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Unions and the Contingent Workforce

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Abstract
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by

Kate Bronfenbrenner

In 1985, Stephen F. Austin State University in Nacogdoches, Texas, announced that it was going to contract out the work of its food-service department, effectively terminating 156 employees. This action was taken despite the department's well established record of profitability and quality service. A workforce of almost entirely African-American women, the food-service workers averaged only $3.80 per hour and they were rarely offered a full work week. Fully aware of the limited number of opportunities in East Texas for women and minorities, the workers were prepared to go to great lengths to prevent their jobs from being eliminated. Most likely they would have lost that battle if they had not been part of an extremely creative and aggressive union organizing campaign.

In fact, the university was replacing the food-service workers with leased employees in direct response to the leadership role played by these workers in the Texas State Employees Union's (TSEU/CWA) two year-old organizing drive for university employees. Three years later, after the union had successfully used every legal, investigative, legislative and community pressure tactic it could muster, the food-service workers were able to keep their jobs under the new management of a private leasing agency. They had also won full union representation rights. Their first contract included a 9 percent wage increase, union dues check-off, grievance and arbitration clauses, and perhaps most significant of all, job bidding and job protection contract language. A year later, the union and the NAACP won a civil rights suit against the university which awarded $800,000 in back pay to food-service workers who had been trapped in low-wage, part-time jobs solely on the basis of race.

The struggle of these food-service workers to gain union representation is a story being repeated across this country, albeit not always with such a happy ending. Unions seeking to organize the unorganized face increasing numbers of part-time, temporary, and leased employees in the workforce. These contingent workers, as they are now popularly called, make up more than a quarter of the American workforce. In today's new workforce, they are the least unionized and perhaps the most difficult to organize.

Yet, like the workers in Nacogdoches, they are also the group most in need of the protection, benefits, and representation that a union can provide. Unorganized, they can effectively be used by employers to undermine the wages, benefits, and unionization of full-time, permanent workers. Organized, they could change the face and fortunes of the American labor movement, bringing in women and minority low wage, service workers into organizations heretofore dominated by dwindling numbers of skilled white male craft workers.

Meeting the challenge of organizing and representing contingent workers will be a difficult but not insurmountable assignment for American labor. This article will present the dimensions of that challenge and the union response, including background statistics on the contingent workforce, legal barriers to organizing contingent workers, and contract gains made by unions currently representing part-time, temporary, and leased employees.

Growth of the Contingent Workforce: Background Statistics

In 1985, at a conference on employment security, Bureau of Labor Statistics (BLS) Commissioner Janet Norwood coined the term **contingent employment** to describe part-time, temporary, and contract employment systems. By 1994 the term had caught on as the most appropriate description for this rapidly expanding sector of the American workforce.

There have always been some service industries, such as hotel, health care and retail, that have had to maintain a large contingent workforce because of their long hours and fluctuating demand. There have also always been many workers, especially women, students, and elderly, who have sought part-time and/or temporary employment because of family, personal health, or educational priorities.

Recently, however, American corporations have been replacing their permanent, full-time workers with temporary, part-time, and/or leased employees for the sole purpose of cutting labor costs, increasing management flexibility, and in many cases avoiding unionization. For these employers, utilizing a contingent workforce is an effective way to avoid paying for health insurance and pensions, as well as paid time off for sick days, holidays, and vacations. For other management representatives, the financial and flexibility benefits go even further:

> *The employer incurs no legal or moral obligation for severance pay or layoff benefits, or rights to re-employment. Employers have no implied commitment to provide promotion opportunities, or to offer training and/or development to contingent workers (Congressional Testimony of Audrey Freeman, Human Resources Program Group, May 1988).*

The number of workers involved is staggering. According to a study by the George Washington Center for Social Policy, part-time workers, defined as those who work less than 35 hours a week, account for 20 percent of the U.S. non-agricultural workforce. Higher paying managerial, professional, and technical jobs account for only 17 percent of part- time jobs, compared to 31 percent of full-time positions. In contrast, close to 78 percent of part-time jobs are in low paying sales, clerical, service, and unskilled occupations.

Equally disturbing is the fact that **involuntary** part-time employment represents the fastest growing employment arrangement in the U.S.,

rising from 2.1 million workers in 1970 to 5.4 million by 1988, with 53 percent of that increase occurring since 1979. Ninety-four percent of these workers have been forced into part-time work because of slack demand or their inability to find full-time work.

The BLS category of **voluntary** part-time is also misleading, for it includes those who "choose" part-time work because of a physical or mental disability, the inability to find affordable child care, inadequate transportation, or other personal constraints. It also masks the fact that those choosing to work part-time are not necessarily choosing to work in low wage occupations, but are trapped in those jobs because that is where part-time work is concentrated.

