September 1994

Statement of Howard V. Knicely on Behalf of the Labor Policy Association Before the Commission on the Future of Worker-Management Relations

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Comments
Includes results from a 1986-87 AFL-CIO Organizing Survey.

Suggested Citation
STATEMENT OF

HOWARD V. KNICELY

BEFORE THE

COMMISSION ON THE FUTURE OF WORKER/MANAGEMENT RELATIONS

ON BEHALF OF THE LABOR POLICY ASSOCIATION

SEPTEMBER 8, 1994
My name is Howard Knicely. I am Executive Vice President of TRW, and I am appearing before the Commission this morning as the Chairman of the Board of Directors of the Labor Policy Association. Appearing with me is Rex Adams, Vice President of Administration for Mobil and a member of the Association's Executive Committee. As Stephen Darien testified at the August 10 hearing, the comments LPA is presenting during this final set of hearings are the product of considerable discussion of the Fact Finding Report\textsuperscript{1} by the members of the Association in a series of meetings specifically called for this purpose.

At the outset, we would like to express our appreciation to Secretary of Labor Robert Reich and Secretary of Commerce Ronald Brown for assembling this Commission to begin not only improving our nation's employment policies, but also the process by which those policies are formulated. Work systems, work design and work relationships are in a constant state of evolution with each century bringing new attitudes, expectations, and forms of association. The present one is no exception. Before the industrial revolution, the concepts of union representation and collective bargaining as we know them today were not even being discussed in a theoretical sense. As the workplace changed in the late 19th century with the introduction of systems of mass production, however, collective bargaining and third party representation of rank-and-file employees became the dominant system of labor-management relations in large enterprises. That system reached a peak during the middle part of this century, but since then, the workplace and work practices continued to evolve, and with it worker-management relationships. Traditional forms of collective bargaining now cover only ten percent of the employed private sector workforce. The system of industrial

\textsuperscript{1} Hereinafter referred to as the Report.
relations that guided employment policy in the 1940's, 1950's, and 1960's is now exemplified by millionaire baseball owners and millionaire baseball players having shut down a sector of the U.S. economy by a strike that may not be resolved for several months to come. The baseball strike is instructive because it involves one of the few remaining American industries that is still shielded from competition, thus giving the two sets of millionaires the luxury of pursuing what many non-participants view as ethereal demands. The vast majority of American companies, however, no longer operate in sheltered markets. Rather, we are constantly pressured by a host of highly competitive forces which have led front-line employees, managers, and unions to seek more cooperative ways of working with one another to ensure the long term viability of our organizations.

It is for these reasons that the members of the Labor Policy Association, the NAM and hundreds of other business organizations were pleased that the Commission in its Report recognized the existence of these new forms of work relationships, generically described as employee participation or employee involvement. While, as expressed in our testimony on August 10, LPA members are still not certain whether the Commission understands the full significance of employee involvement in today’s workplace, you have made an invaluable contribution to the continued progress of employment policy by ensuring that any future discussion of changes in those policies will deal with this new reality. In our August 10 statement, we detailed our concerns with the conclusions reached and the suggestions made in Chapter II, but on the whole we believe that its findings provide the necessary factual basis on which substantive discussions of policy changes can proceed.

We would additionally point out that Chapter II asks whether these new forms of
employee involvement are little more than "temporary fads that will ebb and flow." No one has yet discovered the perfect workplace, and we fully expect that the progressive organizational designs that have been described to you will eventually be replaced by even better ones. In the year 2094 when the Department of Labor (or whatever it is called by then) convenes a commission similar to this one, we are certain that its findings of fact will include descriptions of late 21st century work systems that are fundamentally different than the ones that were commonly prevailing in the mid-20th century.

We were also pleased with Chapter IV of the Report because it acknowledges perhaps the most important employment policy development since the 1960's—the shift in employee power in worker-management relations from unions to plaintiff attorneys. The chapter breaks new ground in dealing with the legal gridlock that this shift has generated by again providing the necessary factual basis for substantive discussions. Regarding Chapter I of the Report, LPA has not offered a detailed economic analysis of its portrait of gloom nor do we intend to do so. Granted, the U.S. has significant economic and social problems that cry out for improvement. We would only say that, accepting your picture as correct, it is surprising that:

1. our borders are being overrun by so many people desperately seeking entry into the good life of the United States,

2. our rate of joblessness is so much lower than in Canada, Europe and other countries that have what the Commission may believe to be far more progressive employment policies, and

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2 Report, 48.
3. American business is competing so well with countries whose workers don't earn in a day what U.S. employees earn in an hour.

