.[16] Although the UFCW's nontrespassory efforts at communicating with Lechmere employees had resulted in only one signed authorization card, the Court held that the Union had reasonable access to the Lechmere employees because "*[a]ccess* to employees, not *success* in winning them over is the critical issue." [17]

Discrimination By the Employer

Post-*Lechmere* decisions suggest that nonemployee union organizers have the greatest chance of gaining access to an employer's property if the employer has a discriminatory no-solicitation policy. In *Babcock*, the Court held that an employer may prohibit nonemployee distribution of union literature only if its no-solicitation policy does not discriminate against a union in favor of other groups.[18] The *Lechmere* decision did not disturb this portion of the *Babcock* holding; in fact, in upholding Lechmere's right to exclude nonemployee union solicitors, the *Lechmere* Court noted that the Lechmere no-solicitation policy had been consistently enforced against all types of solicitation in the past.[19]

In post-*Lechmere* nonemployee access cases, courts have focused their analyses on the inaccessibility of employees and discrimination in the substance or enforcement of a no-solicitation policy.[20] The Board, however, has recently decided three nonemployee access cases *solely* on the basis of disparate treatment.[21] In one

[11] *Jean Country*, 291 NLRB 11 (1988), 1988-89 CCH NLRB ¶ 15,118.

[12] *Id.* at 14.

[13] *Lechmere*, 112 S. Ct. at 848.

[14] *Id.* at 849 (quoting *Babcock*, 351 U.S. at 113).

[15] *Lechmere*, 1125. Ct. at 849.

[16] *Id.* at 849.

[17] *Id.* at 850 (emphasis in original).

[18] *Babcock*, 351 U.S. at 112.

[19] *Lechmere*, 112 S. Ct. at 844, n.1.

[20] See, e.g., *Oakwood Hospital v. NLRB*, 983 F.2d 698 (6th Cir. 1993), 124 LC ¶ 10,520 (denying a nonemployee union organizer access to a hospital cafeteria under *Lechmere* because the targeted employees were not inaccessible and because the hospital did not discriminate against the union); *Sparks Nugget v. NLRB*, 968 F.2d 991 (9th Cir. 1992), 122 LC ¶ 10,266 (denying nonemployee pickets and handbillers access to hotel property because their targets, hotel customers, were not inaccessible and because the employer did not discriminate against the union).

[21] *New Jersey Bell*, 308 NLRB No. 32 (1992), 1992-93 CCH NLRB ¶ 17,429; *Susquehanna United Super, Inc.*, 308

of these cases, *Davis Supermarkets, Inc.*, the Board held that the employer had illegally excluded nonemployee pickets and handbillers from its property because, in the past, the employer had allowed solicitation by another labor union and by church and school groups.[22] Similarly, in *Susquehanna United Super, Inc.*, the Board held that the employer had unlawfully discriminated against nonemployee picketers by excluding them from its parking lot when it had allowed other groups and individuals to fund raise and advertise on its property.[23] In *New Jersey Bell*, the Board again decided that an employer's discriminatory denial of union access to its property was unlawful. New Jersey Bell had implemented a rule that required nonemployee union officials to receive permission to conduct union activity on company property. Pursuant to this rule, the employer ejected a union official who had failed to obtain this permission. The Board decided that the employer's rule was facially discriminatory because it required union officials to obtain permission for the discussion of union matters on company property, but not for the discussion of non-union matters.[24]

These recent Board decisions indicate that, if a union can demonstrate that an employer has allowed other groups to solicit on its property, the Board will compel the employer to extend the same opportunity to union solicitors. *Susquehanna United Super* gives examples of circumstances that a union might use to demonstrate that a employer has discriminated by excluding union solicitors. In that case, the Board found that the employer had allowed solicitation by groups other than the union when it had permitted businesses to place leaflets on cars in the employer's parking lot, had allowed cars advertised for sale to be parked in the employer's parking lot, and had permitted Boy Scouts and Little League teams to fund raise on the employer's property.[25] In contrast, the Ninth Circuit has held that solicitation by the employer is not a basis upon which the union may prove discriminatory access.[26]

The Board's decision in *New Jersey Bell* suggests that not only may union representatives prove that they have been discriminatorily excluded on the basis of their *status* as union representatives but also that they may prove discriminatory exclusion by demonstrating that the employer's denial of access to a union representative was based merely on that person's *participation* in union activity. The view that an employer may not discriminate on the basis of participation in union activity was also voiced by the dissenting Judge in *Oakwood Hospital v. NLRB*. In his dissent from that decision, Judge Keith asserted that the employer unlawfully discriminated against a union representative by ejecting him from its cafeteria.[27] The hospital had allowed this representative to conduct union activity on its premises when it believed that this activity was limited to representing hospital employees already represented by his union. It was only when the Hospital learned that the union representative was attempting to organize other Hospital employees that it ordered him to leave. Based on these facts, Judge Keith concluded that the Hospital had selectively enforced its anti-solicitation policy against only those nonemployees conducting union solicitation.[28] Although this argument failed to gain support from the Sixth Circuit majority, it may be more successful in other circuits.

(Footnote Continued)

NLRB No. 43 (1992), 1992-93 CCH NLRB ¶ 17,425; *Davis Supermarkets, Inc.*, 306 NLRB No. 86, (1992), 1991-92 CCH NLRB ¶ 17,123.

[22] *Davis Supermarkets*, supra.

[23] *Susquehanna United Super*, supra.

[24] *New Jersey Bell*, supra.

[25] *Susquehanna United Super*, supra.

[26] *Sparks Nugget*, 968 F.2d at 998.

[27] *Oakwood Hosp.*, 983 F.2d at 704-05.

[28] *Id.*

Absence of Employer Property Interest

Even if an employer has not discriminated against the union by denying access to its property, nonemployee union organizers may gain access under *Lechmere* if the employer does not have a sufficient interest in the property from which it wants to expel the union. Prior to *Lechmere*, the Board held in several decisions that an employer may not exclude nonemployee union organizers from property which it does not own.[29] For example, in *Johnson & Hardin Co.*, the Board held that an employer illegally excluded union solicitors from a driveway owned by the state.[30] Similarly, in *Barkus Bakery*, the Board decided that the employer had no right to exclude union pickets from private property adjacent to the employer's plant when that land was owned by someone other than the employer.[31]

Lechmere did not undermine these Board decisions for two reasons. First, the employer's property interest was not at issue in *Lechmere* because Lechmere owned the property from which it excluded the UFCW organizers. Second, the language of the *Lechmere* opinion indicates that the holding presumes an employer's ownership of its premises. For example, the *Lechmere* Court states that "an employer may validly post *his property* against nonemployee union distribution of union literature." [32] The *Lechmere* decision should, therefore, be limited to situations in which the employer owns the property from which it excludes the union.

If an employer does not own the property from which it wants to exclude a union, state property law may also prevent the employer from excluding union representatives from its property.[33] United Food and Commercial Workers attorneys Carey R. Butsavage and George Wiszynski explain that employers must have the exclusive right of possession that a property *owner* enjoys in order to bring an action for trespass against union organizers who merely remain on property after being ordered to leave.[34] Unlike the employer in *Lechmere*, who owned the property surrounding its store, employers located in shopping centers usually possess only easements or licenses which provide their employees and customers the right to use shopping center common areas, such as parking lots and sidewalks. An employer with only one of these limited property interests may only bring a trespass action if the employer can prove that the union has interfered with the employer's easement or license.[35]

The terms of the employer's lease may indicate which of these property interests, if any, the employer possesses. For example, the Board has held that an employer who leases property in a shopping center has no exclusory property interest, but an Administrative Law Judge recently decided that an employer/lessee lawfully excluded union solicitors from the sidewalk in front of its store when the employer's lease gave it the right to control the side-

[29] Robert S. Giolito, "Organizing After Lechmere," Teamsters Lawyers Conference (October, 1992).

[30] *Johnson & Hardin Co.*, 305 NLRB No. 83, (1991), 1991-92 CCH NLRB ¶ 17,007.

[31] *Barkus Bakery*, 282 NLRB 351 (1986), 1986-87 CCH NLRB ¶ 18,515.

[32] *Lechmere*, 112 S. Ct. at 848 (quoting *Babcock*, 351 U.S. at 112) (emphasis added).

[33] State *property* law is not the only area of state law under which union representatives may gain access onto an employer's property. Unions may also have access rights under state *constitutional* law. While the Supreme Court has denied union access to private property under the First Amendment, *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*, 391 U.S. 308 (1968), 57 LC ¶ 12,681, some states, such as California and Colorado, have granted access to private property for free speech under their state constitutions. Cynthia Estlund, "What's Left After *Lechmere*," 1992 AFL-CIO Union Lawyers Conference (May 13,1992).

[34] Carey R. Butsavage and George Wiszynski, "One Approach to *Lechmere v. NLRB:* Using Common Law Trespass and Property Principles to Gain Access to Private Property," UFCW Attorneys' Conference (October 12,1992).

[35] *Id.*

walk.[36] Under both federal labor and state property law, therefore, an employer who does not own the property from which it wants to exclude the union will have a very limited right to deny union access to this property.