These statistics also severely underestimate the number of part-time workers by excluding workers holding more than one job if the total hours from all jobs add up to thirty-five hours or more. Yet the rights, benefits, and security of workers holding two or three part-time jobs are very different than those working in one permanent full-time position, even if they average the same number of hours per week. In 1985, the Current Population Survey estimated that 3.8 million persons held a part-time as well as a full-time job and another 1.2 million held two or more part-time jobs. More recently, as a result of recessions, the number of formerly high paid industrial workers working in several low paying service jobs has increased even further.

Benefits coverage for part-time workers is even more dismal. In a study by Hewitt Associates involving 484 companies, only half were found to provide any benefits for employees who worked less than 20 hours a week. According to George Washington Center for Policy Studies, 80 percent of part-timers are excluded from their employers' pension plans. Only one-third of involuntary part-time workers, and one-fourth of voluntary part-timers receive any health insurance. Part-timers are also less likely to be covered by unemployment insurance when they are laid off.

Statistics on temporary workers are more difficult to come by. There is certainly some overlap with the part-time workforce, for temporary workers include all employees who lack either an express or implied commitment from the employer for permanent employment. However, three-fifths of these temporary workers do work full-time. They simply have no guarantee of employment. Some switch jobs every couple of months; others have worked the same job for more than a decade, but are on a year to year contract, with no commitment from their employer, often in order to avoid the payment of benefits.

The only current data on the temporary workforce focus on the approximately 700,000 workers employed in the temporary help industry, made up of businesses who supply workers to other employers on a fee or contractual basis. This figure does not include the hundreds of thousands of temporary employees who work directly for public and private sector employers. We know, however, that that number is very large. The Federal government alone employs close to 300,000 direct hire temporaries and Los Angeles County employs over 10,000, for example.

Leased employees include "Kelly Girl" clerical workers, health agency nurses, cleaning service custodians, truck drivers, computer programmers, and day laborers. Although more than half of the leased workforce consists of office support personnel, more than 25 percent of leased employees staff "light" manufacturing plants. Like the regular, part-time workforce, temporaries average lower wages than their full-time permanent counterparts, and are more likely to be women (two- thirds of the temporary workforce) or African-American (one-fifth of the temporary workforce).

The businesses contracting with these leasing agencies usually do so to avoid the headaches and liabilities of starting or increasing their own payroll; among these liabilities include fringe benefits, workers and unemployment compensation costs, and in many cases union and discrimination charges. Although many of the temporary agencies could, through economies of scale, afford to set up some kind of benefit

program for these employees, the large majority of leased employees receive no benefits at all.

According to a recent Bureau of Labor Statistics survey of twenty-six states, only about one-fourth of workers employed by the temporary help industry receive any form of health insurance, and only one-fifth receive life insurance. These workers are also much less likely to receive paid leave benefits such as sick leave, holidays and vacations, and which they usually only qualify for after accruing more than 1,500 hours of work.

Direct hire temporaries are even worse off. Although there are no accurate data, unions and other advocates for these workers have generally contended that the large majority of direct hire temporaries receive no benefits at all. Moving from job to job, they work without health insurance, are ineligible for promotions, and are completely outside the unemployment compensation system as most systems require a minimum work-time length with an employer to qualify for unemployment. They are the most invisible and most destitute segment of the contingent workforce.

In many cases, contingent workers work alongside full-time permanent employees, doing the same work for a lower wage. In other cases, they are given a different job classification to justify the difference in wages, although job requirements and qualifications remain identical. Women and minorities constitute a disproportionate share of the contingent workforce, and are especially likely to be forced to take involuntary, part-time, or temporary positions.

And women and minorities working in contingent jobs constitute the majority of American workers employed at or below minimum wage. Hispanic and African-Americans are most likely to be trapped in involuntary part-time jobs. Because of their child care responsibilities, it is not surprising that women are three times more likely then men to "voluntarily" seek part-time work. However, women are also more likely than male workers to be working part-time involuntarily, and that number increases every year, especially for married women.

The Union Response

The union response to this increase in contingent workers has been mixed. Some service-sector unions have always represented part-timers and have attempted in their contracts to extend the rights and benefits of full-time employees to part-time workers, to the greatest extent possible. At the same time, these unions have also struggled to limit the use of nonunion temporary employees to do bargaining unit work.

Other unions, in more traditional industries, have put their efforts into negotiating restrictions on the hiring or permanent retention of contingent workers and have excluded them from contractual rights and benefits. In past years, when these unions had more bargaining power, this method often worked and prevented the employer from replacing the permanent workforce with part-time and temporary workers. However, at the same time it also prevented women and other workers, who voluntarily sought part-time employment, from working in higher-paying union jobs, in effect trapping contingent workers in nonunion jobs and industries.