That brings us to Chapter III of the Report, the subject of today's hearing. In our opinion, it can be described most charitably as a disappointment. Not only does it present a decidedly one-sided view of the issues of union representation and collective bargaining, it perpetuates a number of myths about labor-management relations. As long as policy makers continue believing in these myths, which are only reinforced by Chapter III's findings, any serious attempt at improving worker-management relations in this particular arena will be frustrated. Unlike Chapters II and IV of the Report, we do not feel a good faith attempt has been made in Chapter III to establish a set of facts that could bring the parties together to begin serious policy discussions, nor do we accept several of your findings as facts.

The findings the Commission has either explicitly made or strongly implied in Chapter III can be summarized as follows:

1. American workers have a strong preference for traditional union representation and collective bargaining that is being frustrated by employer hostility to unions.

2. This hostility is the primary, if not the sole, reason for the decline in union representation in America.

3. The principal manifestation of this hostility is employees seeking union representation who are intimidated into voting against the union by employers who routinely fire anyone sympathetic to such representation.
4. If a majority of employees in a bargaining unit has the courage to overcome this hostility and vote in favor of union representation, one-third of the workplaces desiring such representation will never be able to negotiate their first contract because employers will do everything in their power both inside and outside the law to frustrate agreement.

5. There is a "dismal side" to labor relations in that some employers break the law to resist unionization.

We would like to deal with each one of these "findings" in turn.

Employee Preferences

Regarding the question of employee preference for union representation, the Report attaches great significance to surveys which show that 30% of the non-union workforce wishes to be represented by a union. We attach greater significance to the fact that 70% do not wish to be represented. A number of recent surveys reinforce this finding. Three surveys conducted in the mid-1980s, including one specifically for the AFL-CIO, found that 65-75% of all non-union workers would reject union representation in a secret ballot election.\(^3\) These percentages are matched by the percentage (64.9%) of votes cast against union representation in all NLRB elections.\(^4\) Attitudes have not changed since, as was


shown in a 1991 Penn+Schoen poll conducted for the Employment Policy Foundation which found that 73% of all employees do not favor having a union in the workplace.

We would bring to the attention of the Commission a survey conducted by the AFL-CIO's Department of Organization and Field Services that was released in February of 1989, a copy of which is attached to our statement. In a cover letter to AFL-CIO affiliates, Ms. Vicki Saporta, then Director of Organizing for the Teamsters, said the survey summarized interviews with union organizers involved in 189 NLRB elections in units over 50 held between 1986 and 1987. The survey itself states:

In order to obtain this data, lengthy interviews were conducted with the lead organizers in these campaigns, during which questions were asked concerning the union’s tactics, the company’s tactics, and characteristics of the workforce.5

This survey, we would submit, may help the Commission determine the accuracy of the facts contained in its Report that it now desires to become the basis for discussions of policy changes.

Interestingly, the survey found that the northeast, particularly New England, is the most inhospitable for union organizing with the win rate there only 32%. We would point out that states like Connecticut, Massachusetts and Rhode Island constitute an area with a large percentage of workforces represented by unions. At the same time, the survey found that the greatest percentage of organizing success was in the west/southwest, a region in which union representation is much less prevalent. There the organizers enjoyed a 51% rate of victory. One would assume that if unionized working relationships were as successful as

Chapter III makes them out to be, then the areas of the country with the heaviest unionization rates would be those with the highest union win rates, yet that is not the case. An inference that may reasonably be drawn from these statistics is that the more employees know about the actual operation of unions in the workplace, the less likely they may be to vote in favor of union representation. This same inference can also be drawn from another statistic in the AFL-CIO survey in the section entitled, "Prior Union Exposure" which came to the following conclusions:

Familiarity and prior experience with unions has an ambiguous effect on the ability of unions to win NLRB elections. If former union members make up a small portion of the workforce, the win rate rises slightly. However, if former members made up more than half the workforce, the win rate is only 29%.

As the Commission undertakes an examination of government policies to determine how they might be altered to increase unionization of the workforce, we would suggest that this particular statistic be given very careful consideration.

We would also direct the Commission's attention to Part A of Chapter III which gives the Commission's perspective on "Experience Under the National Labor Relations Act." In Section 1, the NLRB certification election process is described in great detail. Part A, however, contains no description of the NLRB decertification election process—the process by which employees represented by a particular union disaffiliate themselves from that union—nor is there mention of that process anywhere else in the Report, even though about 15% of all elections conducted by the NLRB are decertification elections. In addition to the

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AFL-CIO Survey, 52.
100,000 or so employees who annually vote against becoming unionized in a certification election, almost 15,000 vote to get rid of a union that is already in place. Moreover, while employees choose not to be represented in about one out of every two elections, in decertification elections, they choose to no longer be represented in seven out of ten.