Organizing and Other Section 7 Rights

Not only does *Lechmere* not limit nonemployee union organizer access rights when the employer discriminates against the union or does not own the property from which it seeks to exclude the union, but *Lechmere* also does not limit the rights of *employees* to organize on an employer's property. In *Republic Aviation*, the Court held that employers must allow off-duty employees to solicit union membership and to distribute union literature at the workplace so long at this activity does not interfere with production or discipline.[37] Neither the *Babcock* nor the *Lechmere* holding undermine the *Republic Aviation* decision because, in both *Babcock* and *Lechmere*, the Court decided to deny access to nonemployee union organizers on the basis that Section 7 protects only *employees*, not nonemployees.[38]

The most obvious consequence of the *Lechmere* distinction between employees and nonemployees is that unions must rely more heavily on employees of the targeted employer to inform their coworkers of the benefits of self-organization. In-plant organizing committees, therefore, achieve even greater importance under *Lechmere*. Under *Republic Aviation*, employees retain the right to organize at their own workplace. It is unclear, however, whether *Lechmere* extends to prevent nonemployee access for other types of union activity or whether it is limited to organizing activity.

At a recent AFL-CIO conference, Cynthia Estlund asserted that *Lechmere* should not apply beyond the organizing context. She reasoned that, in *Babcock* and *Lechmere*, the Court decided that the union organizers had no Section 7 rights,[39] not because they fell outside the NLRA definition of "employee," but because these organizers claimed access rights under the targeted employees' Section 7 right to self-organization rather than their own Section 7 rights.[40]

Under Professor Estlund's interpretation of *Lechmere*, union members should be able to gain access onto the property of an employer other than their own if they do so under their own Section 7 rights. *Lechmere*, therefore, would not restrict nonemployee access for primary strike support, secondary customer appeals, and area standards protests.[41]

Unfortunately, post-*Lechmere* decisions have suggested that *Lechmere* limits the access of nonemployees even when the nonemployees are exercising their own Section 7 rights. In one of these decisions, *Sparks Nugget v. NLRB*, the Ninth Circuit indicated that the *Lechmere* prohibition on nonemployee access extends beyond the organizing context. In *Sparks Nugget*, the Ninth Circuit held that the employer lawfully excluded union representatives who were picketing and handbilling the employer's customers to inform them of the employer's refusal to bargain with the union.[42] The *Sparks*

[36] Giolito, *supra*, n. 29 (citing *Giant Food Stores, Inc.*, 295 NLRB 330 (1989), 1989-90 CCH NLRB ¶ 15,663; *Bristol Farms, Inc.*, 1992 NLRB LEXIS 651 (ALJ Decision, 1992). In *Susquehanna United Super*, the Board held that the employer had no right to exclude union solicitors because it had allowed solicitation by other groups. The Board did not question the employer's exclusory property interest which was based on the lessor's grant of express authority to the employer/lessee to exclude trespassers. *Susquehanna United Super*, supra.

[37] *Republic Aviation*, supra, n. 10.

[38] *Lechmere*, supra, at 848.

[39] 29 U.S.C. 157 (1982).

[40] Estlund, *supra* note 33. Section 2(3) of the NLRA states that the term employee: "shall include any employee, and shall not be limited to the employees of a particular employer." 29 U.S.C. 152(3) (1982). Under this broad definition of employee, the union organizers in *Lechmere* or *Babcock* would not be nonemployees merely because they were not employed by Lechmere or Babcock & Wilcox.

[41] Estlund, *supra* note 33.

[42] *Sparks Nugget*, supra, 968 F.2d at 998.

Nugget court concluded that the *Lechmere* inaccessibility exception did not apply when the union's targeted audience consisted of customers, not employees. The court even further limited union opportunities for access by holding that, even if the *Lechmere* inaccessibility exception did apply, the general public was not inaccessible despite the fact that the general public is a more diffuse audience than the employees of a single employer.[43]

A recent ALJ decision is equally discouraging to unions hoping to limit *Lechmere* to the organizing context.[44] In *Franklin Medical Center*,[45] an ALJ held that an employer properly prohibited area standards protestors from distributing handbills on its property. The ALJ reasoned that, because nonemployee area standards protestors exercise a lesser Section 7 right than the Section 7 right at issue in *Lechmere*, they have a heavier burden than nonemployee union organizers to show their trespass is justified.[46] Although unions may certainly argue that *Lechmere* does not limit their access to an employer's property to conduct activity other than organizing, the *Sparks Nugget* and *Franklin Medical Center* indicate that such an argument may be problematic.

Conclusion

Hopefully this article has provided union organizers with some historical background to *Lechmere* and some ideas for distinguishing *Lechmere*. Although *Lechmere* was certainly a blow to union organizing, it should not discourage union organizers from attempting to gain access to an employer's property, as this direct contact with employees is essential. If there is a positive side to *Lechmere*, it is that the decision will force union organizers to base their organizing campaigns on the support of pro-union employees of the targeted employer; as experienced union organizers well know, this support is the key to a successful organizing campaign.

[The End]

Beyond Litigation: New Approaches to Federal Labor Relations—Let's Give Change a Chance

By Jean McKee

Chairman of the Federal Labor Relations Authority

I would like to discuss some concerns I have had regarding the federal labor-management relations program and the way unions and agencies conduct their labor relations. Then I will sketch what the Federal Labor Relations Authority (FLRA) has been doing to improve the program. Finally, I will share why I am optimistic that the program is headed beyond litigation as the parties begin exploring the full range of alternative processes to mutual dealings.

First, let me give you the framework against which change is occurring. For years, the Authority focused on litigation. The cases we review include arbitration awards, decisions issued by administrative law judges in unfair labor practice cases, and decisions and orders by our regional directors in representation cases. We also decide issues of what is negotiable

[43] *Id.*

[44] Giolito, *supra* note 29 (citing *Franklin Medical Center*, 1992 NLRB LEXIS 672 (ALJ Decision, 1992).

[45] *Franklin Medical Center*, 1992 NLRB LEXIS 672 (ALJ Decision, 1992).

[46] *Id.*

between labor and management in federal sector labor relations.

As I sat at my desk and the cases came in a constant flow, the litigating process only seemed to be creating winners and losers. This scenario had been going on since the Authority was created in 1978 as part of the Civil Service Reform Act. Like songstress Peggy Lee, I began to ask myself: "Is that all there is?" Who is concerned about the relationship between labor and management? Coming from the Federal Mediation and Conciliation Service (FMCS), I knew what was going on in the private sector with labor management cooperative efforts.

Other factors were also having an impact on the program: first, the FLRA's budget and staff were reduced dramatically and we knew we had to look for new ways to implement the charge we had been given by Congress; second, the entire Government faces fiscal restraints; third, a lessening of litigation can lower the costs of Government; and fourth, it would seem that if the workplace is less adversarial productivity can improve.

So I began to look at what we could do to improve the program. We might work on the problem by going outside the 9 dots—that old game of joining all the 9 dots with one single line solved by extending the line beyond the confines of the square they form. Well, the statute controls our basis for acting, so I looked there first and found a basis. It states, in part, that collective bargaining is to encourage "the amicable settlement of disputes." [1] The statute also states that: "the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the government." [2] With this in mind, we at the Authority have embarked on a major program to reevaluate and reinvigorate, or in current terms reinvent, the federal sector program.

I have had additional concerns about the program. Most recently, the program has been affected by the changes taking place in the government, the effect these changes have had on the Authority, and the reaction of the parties to such changes. For example, we are all familiar now with the dramatic downsizing and reorganizations of the federal government. A number of agencies, particularly the Department of Defense (DOD), will be seriously affected by the reductions in budget and staff. In March, Defense Secretary Les Aspin recommended the additional closing of 31 major military bases and the scaling back of 134 other installations. This is the third and largest round of base closings in recent times, and may potentially generate the most profound effect in the nation's civilian federal work force. This plan will hit some regions harder than others. On the West Coast, for example, the San Francisco Bay area will take the hardest blow. Slated for closing are seven facilities which employ roughly 30,000. Nationwide, it's difficult to estimate what impact the base closings will have, but surely civilian employees by the hundreds of thousands will be affected.

For the most part, as a result of the reorganization and downsizing, we're experiencing drastic increases in the number of cases filed with the FLRA. Fortunately, at the Authority level, over the last 2 years, the Members and I have succeeded in reducing our case inventory from a high of 620 in 1990 to fewer than 180 cases. Through the hard work and dedication of our staff, were looking at the lowest inventory of cases in the history of the agency. This significant achievement, I might add, has been accomplished despite a 30 percent reduction in staff since 1980.

[1] 5 U.S.C. 7101(a)(1)(C).

[2] 25 U.S.C. 7101(a)(2).

However, the regional offices, which investigate unfair labor practice charges and handle representation cases, have been reporting a steady increase in the number of cases filed. For example, last year the regional offices reported a 50 percent increase in the number of representation cases. This year and next year, we project even more radical increases. Not since the early days of the Authority have we seen so many representation cases. They seem to be making a comeback. I heard someone say the other day: "Gee, looks like FLRA cases are in again!" Well, I'm not sure of that, but I am sure of one thing: the downsizing and the reorganizations will continue to have a direct impact on case filings.

Let me explain. Many of the DOD reorganizations have resulted in the assimilation of functions performed by separate branches of the military into single agencies. When these mergers occur, the incumbent unions compete to pursue representation efforts within the new entity. As a result, representation petitions are filed, hearings held, and in some instances, elections conducted. So, for example, the Defense Commissary Agency combines the commissaries of the individual armed services. Nearly 400 commissary stores were involved in this reorganization. Most of them included certified bargaining units. As a result of the consolidation, the affected unions filed petitions all over the country to resolve the status of employees in the new agency.