As employers have become more effective in forcing their demands on unionized workers, and as the percentage of contingent workers dramatically increases, the more traditional unions are looking to the experience of their brothers and sisters in the service sector for the most effective organizing and bargaining strategies for representing these workers. They have recognized that the best way to prevent the replacement of full-time permanent employees with an involuntary contingent workforce is to organize actively and negotiate for full bargaining unit status and privileges for part-time and temporary workers. In addition, many unions are looking at ways to increase the options for those who want or need part-time and temporary work, but do not want to lose job security, contract benefits, or union status.

Contingent Workers Under the NLRA

With the expansion in organizing activity among contingent workers, the NLRB has had to define increasingly the bargaining unit status of this new workforce. This is one area where the conservative National Labor Relations Boards (NLRB) of the 1980s failed to leave their distinctive stamp. This may be because most of these unit disputes come down to one or two workers whose challenged ballots could decide a very close election, with both management and the union arguing for inclusion or exclusion depending on which way they thought the contingent workers were going to vote. With management and union interests switching back and forth, it would have been difficult for the NLRB to develop a standard that would consistently benefit employers.

Instead, the NLRB has developed a fairly inclusive standard for part-timers, placing less emphasis on hours worked and more emphasis on regularity, continuity/tenure of employment, and similarity of wages, benefits, and working conditions. This standard has allowed the inclusion of on-call nurses who work only one eight hour shift every two weeks, or teenage grocery baggers on an "as needed" basis.

Direct hire temporaries have been included in bargaining units and permitted to vote in union certification elections, if they were employed on the eligibility and election dates and had been given no "date certain" for termination of their employment. In practice this standard has included employees who have told the employer they would only work until spring, or who have been hired as a replacement for an ill employee, or who are on year-to-year grant funding with no guarantee of refunding.

Thus, for unions the most pressing question is not whether the Board of Courts will certify a unit including regular, part-time, or direct hire temporary employees, but whether the expensive and lengthy litigation necessary to get them included in the unit is worth the risks inherent in delaying the election for a few uncertain votes. The risks of excluding them from the unit may be even greater, however, for even if the union

wins, the employer can legally erode bargaining unit positions by filling vacancies with excluded contingent workers.

For leased employees, NLRB decisions have been more detrimental to unions. It has held that unions can organize workers employed by a temporary help agency as a separate bargaining unit. However, few unions have succeeded in this kind of organizing because of the transient nature of the workforce, the scattered and changing nature of the work sites, and the inability to bargain effectively for the workers when their wages, hours, and working conditions are partially determined by the contracting business.

Unions representing leased employees make little headway in bargaining unless the business subcontracting the work is found to be a joint employer with the leasing agency. In the words of labor lawyer John Axelrod:

> *Absent joint employer status, the recipient can resubcontract the work, without having to bargain, whenever the employees assert themselves. Absent joint employer status, a union cannot bind the recipient to a collective bargaining agreement signed by the leasing organization; unless the recipient is bound, an arbitration awarding statement may be wholly illusory. Absent joint employer status, the recipient is not a part to negotiations and is immune to a union's economic strength (The Labor Lawyer 853, 1987, p.872).*

But gaining NLRB agreement as to joint employer status is difficult to achieve. The union must prove that both employers co-determine essential terms and conditions of employment. Although the standard seems reasonable, the facts are open to manipulation and subjective interpretation. Even in cases where the company has some responsibility for bargaining, hiring, record keeping, and supervision, the courts have found that the degree of control was not significant enough to merit a finding of joint employer status, thus permitting the business to cancel its leasing contract and replace the workers, without any bargaining with the union.

Joint employer status becomes even more complicated in cases such as the Nacogdoches food-service workers example, where a public sector employer has a leasing arrangement with a private sector agency. The Board has declined jurisdiction in several units where the public employer retained significant control over the essential terms and conditions of employment of the private agency employees. For their part, state labor boards have also refused jurisdiction over anyone employed by private leasing agencies but working out of a public entity.

However, as the number of these situations increases, the NLRB has taken a more liberal view. It has accepted jurisdiction in units where the public employer sets base wages and benefits or had final review over wage decisions, as long as the private agency had enough control over economic conditions to enter into a meaningful bargaining relationship.

Still, if the public employer contracts for private leased employees--whether a prison contracting for counseling services, or a public hospital contracting for lab workers--and maintains a major role in personnel decisions, the employees could be unprotected by either public or private sector labor law. With these employees trapped in a legal no-man's land, even if the union is eventually able to gain NLRB jurisdiction, they are often only able to do so after years of expensive and time consuming litigation, which few unions are willing to undertake.