The lack of discussion of the decertification process raises another significant issue. We are surprised that despite the Commission's own data that 70% of the workforce has a preference against union representation, not one of the 354 witnesses brought before you was a rank-and-file employee who testified why they had voted against the union either in a certification or a decertification election. We find it inexplicable that a federal commission with the mandate this one has would choose to ignore completely the views of the majority of the American workforce. In contrast, the Commission did hear from a number of employees who were brought forth by organized labor to portray the so-called "Human Face of the Confrontational Representation Process." In doing so, the Commission apparently accepted at face value everything it was told by these witnesses without seeking testimony from employees in the same workplace that might have had a different point a view.

A close look at the story of one of these witnesses—Judy Ray of Peabody, Massachusetts—is telling. Ms. Ray testified that she had been fired by Jordan Marsh Stores on the day after Thanksgiving solely because she was a union organizer. She labelled the "harassment" she had suffered from the company a "disgrace." The Report reprints Ms. Ray's account as one of the "facts" the Commission had found. The day before the June 10 election, however, the local paper published a letter from 29 Jordan Marsh employees characterizing Ray's actions against the company as a "personal vendetta" and specifically refuting Judy Ray's statement that "she speaks for us:"
Her attempt to divide a staff that works well as a team, despite her recent public statements and condemnations, are offensive and ineffective.\(^7\)

Apparently, a solid majority of the employees agreed more with the sentiments expressed in the letter than with Ms. Ray. The union was rejected by a 4 to 1 margin (155 to 39) on June 10. Employees who voted against the union claimed to be "absolutely thrilled . . . We did not want the union in our store, and everyone stuck together on that." \(^8\)

Later this month, an NLRB administrative law judge will conduct a hearing to determine whether Ms. Ray, a commission-paid sales person, was fired for union activity or, as the store claims, because she stole a sale of a television set from a fellow employee. We would point out that an attempt by the NLRB on July 29, 1994, to obtain an injunction ordering her reinstatement was thrown out by a federal district court.\(^9\)

If the Commission is truly interested in establishing a set of facts on which substantive policy discussions can proceed regarding the direction of unions and the workplace, it will need to do far more digging into organizing campaigns such as the one at Jordan Marsh in order that all the facts, and not just a select few, are on the table. Business groups would have been pleased to provide "real people—American employees",\(^10\) as the Commission describes them, who would have represented the 70% of the workforce that public opinion polls show prefer to represent themselves in the workplace. Had we done so,


\(^10\) Report, 76.
however, our strong suspicion is that the business community's production of such witnesses would have been viewed as self-serving by the Commission. Indeed, the surprisingly hostile reception the Commission accorded Chester McCammon, a non-union welder from Universal Dynamics who addressed the Commission on August 10 as part of the management panel, is illustrative.

Discharge of Union Activists

With regard to the Commission's conclusions on illegal discharges, the Report as well as studies published by certain Commissioners have painstakingly attempted to demonstrate that illegal discharges occurring in an organizing campaign have increased considerably in recent years and that those discharges are a primary cause of union decline in America. We do not intend to continue splitting hairs over the proper measurement of this activity using the available data. Rather, we challenge the underlying premise of the Commission's use of the data; i.e., that the alleged increase has been a major cause of organized labor's decline. The notion that employers can stifle organizing drives by firing union supporters has been pounded into the American consciousness so thoroughly and for so long that no one, including this Commission, has apparently thought it necessary to challenge it.

Testimony was presented to the Commission by former Solicitor of Labor William Kilberg that management attorneys invariably advise their clients not to terminate any employees during an organizing drive who have any identification with the union because, more often than not, such discharges can have a galvanizing effect on the employees. We couldn't help but notice the skepticism with which this testimony was received by the Commission during the February 24, 1994 hearing, and because of that we were not surprised that there was no acknowledgement of it in the Report. However, Mr. Kilberg's
testimony was recently echoed in a July 28, 1994, letter to the editor of the Philadelphia Inquirer by John Morris, President of the Pennsylvania Conference of Teamsters:

Employers actually make a mistake when they fire employees during a Teamsters organizing drive. In effect, they create martyrs that strengthen the solidarity of the employees when they see the support the Teamsters give to the discharged workers. ¹¹

The AFL-CIO survey described above bears this out. In the section headed, "Discharges," the union organizers polled came to the following conclusion—

Interestingly, unions seem to have a higher success rate (46%) where there is a firing than where there is not a firing (41%). ¹²

This statistic may explain why, notwithstanding any alleged increase in discharges, unions file objections in only 6% of all elections, with 2% of all election results being overturned, percentages that have remained relatively constant over the years. This point was made to the Commission by another witness, former NLRB Chairman Edward Miller, but the Commission chose to relegate this important piece of information to a footnote. ¹³

These facts clearly demonstrate that unions are losing elections because of employee choice, not employer illegalities. Therefore, despite the hyperbole to the contrary that we have heard repeatedly throughout these proceedings, it should come as no surprise that very few employees list fear of employer reprisals as a factor in their decision to remain non-union. According to a 1991 Penn+Schoen poll conducted for the Employment Policy

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¹² AFL-CIO Survey, 53.