The same happened with the Defense Printing Service which was established to provide the printing for the armed forces. The transfer of all DOD supply functions to the Defense Logistics Agency is another example, as is the Defense Finance and Accounting Service, which is beginning its second reorganization in 3 years. This one will affect 50,000 employees. While the list goes on, representation cases keep coming in.

The reorganizations also are increasing the number of unfair labor practice (ULP) charges filed with our regional offices. In the federal sector, agencies involved in representation cases that raise questions concerning representation must maintain existing conditions of employment to the extent possible, unless changes are necessary to ensure the efficient functioning of the agency.

Well, guess what? In various instances, agencies have made changes that are alleged by the unions to constitute ULPs, and charges are filed. The number of charges filed has increased dramatically. This year we anticipate over 10,000 charges—the 7th year in a row of increased ULP filings. With increasing cases and decreasing staff, the workload per agent in our regional offices has escalated 94 percent. The result is that the regional offices must conduct virtually all investigations by interviewing witnesses on the phone, rather than spending time in travel for on-site investigations. To illustrate the FLRA regional case load: a staff member at the National Labor Relations Board handles 40 to 60 cases, while one of our staff handles about 200 cases. Phone interviews may not be the most effective way to investigate, but they stretch limited resources and save travel time. Of course, the more cases we get, the longer it takes us to investigate and resolve them, and the less effective the government agencies are at achieving the objectives of the reorganizations.

On the whole, I believe that agencies and unions realize that budget cutbacks and personnel reductions are part of the fabric of government today. Natural corollaries of these pressures are the parties' increased interest in the need to work together, to be more sensitive to each other's needs, and to find approaches which facilitate joint problem solving. Among the positive signs, labor union leaders have been approaching us to suggest getting together a group informally

to come up with suggestions of ways to enhance the total program.

Recently, we have seen specific examples of changing attitudes. The American Federation of Government Employees (AFGE) and the Defense Logistics Agency were able to work out their differences regarding a reorganization. Their efforts have assured a more expeditious resolution of representation cases. In this regard, a union official states: "We started out from a position of trust. The lines of communication were open and both sides were flexible." To me, that reflects a discovery of common ground, a change of attitude towards each other, a maturing of their relationship, and a search for ways to work together, especially in tough times.

The bad news is that the reorganizations will cause a tremendous disruption in the lives of thousands of people. The good news is that the reorganizations have forced the parties, the FLRA and other neutrals to re-examine our individual and collective roles in the program. These changing times have compelled us to find new approaches in federal sector labor relations; approaches that will enhance cooperation instead of continued confrontation. The parties no longer can afford the time and costs of adversarial relations that have exemplified the way agencies and unions conducted their business. I believe the time has come to give change a chance, to go beyond litigation and find new approaches to labor relations.

Now change is not easy, especially in the federal government. We've had the alphabet soup of MBO, ZBB, TOM—still, the government operates in a pyramid structure, while corporations have introduced matrixing and other management theories. Change is risky. There's always a new paradigm. It takes time. That famous Italian philosopher of the 15th century, Nicolo Machiavelli wrote: "There is nothing more difficult to take in hand, more perilous to conduct, or more uncertain in its success than to take the lead in the introduction of a new order of things." Another philosopher, an American of the 20th century, Billy Crystal, put it more succinctly: "Change is such hard work!"

The FLRA is hard at work at change. With support from all corners of the agency, we have embarked on a major initiative to re-invigorate what some have called "a program in need of reform." While I agree that there are areas of the program that need review, I submit there's much the parties, the FLRA, and other neutrals can do, and are doing, within the current program to achieve the goals of the statute. We realize that it's not only the other people who need to shape up. We are looking at our process and program. We have created two task forces, one to look at the ULP process and another to review our procedures and forms for filing representation cases. We have gone from "talking" action to "taking" action. We have designed and implemented a plan for encouraging labor-management cooperation that has surpassed our expectations in terms of response by labor and management. The phone rings off the hook for those involved.

This plan provides the parties and neutrals with assistance in three major areas: information, assessment, and training. The FLRA has established a clearinghouse where labor, management, and neutral representatives may acquire information and resources on labor-management cooperation. We have found that informational materials are sorely needed. As a result, we have stepped-up efforts to assist the parties in this area. Articles and brochures have been published and are available upon request. Because of high demand, we have enhanced the "Quarterly Summary of FLRA Decisions" to include news on Authority programs as well as court cases. The summary is published 4 times a year and is now distributed to over 1,600 individuals and organizations in the federal sector. We

encourage duplication within organizations. A library of current reference materials on different aspects of cooperation is being developed. Soon we will be publishing a step-by-step guide to various programs and processes such as interest-based negotiations and case studies of successful cooperative efforts.

We are finding an increasing interest by arbitrators in taking federal cases. These cases are very different from the private sector (where only the four corners of the agreement are before the arbitrator) with the many laws and government-wide rules and regulations. So we are developing a pamphlet specifically targeted to arbitrators which highlights important FLRA cases and some of the external laws that they must apply in federal sector cases. This pamphlet is intended to serve as a guide to the arbitrator new to the federal sector and as a reference to those experienced in this field. We hope to have the pamphlet available by the end of the summer.

Let me move on to my second point: assessment. The question most often asked by both labor and management representatives is "How does one begin a labor-management cooperation effort?" An essential first step for parties considering a shift in their relationship is an exploration of their current situation. In this area, the FLRA now has an Office of Labor-Management Cooperation which provides information, guidance and referral within the arena of collaborative efforts. Upon request, the office assists the parties in the assessment of their ongoing relationship and guides them through what they want, where they might improve, and who can provide such assistance. While structured assessment of a relationship is available, often the parties end up conducting exploration on their own. Such self-help is the result of a desire to improve their situation or a response to a particular crisis. However, even when they attempt these efforts on their own, they are discovering that the Authority is available to provide assistance.

The third component of our program is training. The FLRA has increased its efforts to develop and sponsor conferences, briefings, and training seminars with labor, management, and neutral representatives throughout the country. These sessions help in providing participants with the necessary knowledge on the rights and responsibilities under the statute, on how to identify and avoid committing unfair labor practices, and on grievance arbitration in the federal sector. Joint training sessions have also provided participants with the basic tools of cooperative efforts such as skills of brainstorming, effective listening and feedback techniques, and consensus decision-making.

In addition to providing training opportunities with organizations such as the Society of Federal Labor Relations Professionals and the National Academy of Arbitrators, the FLRA, in cooperation with the FMCS, will pilot a program this summer on arbitration in the federal sector. This one and a half day seminar is for arbitrators, and the parties and will cover case law and problem areas such as the Back Pay Act and attorney fees. We plan to take the seminar on the road to different parts of the country where it will be accessible to both arbitrators and parties.

A cautionary note is in order. All these efforts take time. We don't expect overnight miracles. As Tom Kochan, labor relations professor at Massachusetts Institute of Technology, has written: "The costs of training are absorbed immediately on the . . . profit and loss statement, but the benefits of enhancing skills are only gradually apparent." [3]

[3] Thomas A. Kochan, "Crossroads in Employment Relations: Approaching a Mutual Gains Paradigm," *Looking Ahead*, January 1993, p. 9.

In the federal sector, as in the private sector, the parties need to make a long-term commitment to ensure the success of these efforts. At IRRA's January meeting in Los Angeles, former IRRA President Ernest Savoie put it this way: "The new labor relations is a long-term process for introducing change and creating more responsive organizations .... There is no template for the new labor relations. It must be created by the parties and tailored to individual situations." [4]

I sense that parties in the federal sector are ready to embark on such a challenge. Surveys of federal employees support this position. A majority of agency and union representatives involved in the program have expressed a strong willingness to enter into cooperative efforts. To be more specific, in the survey, 68 percent of agency and 92 percent of union respondents have said they would like their organizations to be involved in joint labor-management cooperative efforts. We must, to borrow a phrase from the 60s, "seize the moment." We must give change a chance. Already we've seen signs that make me feel optimistic. Under the Administrative Disputes Resolution Act, agencies are required to implement alternate dispute techniques in a number of areas. As a result, there has been an explosion of inquiry, training, and pilot projects related to alternative disputes resolution and its potential application to many different types of disputes.

What's interesting is that labor and management are certainly not required to do anything in this area. Yet some of them have willingly pursued design efforts in the dispute resolution mechanisms we all take for granted, such as unfair labor practices and grievance mediation within the negotiated grievance procedure. For example, the Department of Health and Human Services and its unions have signed agreements where a variety of alternative dispute resolution processes, including grievance mediation, are used to resolve disputes. The FMCS is assisting them in these efforts. Some agencies and unions have taken bolder approaches to changing the way they conduct their dealings. The Labor Department and AFGE negotiated two major agreements using interest-based or "win-win" bargaining. As a result, the FLRA will not see a case from them. That's what I call cooperation! The Internal Revenue Service and the National Treasury Employees Union have implemented a massive program of training to improve workplace relationships. FLRA is co-training with representatives from FMCS a national level labor-management relationship in the interest-based process. We anticipate that the parties will negotiate their future agreements using interest-based bargaining. These parties are giving change a chance.