Representing Contingent Workers

As difficult as it is, winning bargaining unit status for part-time temporary and leased employees is only the first step. Unions also must convince these workers that their interests will not be neglected and overshadowed in protecting the interests of full-time employees.

The union record in winning certification elections in units with part- time workers has been mixed. In a survey of 261 NLRB certification elections done in cooperation with the Organizing Department of the AFL-CIO, I

found that unions were able to win certification elections in 50 percent of the units that had more than 5 percent part-time workers, as compared to a 43 percent win rate overall. The win rate, therefore, did increase as the percentage of part-time workers increased. Thus it appears that part-time workers, per se, are no less likely to vote for union representation than full time workers. Because women and minority service workers make up the majority of the part-time workforce, and because these groups are the most receptive to unions, this should be no surprise. Yet many organizers I interviewed still labored under the misconception that part-time workers are more difficult, if not impossible to organize.

The union record in representing contingent workers has also been mixed, and employers are quick to publicize cases of past neglect. Only if unions bargain for the most inclusive language possible will contingent workers be convinced to vote yes in union elections and become active participants in their unions. Although in the past many unions have entirely ignored the needs and rights of part-time or temporary workers, in some more recently organized units the record is improving.

In my 1988 survey of 100 union "first contract" campaigns (where unions were trying to achieve successful negotiation of a "first contract" after winning a representation election), I found that all of the units where part-time workers were included under the recognition clause provided for some pro-rata of benefits in the first contract. In addition, 77 percent of the first agreements covering part-time workers provided for pro-rated seniority, giving part-timers at least minimal bidding and layoff rights.

The first step in effective representation of contingent workers begins with the recognition clause of the first agreement. The best language simply has all employees working in bargaining unit job classifications covered under the recognition clause. That way, any new workers hired in those job titles, regardless of hours worked, are covered under the agreement. Unfortunately, the majority of contracts still only cover those employees who work over 20 or 30 hours a week. The danger with this

kind of agreement is that the employer will hire large numbers of 19.5 hour employees to undermine the union.

It is also essential that contracts include an automatic upgrade in status for temporaries, per diems, seasonals, and part-timers, whose average weekly hours over a period of a limited number of months is at least equal the number of hours required by the "higher category." There also should be options for workers who want temporarily to change their hours from full-time to part-time status, without loss of seniority, and with the right to return to their full time job after a certain number of months.

Bargaining for part-time employees can be a very difficult and divisive process. Pro-rating of benefits is a perfect example. The most common contract language pro-rates benefits for part-timers across the board, based on the proportion of full-time hours worked. Although this works fairly well for paid time off, such as sick time and holidays, it can be unworkable for health insurance and pension benefits. In those cases, unions should attempt to get full benefit coverage for as many part-timers as possible. Alternatively, unions should try to get employers to contribute directly into a union health and welfare plan, especially in industries such as entertainment, where workers move from job to job and can be employed by several different companies at the same time.

In many contracts full-timers always have seniority rights over part-timers, leading many part-timers to question whether unions are really working in their interest. There are several ways that unions have worked to remedy this problem. The simplest method, but most controversial with full-timers, is to make all seniority based on length of service. A more popular solution is to pro-rate seniority based on hours worked.

When it comes to layoffs, some contracts give full-timers and part-timers equal bumping rights, if the full-timer is willing to take the part-time job, or the part-timer is willing to take the full-time job. Others specify that a full-

timer can bump two part-timers with less seniority, and a part-timer can bump a full-timer for part-time hours.

For promotions and job bidding, too many contracts restrict the rights of part-time employees to bid for full time positions. In workplaces such as Stephen F. Austin University, this often serves to reinforce the entrapment of women and minorities in low-wage positions with erratic hours and few benefits. Ideally, part-timers should have equal rights, based on seniority, to bid for full-time vacancies. Full-timers interested in part-time positions should also be able to reduce their hours. And temporary employees should be given preference for vacant positions before the employer hires outside workers.

It is also essential that contracts provide some kind of guarantee of hours and schedules for part-time workers. In many contracts, full-time schedules and hours are guaranteed, while part-time schedules can be changed at management's discretion. This is one of the reasons that employers find part-timers so attractive, and one of the most significant protections unions can provide part-time employees.

Organizing and bargaining for part-time and temporary workers is a formidable task. With most bargaining units dominated by a full-time majority, unions must struggle to convince the full-timers that bargaining for rights and benefits for part-time workers is in their interest as well. Employers must be convinced that they pay a high price for complete "flexibility" because of the increased turnover and lower productivity associated with a contingent workforce.

Despite legal, economic, and internal barriers it is well worth the effort for the American labor movement to organize the contingent workforce aggressively and creatively. Part-time temporary and leased employees, trapped in low-wage jobs with few if any benefits, are the workers most in need of unionization--for their own sake and the sake of those already organized.