But the parties are not alone. Even at the highest levels in the new administration, there's a genuine interest in cooperation. Labor Secretary Robert Reich has been quoted numerous times in support of labor-management cooperation, emphasizing the administration's interest in ending hostility and turmoil between management and labor.

James King, the new head of the Office of Personnel Management has stated: "federal labor-management relations have historically been adversarial and lacking a sense of common interest .... As a result, we have often had a climate in which the customer becomes remote as both sides are preoccupied with their internal disputes. I believe this must change, and that this is the time for change." [5] James King is willing to give change a chance.

With these efforts bubbling throughout the federal government, I believe the FLRA is on the right track by encourag-

[4] Ernest J. Savoie, remarks before the Industrial Relations Research Association, 6 January 1993, The Bureau of National Affairs, Inc., 13 January 1993, p. E-2.

[5] James B. King, Prepared Statement and Pre-Hearing Questions for Confirmation Hearing, U.S. Senate Committee on Governmental Affairs, 30 March 1993, p. 31.

ing parties to look beyond litigation at new approaches to their relations. The FLRA has rededicated resources to this effort, while continuing our statutory responsibility to decide cases. In the long run, the parties' improved ability to work together will enhance the overall functioning of the government.

In a recent speech on the importance of the arts as a unifying force for our often divided society, former Congresswoman Barbara Jordan stated: "We are properly positioned in this time, in this year, 1993, to begin a new cycle. Optimism is fairly dripping from the air . . . as we seek to find our niche. This is not a time to be shy. One way to guarantee that this sense of hope will not be lost is to act on it now." [6]

Her words reflect how I feel about the federal labor-management relations program. This is not a time to be shy. Optimism is in the air. The way to guarantee that this sense of hope for the program will not be lost, is to act on it now.

[The End]

Grievance Mediation: How To Make the Process Work for You

By Sylvia Skratek

Mediator/Arbitrator

Grievance mediation as a step prior to arbitration will yield faster, less expensive, less time consuming and more satisfactory resolutions to all grievance disputes that are resolved without proceeding to arbitration than would the use of arbitration alone to resolve the same dispute.[1] Grievance mediation is a step inserted in the grievance procedure of the collective bargaining agreement just prior to arbitration. After the parties have pursued all previous steps of the grievance procedure, they would have the option of referring the grievance to a mediator. The mediator assists the parties in their attempts to reach a mutually satisfactory settlement.

The process itself is not a new idea. Prior to World War II, mediation was the predominant method to resolve grievances. The introduction of arbitration during the war led to the displacement of mediation as the final step in the grievance procedure. After the war, there was little interest in the removal of arbitration and until the mid 1980s grievance mediation remained dormant.

During the 1980s, two studies were conducted: one in the bituminous coal mining industry[2] and the other in the education industry[3]. The results of those two studies led to the increased use of the process and today several industries have inserted grievance mediation in their collective bargaining agreements. Those industries include: AT&T and the Communication Workers of America; Continental Telephone and IBEW; Teledyne Motors and UAW; Chicago Transit and ATU; and Washington State Schools and Washington Education Association affiliates.

Nationally, more than two thousand grievances have been referred to mediation. About 80 percent of those have been

[6] Barbara Jordan, "Nancy Hanks Lecture on the Arts and Public Policy," 16 March 1993 (New York: The American Council for the Arts, 1993).

[1] Sylvia Skratek, "Grievance Mediation of Contractual Disputes in Washington State Public Education," *Labor Law Journal* Vol. 38, No. 6 (June 1987), p. 371.

[2] Stephen B. Goldberg, "Grievance Mediation: A Successful Alternative to Labor Arbitration," *Negotiation Journal*, 5 (January 1989), p. 9.

[3] Skratek, cited at note 1, pp. 370-76.

successfully resolved without proceeding to arbitration.

The parties that have used the process have indicated that they do so because: the final decision remains with the parties; problems are identified and analyzed; the underlying problems are surfaced and addressed; a "cooling off" period occurs; communication skills are improved; ongoing labor relations are enhanced; it is quicker and less adversarial than arbitration; and mediation can provide an unbiased third party opinion on a non-binding basis if the parties desire.

Rules for Mediation

Parties that have used grievance mediation have established a series of suggested rules that should be adopted prior to the introduction of the process, among which are the following. (1) Proceedings before the mediator shall be informal. The rules of evidence will not apply. No record of the mediation conference shall be made. (2) The grievant shall have the right, and should be encouraged, to be present at the mediation conference. (3) One representative shall present the position of each party to the mediator, but all participants should actively partake in the conference. (4) The mediator will have the authority to meet separately with any person or persons, but will not have the authority to compel the resolution of a grievance. (5) If no settlement is reached, the mediator shall provide the parties with an immediate oral advisory opinion, unless both parties agree that no such opinion shall be provided. (6) If no settlement is reached at mediation, the parties are free to arbitrate. If they do so, the mediator may not serve as the arbitrator, nothing said or done by the mediator may be referred to arbitration, and nothing said or done by either party for the first time at mediation may be used against it at arbitration. (7) The representatives of the parties are encouraged, but not required, to present the mediator with a brief written statement of the facts, the issue, and the arguments in support of their positions. If such a statement is not presented in written form, it shall be presented orally at the beginning of the mediation conference.

The Advocates Role

Over the years, as I have introduced grievance mediation to advocates, the one question that most often arises is related to the actual mediation conference. Advocates are very comfortable presenting their issues in a conference that focuses upon the entire collective bargaining agreement but their comfort level diminishes considerably when they view grievance mediation as a conference in which they will focus on a very narrow issue. To address their discomfort, I have outlined a few recommendations.

Prior to the Conference

Prior to any mediation conference and before you pay any neutral to help you resolve the dispute, make certain that all earlier steps of the grievance procedure have been fully utilized. Has there been a dialogue at each step? Or have the disputants merely passed the grievance from one step to the next? Full communication at the earliest steps of the procedure can lead to settlement; therefore, advocates should emphasize the importance of these steps to their clients. Assist the client in determining if there is the possibility of settlement without outside assistance and, if so, pursue it!

Assuming that settlement cannot be accomplished, the next step is to meet with the disputant and thoroughly review the situation, the facts, the opinions, and the expectations parties have of the process. Your disputant might have unreasonable expectations of being proven "right" through the mediation process. Or your disputant may be simply going through the mediation process as a necessary step to arbitration, where they know they will "win" and get everything that they believe is their due. It is important that

disputants understand the risks of arbitration and the reality that they might actually lose their case. Be certain that your side is willing to settle the dispute. Be cautious of statements such as: "I will participate in mediation so that I can give the appearance of being an honest player." That is an indicator that your disputant may make settlement difficult.

Consult with the other disputant's advocate to make the final arrangements for the mediation conference: time, location, mediator notification. Verify that the persons with the authority to settle will be present at the conference. When mediation fails, it is most often because there was no authority to settle. Make certain that does not happen in your conference! And finally prepare all copies of all necessary documents that are pertinent to your discussion. Do not over prepare, but remember that you will need to educate the mediator about the dispute.

At the Conference

Allow the mediator to make opening remarks. Even if you have heard it all before, the mediator's remarks lay the foundation for others who may not have previously been through a conference. These remarks also provide an indication as to how the mediator will proceed.

Make your opening presentation of your side's case, including all facts and appropriate opinions. Ask the disputant that you represent to further clarify the situation. Let your disputant talk and let your disputant vent. Be alert for rambling remarks, but otherwise let the disputant take the opportunity to thoroughly describe the problem.

If, and this is a big IF, other parties have something to add, have them do so. But remember, this is not a formal hearing, but rather a conference between the disputants. The disputants should do most of the talking. The mediator will most likely separate the parties. Allow him/her to do so. And trust him/her to work the issue. Do not withhold information. Remember, nothing said or done for the first time in mediation can be used by either party in any subsequent hearings.

Listen carefully to everything being said by every person who is present. Settlement opportunities come in strange ways. When settlement is reached, make certain it is written up and signed by the parties before the mediator goes home. Don't let settlement slip away! If settlement is not reached, contact the other side prior to arbitration to determine if the conference has triggered any thoughts. Perhaps they would like one last try at settlement? Many grievances settle after the conference itself and the door should be left open to further discussion.

Remember, the entire conference should be informal. There should be no formal interrogation, no transcript, no attorneys, no record, and no briefs: relax, listen carefully, and communicate openly.

Dealing with Problems

Over the years, advocates have raised questions about the process that need to be addressed. How do I mediate with only a single issue? Will I have to compromised to achieve settlement? Emphasis must be placed upon expanding the box through the mediation process; the underlying issues that open the door to settlement will surface through mediation. Those underlying issues often lead to settlements that can be achieved without either party having to compromise the position that they established on the grievance form. Additionally, the process itself often opens the eyes of the parties with the result being either the granting or the withdrawal of the grievance.

What about the grievant's need for "a pound of flesh?" This does tend to get in the way of settlement, particularly when they can be heard saying: "we'll go through this mediation, but eventually we're going to arbitrate it and kill them."

Even more interestingly, some grievants achieve good settlements through mediation but are still unhappy: "Some of

my dissatisfaction is probably from settling instead of going to arbitration. I don't believe we would have gained as much in arbitration. What I would have gained was the satisfaction of having the arbitrator telling the other side that they were wrong." [4]

The advocate's job is to work with the grievant to undo their expectations. Remember that those expectations are based upon the 50 plus years of arbitration that labor and management have encouraged. The advocate must focus for the grievant the reality that arbitration is a "gamble." Somebody loses and it could be the grievant. Remind the grievant that unions win a little over 30 percent of the cases that go to arbitration.[5] And management always loses, regardless of the actual case outcome, because of the implications that the adversarial nature of arbitration can have upon the workforce. The advocate must emphasize the positive aspects of a mediated settlement, which yields an outcome that favors both parties.

Many advocates simply don't want to use mediation. They believe that "if I can't settle it, then nobody can." I call this the "real men don't mediate" syndrome. This syndrome requires an emphasis upon the importance of introducing objectivity into the process. Such objectivity can shed new light on the problem. It can also lead to a creative interaction that results in the identification of solutions. By allowing a mediator to assist with the problem the advocate may open the door for a resolution.

There is also the "Perry Mason" syndrome, which is identifiable in advocates who actually thrive on arbitration. They enjoy the legalistic aspects of arbitration; they love interrogating witnesses; and they relish the opportunity to cross examine. This syndrome is most evident in advocates who are not attorneys and see this as an opportunity to be an attorney for the day. It is important to remind those advocates that it is not their day in court; rather they should be looking to use the process that is in the best interests of their clients. The process belongs to the parties not the advocates!

An additional problem arises with "out of house" attorneys who may be unfamiliar with the mediation process and are therefore unwilling to recommend the process to their clients. Fortunately, efforts are being undertaken to educate attorneys about alternative dispute resolution, and those efforts should make them more comfortable with the process. Some management advocates have suggested it is not necessary to use an attorney in a mediation conference, that "mediation is a golden opportunity to disregard attorney's advice (which I don't always agree with), and it can be a real money saver not to use an attorney." [6]

Concerns

Two legitimate concerns have been raised about the process: earlier settlements will be discouraged, and mediation will be used as a discovery step. Both concerns can be addressed through careful structuring of the process.

Mediation will in some cases be seen as a "new toy" to which all grievances should be sent. An internal screening process can eliminate such occurrences. Questions should be asked. Should this grievance go anywhere? Are the parties willing to settle? Are one or both parties locked into their positions? How complex are the issues, and how difficult will it be to settle the case? With such an internal process you can avoid the discouragement of earlier settlements. The parties will not see the process as a "new toy," but rather a legitimate step that should be taken carefully. When the process is properly managed, you will find that the parties

[4] *Ibid.* p. 373.

[5] American Arbitration Association, "Labor Arbitration Case Trends—An Update," *Study Times* (October 1984).

[6] Skratek, cited at note 1, p. 373.

actually learn to settle their cases earlier. Your actual arbitration cases will go down, and the education process that occurs through mediation will enable the parties to communicate at the lower steps of the procedure, thereby leading to more rather than fewer earlier settlements.

Mediation as discovery has been experienced in situations in which the mediator's services are provided at no charge to the parties. Public agencies that have provided such free service have found their case loads double, their settlement rates go down, and the parties freely admitting that they are using the process to learn more about the other side's case. The solution is to carefully structure who will be used as the mediator. Several agencies have established panels of experienced mediators. Their credentials include years of arbitration and/or mediation experience and training in the mediation process itself: Not all arbitrators can serve as mediators. But an important aspect of having an arbitrator serve as a mediator is the fact that when they indicate what they think might be the outcome in arbitration, you are quite certain that you are getting a well reasoned opinion from an established arbitrator. Those mediators charge fees that are slightly higher than they might charge for a day of arbitration, but remember you save the costs of the arbitrator's study time. Overall, you save about two-thirds the cost of an arbitration hearing. One such agency is the Mediation Research and Education Project, Inc. in Chicago, Illinois.[7]

Conclusion

The overall promise of grievance mediation is encouraging. Participants have cited its open communications, high level of trust, low level of defensiveness, and avoidance of power trips as its strongest selling points. Participants say that the process enables them to talk face to face about the problems, opens the door for future communications, and facilitates discussion of problems that would not surface through the arbitration process. Participants note that they are not in a battle to see who can present the best case but are working to solve a problem; the focus is not on who is right but rather on how the needs and interests of the parties can be addressed. I encourage you to join the users!

[The End]

Confronting AIDS in the Workplace: Responses of Southern California Organizations*

By Kathleen Montgomery and Denise Brennan

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This paper will present preliminary results from a recent pilot study of organizations headquartered in the Inland Empire region of Southern California (Riverside and San Bernardino Counties). The study was designed to assess the extent to which organizations have confronted the issue of AIDS (acquired immune deficiency syndrome) in the workplace. The study is part of a larger research project that will investigate the responses of organizations throughout California in terms of workplace disruptions and the development and implementation of policies addressing the issue of employ-

[7] Mediation Research and Education Project, Inc., 357 East Chicago Avenue, Chicago, IL 60611.

* Presented at the 45th Annual Meeting of the Industrial Relations Research Association, Anaheim, California, January 5, 1993.

ees infected with HIV (human immunodeficiency virus), which causes AIDS.

Rapidly growing numbers suggest AIDS is penetrating all segments of society—no longer confined to the high concentration areas of San Francisco, New York, and Los Angeles, but moving into areas of rapid regional growth such as the Inland Empire. Further, individuals infected with the AIDS virus are most likely to be adults of working age. For example, in San Bernardino County, 68 percent of the reported cases of AIDS are individuals between the ages of 20 and 39. Nevertheless, the majority of U.S. companies appear not to have faced, in a systematic way, the issue of AIDS in the workplace. Reports from various studies indicate that a majority of U.S. companies have not adopted formal policies or even informal guidelines for dealing with the presence of employees who become infected with the virus.[1]

Many recent articles lament the reluctance of business firms to be foresighted in their approach to AIDS in the workplace.[2] They argue that the lack of preparation raises the likelihood of persistent fears and confusion among employees, with the potential for low employee morale and damaged productivity. Further, it increases the potential for labor-management disputes and other forms of organizational liability if infected individuals or their coworkers believe their rights have been violated.

Given the probability that virtually all firms have already, or will soon encounter, an HIV infected employee, and given the potential for disruption that an unprepared workplace fosters, it is troubling to find that only a few firms have taken a proactive stance toward this major environmental threat. Some observers have suggested that the issue of HIV infected employees has received scant attention because of the outdated belief that, once individuals became HIV infected, they quickly became too ill to work. This attitude fails to recognize that, in recent years, improved drug therapy has prolonged the time between infection and the onset of debilitating symptoms, thus allowing infected individuals to remain productive members of the workforce for many years. Other observers have speculated that businesses have avoided establishing AIDS-related employment policies because of the preference for a reactive stance to uncertainty. However, a more systematic analysis of organizational decision making in the context of AIDS in the workforce, either by academicians or practitioners, is absent in the literature.

The current pilot study and the forthcoming larger study have been designed to fill this research void. The studies explore the organization's experiences with HIV infected employees and the reactions of coworkers, as well as management's response to this potentially disruptive workplace issue. Particular attention is placed on whether the organization has adopted a formal policy regarding HIV infected employees, the policy development process, and notable barriers or facilitators to policy development.

For relevance to an academic audience, answers to these important questions can advance our understanding of organizational decision making during periods of environmental uncertainty. For relevance to an audience of policy makers and prac-

[1] Laura Brown, "Fighting AIDS with Facts and Compassion," *Association Management*, 43 (September 1991), pp. 63-66; John K. Ross and William Middlebrook, "AIDS Policy in the Work Place: Will You Be Ready?" *SAM Advanced Management Journal* 55 (Winter 1990), pp. 37-41; Philip Rutsohn and Donald Law, "Acquired Immune Deficiency Syndrome: A Small Business Dilemma," *Journal of Small Business Management*, 29 (January 1991), pp. 62-71.

[2] Thomas DiLauro, "Relieving the Fear of Contagion," *Personnel Administration*, 34 (February 1989), pp. 52-58; Alan Emery, "AIDS Strategies That Work," *Business and Health 7* (June 1989), pp. 43-66; Joseph Feldschuh, "AIDS and Ostriches: Business Is Not Facing Up to the Scourge," *Barron's*, 69 (December 18, 1989), pp. 16-17; Hem Jain, "AIDS: Need for Policy in the Workplace," *Industrial Relations*, 44 (Autumn 1989), pp. 950-964; Charles Nau, "ADA Forces Employers to Respond," *Personnel*, 68 (April 1991), pp. 9-10; Ross and Middlebrook, cited at note 1.

titioners, the identification of organizational structures and processes that inhibit or encourage organizational action in this context may provide guidance to firms to help them deal constructively with the issues of AIDS in their workplace.

The Model and Component Variables

The literature on organizational decision making during periods of environmental uncertainty or sudden environmental jolts[3] generally addresses larger-scale strategic choices, rather than incremental policy changes. Nevertheless, insights from this literature are useful for studying organizational decisions relevant to the current issue. For example, our understanding is enhanced by research identifying forces promoting organizational inaction or inertia,[4] as well as by research arguing for management's ability to make strategic choices (i.e., policy changes) in response to environmental shifts.[5]

Shortell, Morrison, and Friedman[6] have developed a model of the conditions and circumstances under which various strategic choices are likely to occur. This model can be modified for the purposes of this study, which is designed to examine the adoption of new policies. The major predictors in a comprehensive model are [managerial characteristics; organization characteristics] → [perceived need; organization philosophy; perceived feasibility] → [policy adoption].

Managerial characteristics include background, tolerance for risk, tenure with firm, and commitment to addressing HIV issues. Organizational characteristics include size, sector, location, and age.

The perceived need to adopt a workplace AIDS policy includes factors in the environment (number of people with AIDS in the community and the workforce, local regulations, and societal norms), as well as organizational performance variables (worker conflict and refusal to work with infected coworkers, productivity, turnover, absenteeism, and employee litigation).

Organizational philosophy is measured by following the typology of Miles and Snow:[7] "prospectors" tend to be in the forefront of human resource policy making; "defenders" tend to ignore changes and to maintain status quo; "analyzers" tend to be followers who make changes after others have done so; "reactors" tend to have inconsistent, *ad hoc* responses.

Perceived feasibility of policy implementation involves assessment of the availability of resources (separate human resources department and access to consultants), the characteristics of the workforce (size, diversity, tenure with firm), and a belief that policy can have an impact on human resource functioning.

Hypotheses

The following hypotheses are based on the comprehensive model to be tested with data from the large-scale study. (Because the pilot data are not sufficient for testing the comprehensive model, simplified elements of the hypotheses will be tested and discussed in the results section.)

H1: Policy adoption will be more likely for those firms where *perceived need* is highest. In particular, perceived need is ex-

[3] A. Meyer, "Adapting to Environmental Jolts," *Administrative Science Quarterly*, 27 (1982), pp. 515-537.

[4] Howard Aldrich, *Organization and Environments* (Englewood Cliffs, N.J.: Prentice-Hall, 1979); Michael Hannan and John Freeman, "Structural Inertia and Organizational Change," *American Sociological Review*, 49 (1984), pp. 149-164.

[5] Paul Lawrence and Jay Lorsch, *Organization and Environment* (Boston: Harvard Press, 1967); Jeffrey Pfeffer and Gerald Salancik, *The External Control of Organizations* (New York: Harper, 1978).

[6] Stephen M. Shortell, Ellen Morrison, and Bernard Friedman, *Strategic Choices for America's Hospitals* (San Francisco: Jossey-Bass, 1990).

[7] Raymond Miles and Charles Snow, *Organizational Strategy, Structure, and Process* (New York: McGraw-Hill, 1978).

pected to be higher in organizations located in communities with greater numbers of reported AIDS cases and in communities that have enacted local antidiscrimination ordinances, as well as in organizations with greater numbers of HIV infected employees. Further, perceived need is expected to be higher in organizations that have already encountered instances of compromised performance and/or the threat of litigation related to the presence of HIV infected workers.

H2: Organizations that have demonstrated an *organizational philosophy* that characterizes it as a prospector, tending to be in the forefront of human resource policy making (e.g., early adopters of sexual harassment and family leave policies), will be most likely to have adopted AIDS-related workplace policies and to have adopted such policies earlier than other firms.

H3: Policy adoption will be more likely in firms that favorably *perceive the feasibility* of policy adoption, implementation, and impact. Such firms will be those with greater resources to allocate to human resources and with a large non-transient workforce, as well as those firms that believe an AIDS related workplace policy can have a positive effect on human resource management.

It is also expected that certain *managerial and organizational characteristics* may have a moderating effect on the predictor variables. The direct effects of managerial and organizational variables on policy adoption will also be examined.

Sample and Data Collection

A convenience sample was constructed of organizations headquartered in the Inland Empire. Lists of public and private organizations, varying in size and industry, were compiled, and 70 organizations were selected from these lists. Letters describing the study, identifying the study investigators, and assuring confidentiality were sent to the individual responsible for human resources in each of these organizations. The letters requested participation in a telephone interview for which the addressee would be contacted within a week's time.

Interviews were completed with the director of human resources (or equivalent) in 25 organizations, for a response rate of 36 percent. Telephone interviews, using a standardized interview guide, required between 15 and 25 minutes to complete, depending on the extent of the organization's experience with HIV infected employees and related policies. Interviews were completed between July and August 1992. There were no incomplete interviews; once begun, all interviews continued to their proper conclusion.

An evaluation of the nonrespondents did not reveal any systematic refusal to participate by industry or organization size, although there was clearly reluctance by some individuals to discuss the issue because of its sensitivity. AIDS remains a subject that many individuals can discuss only with great discomfort, if at all. Despite repeated assurances of confidentiality, several participants who agreed to be interviewed did so only after closing their office doors so that they would not be overheard by others in the organization. In addition to the element of discomfort, it is important to note that the timing of the interviews may have added to the reluctance of some organizations to participate. The Americans With Disabilities Act, which includes HIV infected individuals as a protected group, became effective for businesses in July, just as the study was being conducted. There remains a great deal of uncertainty on the part of employers as to their responsibilities under this legislation, and it is likely that some organizations refused to participate out of concern that their actions may not be in compliance with the law.

Results

Participating organizations varied in workforce size from 9 to 5000 employees

and included organizations in government, education, manufacturing, legal services, banking, and retail. Because a large proportion of the organizations headquartered in the Inland Empire are in the service sector, the sample is perhaps more reflective of the service organization's response to the AIDS epidemic than that of manufacturing. Fifteen of the 25 organizations (60 percent) already have or expect soon to have an HIV infected employee on the payroll. Four organizations report that they currently employ an HIV infected individual. Six of the 25 organizations (24 percent) have established formal policies with regard to employees who have AIDS or are HIV infected. These results are similar to reports of regional studies completed elsewhere.

Because of the small number of organizations included in the study, the fact that few of them had AIDS policies, and the nature of the sample selection, hypothesis testing was conducted primarily as an exploratory exercise to provide information for the planned larger study. Hence, multivariate analysis was not undertaken at this stage. However, several suggestive bivariate results are discussed below.

Hypothesis 1

The first hypothesis predicts that policy adoption will be more likely for those firms where perceived need is highest. For the pilot study, two variables were used to assess perceived need: (a) the presence of an HIV infected employee and (b) the degree of workplace disruption related to HIV infected individuals, in terms of refusals by coworkers to share the working environment with HIV infected employees (e.g., office space, equipment, restroom and eating facilities) and reports of conflicts among workers about HIV infected employees. Results are reasonably supportive of this hypothesis. First, all of the organizations that have adopted a policy already or soon expect to have an HIV infected employee. As noted, four organizations already have an HIV infected employee; three of these organizations (75 percent) have adopted a policy. Eleven more organizations expect soon to have an HIV infected employee; three of these organizations have also adopted a policy. In comparison, no organization without an HIV infected employee (now or soon expected) has an HIV policy.

Second, in terms of workplace disruption, four organizations report refusals by coworkers to share eating or restroom facilities or workplace equipment; two of these organizations (50 percent) have policies. Five organizations report conflict among workers regarding working with employees with AIDS; three of these organizations (60 percent) have policies. Hence, while the overall policy adoption rate is not high, those where the perceived need is higher are more likely to have policies than organizations with a lower perceived need.

Hypothesis 2

This hypothesis introduces the organization's philosophy into the policy adoption decision. That is, it is predicted that organizations that have adopted an organizational philosophy that places them in the forefront of human resources policy making (i.e., by adopting "socially aware" policies such as sexual harassment and family leave policies) will be more likely to have workplace policies related to HIV infected employees. Results are somewhat equivocal in this case: five of 18 organizations (28 percent) with a family leave and/or child care policy also have an HIV policy. This compares with one of seven organizations (14 percent) without family leave and/or child care that has an HIV policy. Having a sexual harassment policy, however, does not make an organization more likely to have an HIV policy: five of 21 organizations (24 percent) with a sexual harassment policy have an HIV policy, as compared with one of four organizations (25 percent) without a sexual

harassment policy that has an HIV policy.

Another way to examine the organization's philosophy toward human resources policy making is to characterize them as primarily innovative policy adopters or "prospectors", reluctant policy adopters or "defenders" of the status quo, or somewhere in between. These assessments were based on self-described characterizations of their strategic orientation to policy making in response to the following four statements: (a) We prefer to experiment with innovative approaches to personnel policies, regardless of whether they have been tried elsewhere or not (Prospector/Innovator); (b) We prefer to maintain consistent policies and avoid making substantial changes unless absolutely necessary (Defender); (c) We prefer to evaluate the experience of other organizations before adopting new personnel policies ourselves (Analyzer); and (d) We prefer to develop new policies on a case by case basis, as they fit our own organizational needs (Reactor).

Results demonstrate that one organization strongly characterizes itself as a prospector; this organization also has an HIV policy. Eleven organizations characterize themselves as defenders; one of these (9 percent) has an HIV policy. Three organizations characterize themselves as analyzers; one of these (33 percent) has an HIV policy. Nine organizations characterize themselves as reactors; three of these (33 percent) have HIV policies. Thus, while the number of organizations that consider themselves to be innovators is minute, the prediction that this type of organization will be most likely also to have an HIV policy is supported. Conversely, the least innovative type of organization, the defender of the status quo, is also least likely to have an HIV policy, lending further support to the second hypothesis.

Hypothesis 3

This hypothesis examines the perceived feasibility of policy implementation, using as an indicator the presence of resources in the form of a separate human resource management department. Eighteen organizations report having a separate department for human resources management; six of these organizations (33 percent) have an HIV policy. None of the seven organizations without a human resources department has an HIV policy. The hypothesis is supported by this result; however, it is clear that other variables are necessary to test the impact of perceived feasibility more thoroughly.

Other Observed Relationships

Managerial characteristics were also predicted to have an influence on policy adoption. In the pilot study, the degree of importance that the top management of the organization places on the issue of AIDS in the workplace was examined for its association with the presence of an HIV policy. Ten organizations report that this issue is somewhat or very important to top management; four of these organizations (40 percent) have HIV policies. This compares with 15 organizations where the issue of employees with HIV is of little or no importance to top management; two of these organizations (13 percent) have HIV policies.

Organizational characteristics such as sector and location also may affect the likelihood that an organization will have an HIV policy. As noted in the pilot study, most of the organizations are in the service sector and all are located in the Inland Empire, so these two variables were not analyzed with the current data. In terms of organization size, the smallest workforce size where an HIV policy existed was 70 employees; however, four of the organizations with HIV policies had work forces over 1200. Because organizational size is highly correlated with likelihood of having an HIV infected employee and with the presence of a separate human resources department, the interaction of these relationships will be examined more closely in the larger study.

Discussion

Analysis of data from the pilot study lends preliminary support for hypotheses predicting which organizations are most likely to have adopted policies regarding HIV infected employees. While many organizations in the study seem realistic about the likelihood that their workforce will not remain untouched by the AIDS virus, there remains a reluctance by the majority of organizations to articulate a formal policy about how they will treat such employees. Evidence from these data suggests that much of the inaction results from a perception that the issue needs no particular attention within the organization and/or from an organizational philosophy that reinforces the status quo. It is also likely that the impact of these factors is heightened by a signal from top management that the issue is not important. Anecdotal evidence also indicates that some of the reluctance to adopt an HIV policy is a result of management's uncertainty about their obligations, legal and ethical, to HIV infected employees and their coworkers. As the requirements under the Americans With Disabilities Act become clarified, through regulations and court decisions, at least some of the legal uncertainty should be resolved.

It also must be emphasized that the issue of policies regarding AIDS in the workplace is far more complex than merely the prediction of which organization will or will not have a policy. Other important aspects of the issue include an investigation of the content of the policies that are adopted, the adoption and implementation process, and the impact of the policies on performance, productivity, and quality of work life. These aspects will be explored in greater depth in the forthcoming study.

Table 1:
Bivariate Predictors of HIV Policy Adoption

	Total		Has HIV Policy	
	N	%	N	%
H_1: Perceived Need				
Presence of HIV-Infected Employees				
Now in organization's workforce	4	16%	3	75%
Expected soon in organization's workforce	11	44%	3	27%
Not present and not expected soon	10	40%	0	0%
Workplace Disruption				
Conflict among workers about HIV	5	20%	3	60%
No conflict among workers about HIV	20	80%	3	15%
Coworkers refuse to share workspace	4	16%	2	50%
No refusal to share workspace with HIV+	21	84%	4	19%

Table 1: (continued)

	Total		Has HIV Policy	
	N	%	N	%
H_2: Organizational Philosophy				
Socially Aware Human Resources Policies				
Has family leave/child care benefits	18	72%	5	28%
No family leave/child care benefits	7	28%	1	14%
Has sexual harassment policy	21	84%	5	24%
No sexual harassment policy	4	16%	1	25%
Strategic Orientation to Policymaking				
Innovators	1	4%	1	100%
Defenders	11	44%	1	9%
Analyzers	3	12%	1	33%
Reactors	9	36%	3	33%
H_3: Perceived Feasibility of Implementation				
Human Resources Management Staff				
Separate HR department	18	72%	6	33%
No HR department	7	28%	0	0%
Other Relationships				
Importance to top management of issue of AIDS in the workplace				
Very important	4	16%	2	50%
Somewhat important	6	24%	2	33%
Somewhat unimportant	6	24%	1	17%
Not at all important	9	36%	1	11%

[The End]

Unions in the Inland Empire: Perceptions of Change

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In the latter part of 1991, we undertook a study of changes affecting labor unions in San Bernardino and Riverside Counties in Southern California, a region known as the Inland Empire. We asked over 200 federated and independent unions to identify what had changed over the last 10 years in such areas as union membership, job availability, political activity, subjects of bargaining, bargaining power, member satisfaction with union services, cooperation among unions, union-employer cooperation, and anti-union tactics by employers. The context for our inquiry is rapid growth in area population and employment.

Characteristics of the Inland Empire

The Inland Empire is 27,370 square miles in area. Bisected by the San Andreas Fault, the region is comprised largely of the Mojave Desert and low mountain ranges, and contains national forests, military installations, and Indian reservations. It stretches from the Los Angeles and Orange county lines, approximately 25 miles east of downtown Los Angeles, to the Arizona and Nevada borders. San Bernardino County, the largest county in the United States, is bigger than New England.

The major cities are located in the southwestern portion of the region. Riverside and San Bernardino lie approximately 60 miles east of downtown Los Angeles. Riverside, San Bernardino, and Ontario make up the Standard Metropolitan Statistical Area.

The region has its roots in agriculture, notably the citrus industry, and emerged as an industrial center because of proximity to Los Angeles and Orange Counties, land availability, a large labor supply, a highly developed freeway system, and presence of three railroads and Ontario International Airport.

Home prices average as much as $100,000 less than in Los Angeles and Orange Counties.[1] It is estimated that more than 30% of the employed workers commute to work outside the area.[2] Labor costs are below those of Los Angeles and Orange Counties by as much as 35 percent.[3] The average annual salary in 1990 was $21,963, compared to $26,180 in California and $23,602 nationally.[4] In cost of living, the area ranks eighth among the nation's 300 largest metropolitan areas.[5]

The availability of jobs and reasonably priced housing resulted in rapid population growth in 1980-1990—from

* Presented at the 45th Annual IRRA Meeting, Anaheim, California, January 5-7, 1993. Copies of the union survey may be obtained from the authors.

[1] David J. Jefferson, "Fastest-Growing Area of California Finds Slump Hits Fast Too," *Wall Street Journal*, December 27, 1990, p. A10.

[2] Andrew Moore, Managing Editor, *Inland Business Magazine*, Rancho Cucamonga, California, Telephone Conversation, May 6, 1993.

[3] Jefferson, supra. See John Whitehair, "S.B. Area Nearly Lowest in Starting Pay for Office Workers," *San Bernardino Sun*, February 5, 1992, p. B8. In a survey by Thomas Temporaries, Irvine, California, San Bernardino ranked 17 of 18 areas in California in salaries paid office workers.

[4] John Whitehair, "Area Wages Go Up 4.8% in Past Year," *San Bernardino Sun*, December 10, 1991, p. B8, citing U. S. Department of Labor data. In annual pay, the region ranked 128 of 320 metropolitan statistical areas in the United States.

[5] "Survey: Area is Not Cheap," *San Bernardino Sun*, January 22, 1993, p. B8, citing American Chamber of Commerce Researcher's Association data.

1,558,192 to 2,588,793, or 66.1 percent, the fastest growth rate in California.[6] Populations of 3,977,888 and 9,963,700 are projected for the years 2000 and 2040, respectively.[7] The fastest growing cities are Riverside, San Bernardino, Ontario, Rancho Cucamonga, Fontana, and Moreno Valley (see Table 1).[8] By 2030, the Hispanic community will constitute a majority of the population.[9]

From 1990 to 1996, the number of jobs is projected to grow from 761,600 to 927,300, or 21.7 percent, particularly in the services, retail trade, and construction sectors (see Table 2).[10] The region was a national leader in job growth in 1990-1991, but growth declined in 1992 and now lags behind population growth.[11] In March 1993, the unemployment rate was 10.9 percent, compared to 9.7 percent in California and 7.3 percent nationally.[12] The construction and defense/aerospace industries experienced sharp losses in recent years.[13] George Air Force Base closed in 1992, Norton Air Force Base is scheduled to close in 1994, and March Air Force Base is slated for a major realignment.

Between May, 1990, and September, 1992, California reportedly lost 901,800 jobs, with the vast majority of the decline occurring in Southern California, where the Inland Empire is said to be in the best position to weather the recession.[14]

Union Survey Findings

The survey attempted to shed light on three questions regarding changes affecting labor unions in the Inland Empire over the last 10 years. What has changed? Why has it changed? How have unions responded to change?

Of 205 questionnaires mailed, 77 responses were received, 28 from education unions and 49 from all other unions. These included unions in manufacturing, construction, transportation, communications, public utilities, health services, wholesale/retail trade, entertainment, agriculture, government, and multiple industries. Surveys generally were completed by union presidents and business agents. In categorizing our results, we found it convenient to designate 50-59 percent of the responses as a majority, 60 percent as a large majority, and 45-49 percent as just under a majority.

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[6] Inland Empire Economic Council, "Table 1. Population Characteristics by County and City, 1990 Census," *Quarterly Economic Report*, 3, No. 3 (May, 1991), p. 2. Growth rates for San Bernardino and Riverside Counties were 58.5 percent and 76.5 percent, respectively.

[7] Inland Empire Economic Council, "What if Inland Empire Growth Rate for 1990-1992 Continues until Year 2000?" *Quarterly Economic Report*, 4, No. 2 (May, 1992), p. 34, and "Phenomenal Growth Expected for County," *Riverside Press-Enterprise*, April 14, 1993, p. A8, citing California Department of Finance data.

[8] Inland Empire Economic Council, "Fastest Growing Places," *Quarterly Economic Report*, 3, No. 3 (May, 1991), p. 5.

[9] "Phenomenal Growth Expected for County," supra.

[10] Graham Witherall, "Job Boom for Inland Empire, Study Predicts," *San Bernardino Sun*, November 1, 1991, p. A1, citing California Employment Development Department data. See also "10 Top Employers in the Inland Empire," *San Bernardino Sun*, March 29, 1993, p. E1. The ten largest employers, with payrolls ranging from 10,400 to 1,750 employees, are: Stater Brothers Markets, Kaiser Permanente Medical Care Program, Ontario International Airport, Loma Linda University Medical Center, GTE of California, Lockheed Corporation, Southern California Edison, Fleetwood Enterprises, Harris Department Store, and Rohr Aircraft Company.

[11] Inland Empire Economic Council, "Inland Empire Ranks as Third Fastest Job Growth Market in the Nation," *Inland Empire Business Report*, 4, No. 6 (September/ October, 1991), p. 4; John Whitehair, "Job Creation in Region Ranks Low Nationally," *San Bernardino Sun*, November 28, 1992, p. B8, citing a study by M/PF Research Inc., Dallas, Texas; and Inland Empire Economic Council, "More Inland Empire Wage Earners," *Quarterly Economic Report*, 4, No. 2 (May, 1992), p. 35.

[12] "Monthly Release, Riverside-San Bernardino Counties: Table 1. Labor Force/Employment/Unemployment, March, 1993," California Employment Development Department, Labor Market Information Division, Los Angeles, California. Unemployment rates for San Bernardino and Riverside Counties were 10.1 percent and 12.0 percent, respectively.

[13] "Construction in the Southland," *San Bernardino Sun*, March 8, 1993, p. E1, and "Base Closures," *Inland Business Magazine*, April, 1993; Inland Empire Economic Partnership, *Quarterly Economic Report*, 5, No. 2 (April, 1993), pp. 21-25.

[14] "Working to Remedy the Recession" *San Bernardino Sun*, February 17, 1993, p. A1, citing California Department of Finance data; Martha Groves, "California Still Reeling from Recession Blow," *Los Angeles Times*, June 28, 1992, p. D9; and Jefferson, supra, pA1.

One key finding detailed below is that different circumstances exist for the education unions and other unions. For this reason, two categories of findings were developed, one for education unions and one for other unions. Education unions generally are prospering, and while some public utility and government unions reported increasing strength, the other unions generally are experiencing difficulties. A second key finding is that Inland Empire unions largely are optimistic about the future of their unions.

Economic Factors Affecting Respondent's Unions: The continuing conservative political climate was cited by a large majority of all unions as influential. A large majority of the education unions identified the increase in population of the Inland Empire as influential, while just under a majority of the other unions identified technological change and increases in foreign goods imported to the United States as influential.

Union Strength during the Last Ten Years: The education unions largely reported ten years of increasing strength. A large majority was weakest in the early 1980s, and a majority was strongest in the early 1990s. A majority of the other unions reported ten years of decreasing strength. A majority was strongest in the early 1980s, and just under a majority was weakest in the early 1990s. It should be noted, however, that one-third reported either ten years of increasing strength or a decrease followed by an increase in strength at the end of the decade.

Changes Observed over the Last Ten Years: A large majority of all unions reported decreases in the buying power of wages. Job availability is increasing for a large majority of the education unions and decreasing for a large majority of the other unions. Large majorities of the education unions reported increases in membership, attainment of bargaining objectives, and political influence. A majority reported increases in the value of the membership benefit package, and just under a majority reported increases in membership participation. Large majorities of the other unions reported increases in women and minority members and employer use of legal tactics, and a majority reported increases in employer use of labor consultants and the influence of conservative politics.

Responses to Change: In response to change, increases in leadership skills, leadership training programs, and union political activity were reported by large majorities of all unions. A majority also reported increases in service to members. For the other unions, a large majority reported increases in union-employer cooperation, and a majority reported increases in cooperation with other unions and community involvement. Just under a majority of all unions think the public image of unions in general is less positive, while a majority think that the public image of their particular unions is more positive. A large majority of all unions think the legal climate of collective bargaining is less positive for unions.

Subjects of Bargaining

Wages, health insurance, and work hours/overtime were major issues in the 1980s for large majorities of all unions. Wages, health insurance, pensions, and safety/health will increase in importance in the 1990s for large majorities, and work hours/overtime will increase in importance for a majority.

For the education unions, major issues in the 1980s were grievance procedures/arbitration for a large majority, the union/agency shop for a majority, and discipline/discharge for just under a majority. In the 1990s, grievance procedures/arbitration will increase in importance for a large majority, and discipline/discharge will increase in importance for a majority.

For the other unions, pensions were a major issue in the 1980s for a large majority, and the overtime premium, work rules, and safety/health were major issues

for just under a majority. In the 1990s, restrictions on subcontracting will increase in importance for a majority, and management rights, work rules, discipline/discharge, grievance procedures/arbitration, and labor-management committees will increase in importance for just under a majority.

A large majority of the education unions reported they are better off, while a large majority of the other unions reported they are worse off. A large majority, 77 percent, of all unions are optimistic about the future of their unions, 89 percent of the education unions and 67 percent of the other unions.

Interviews with Inland Empire Labor Officials

In the fall of 1991, in conjunction with the survey, interviews were conducted with seven Inland Empire labor officials regarding changes affecting unions over the past 10 years. They represented the Central Labor Council, AFL-CIO, San Bernardino and Riverside Counties, Building Trades Council (BTC), three predominantly private sector unions, and one public sector union.

According to the AFL-CIO, the area unionization rate in 1989 was 19.1 percent, as compared to the national rate of 16.4 percent.[15] All officials noted the growth in regional population. A former AFL-CIO official stated that labor in the Inland Empire developed a regional identity during the 1980s. Four unions experienced growth, while the construction unions underwent severe losses.

One union and the BTC reported wage bargaining had become more difficult. The construction unions had experienced rollbacks and the introduction of multitier compensation systems. According to the AFL-CIO, concessions by unions in general were prevalent in 1984-1985. Health care costs were a contentious bargaining issue for three unions. Two unions and the BTC reported lower strike activity, and the AFL-CIO, BTC, and private sector unions noted the presence of or a rise in union busting activity by employers.

These findings are consistent with the experience of unions throughout the country in the 1980s regarding difficult wage and health care negotiations, lower strike activity, and prevalence of an anti-union climate.[16]

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[15] U. S. Department of Labor, Bureau of Labor Statistics data.

[16] See, for example, Fehmida Sleemi, Joan D. Borum, and Edward J. Wasilewski, Jr., "Collective Bargaining during 1991," Michael Cimini, "Collective Bargaining in 1990: Search for Bargaining Solutions Continues," and Daniel J.B. Mitchell, "The Outlook for Prices and Wages: 1991," *UCLA Employee Relations Update: 1990-1991*, 30th Annual UCLA Employee Relations Conference, March 11-12, 1991 (Los Angeles: UCLA Institute of Industrial Relations, 1991), pp. C1-C16, C37-C51, and B1-B30, respectively; Gary N. Chaison and Joseph B. Rose, "New Directions and Divergent Paths: The North American Labor Movements in Troubled Times," *Proceedings of the 1990 Spring Meeting of the Industrial Relations Research Association*, pp. 591-596; and David Moberg, "Union Busting, Past and Present: Charting an Old American Tradition," *Dissent*, Special Issue: Labor's Future in the United States, Winter, 1992, pp. 73-80.

Table 1:

Fastest Growing Cities in the Inland Empire, 1980-1990

City	*1990 Population*	*1980-1990 Growth Rate*
Riverside	226,505	32.6%
San Bernardino	164,164	39.7%
Ontario	133,179	49.9%
Rancho Cucamonga	101,409	83.5%
Fontana	87,535	135.9%
Moreno Valley	118,779	561.9%

Source: Inland Empire Economic Council, "Fastest Growing Places," ***Quarterly Economic Report,*** 3, No. 3 (May, 1991), p. 5.

Table 2:

San Bernardino and Riverside Counties

Wage and Salary Employment by Industry

	March 1993		% Change 1989 - 1996
Total, All Industries	737,700	100.0%	30.8%
Agriculture, forestry, fisheries	24,200	3.3%	.5%
Mining	1,300	.2%	14.3%
Construction	36,500	4.9%	35.1%
Manufacturing	84,300	11.4%	23.0%
Transportation, communications, public utilities	36,200	4.9%	39.0%
Wholesale and retail trade	183,200	24.8%	32.5%
Finance, insurance, real estate	30,700	4.2%	28.2%
Services	185,600	25.2%	37.9%
Government	155,700	21.1%	26.4%
Federal Government	(18,600)	(2.5%)	(-7.7%)
State and local government	(137,100)	(18.6%)	(32.5%)

Sources: "Monthly Release, Riverside-San Bernardino Counties, Table 2: Wage and Salary Employment by Industry, March, 1993," and "Annual Planning Information, Riverside-San Bernardino, June, 1991," California Employment Development Department.

[The End]

NOTES

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