¹³ Report, 70, footnote 5.
Foundation that was submitted to the Commission, only 1% of all non-union employees who opposed having a union did so out of fear of employer reprisal.

**Employer Hostility as Sole Cause of Union Decline**

Turning to the implied finding that employer hostility is the sole cause of union decline in America, while the Commission does not speak directly to the causes of this decline, it does detail the statistics regarding that decline and then devotes the bulk of Chapter III to a lengthy discussion of employer violations of the National Labor Relations Act, creating the strong implication that those violations are the sole cause of diminished representation. We believe that it would have been more conducive to serious discussion of possible changes in the NLRA if the Commission had tried to look behind these statistics to develop a more complete picture of the causes of union decline. For example, changes in human resource practices, union organizing deficiencies, expansion of statutory employment protections, market forces, employee attitudes and labor's confrontational style are all factors deserving exploration, as discussed briefly below.

**Changes in Human Resources Practices.** As several employer witnesses like myself have testified to the Commission, if thirty years ago my peers and I had espoused to our managements the kinds of workplace practices that we routinely do today, we would have been summarily dismissed. Hierarchical work systems are being abandoned as employers recognize that employees are an intellectual resource that must be tapped if the organization is going to survive in the new economic environment. We believe that the best way to attract a competitive workforce is to offer an attractive workplace, not just in terms of wages and benefits, but also in the extent to which employees become integrally involved in the operation of the worksite, problem solving and dispute resolution. If, in the process,
employees are gaining a "voice" in that workplace, it should not make any difference to the Commission that it may lead to a decline in the union win rate.

Expansion of Statutory Employment Protections. As Chapter IV of the Report describes so eloquently, the declining trend in union density has been matched by an ascending trend in new workplace laws at the federal, state and local level, not to mention the liberal trend in common law developments. Indeed, during the past year Congress has been debating whether to legislate one of the most basic components of any collective bargaining agreement—a health care plan. As more and more components of collective bargaining are superseded by employment legislation, the less meaningful a collective bargaining agreement becomes, and the less attractive a union is to employees.

Union Organizing Deficiencies. On this point, the unions, when talking amongst themselves, have been their own harshest critics. A 1991 survey conducted in cooperation with the AFL-CIO Organizing Department concluded: "[T]he results from this study clearly show that union tactics, taken as a group, play a greater role in explaining the election outcome than any other group of variables in the model, including employer tactics, organizer background, and unit demographics."14

Market Forces. Finally, there are a panoply of market forces—both domestic and international—that have had a dramatic impact on American unionism. For example, much of the decline can simply be attributed to extensive downsizing by unionized companies, particularly during the 1980s. The growth in international competition—boosted by appreciation of the dollar during the 1980s—has been a major contributor. Imports into the United States grew to 13% of the GNP in 1990, almost three times the percentage in 1960.

This outside competition has made it more and more difficult for organized labor to capture an entire industry and remove labor cost competition through pattern bargaining. The inability of a number of companies in traditionally unionized industries to match the competition resulted in a decline in union membership in the manufacturing sector by about 2.3 million during the 1980s.15

The impact of deregulation on four of our major industries—communications, airlines, public utilities and trucking—has had a similar impact. Previously, these sectors were well-insulated against cost competition by a regulatory structure that set prices and limited participation by newcomers. With the entry of new cost-competitive players into these industries, high labor costs can no longer be easily passed on to the customer, and new non-union competitors have captured a good share of these markets. The result was a decline of about 625,000 in union membership in the 1980s in these sectors alone.16

Further, the significant areas of job growth in the United States, going back to the 1950s, have occurred in the service sector, which has traditionally been less organized than the manufacturing sector. Beginning in the 1950s—at the same time union membership was peaking—the United States shifted from a predominantly manufacturing to a predominantly service economy. This shift has occurred with growth in advertising, computer software, data processing, temporary personnel, management, business consulting, legal, accounting, engineering and architectural services. Even within manufacturing, there has been a substantial growth in "in-house" services, which has contributed to the decline in

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16 Ibid., 616.
manufacturing union density from 32% at the beginning of the 1980s to 22% at the end.\textsuperscript{17}

Of course, none of these new market realities touched the American public sector to any significant degree, where union representation has increased in recent years. That sector's insulation from cost competition is a much more relevant explanation for union growth than the absence of employer opposition cited in the \textit{Report}.\textsuperscript{18}

We would also point out that the decline in unionization is far from a uniquely American phenomenon. Had this panel been able to hear from Professor Leo Troy of Rutgers University, he could have explained how the deunionization of America is being mirrored in Canada and the countries of Western Europe as they also shift to a service-based economy, even though the labor laws of those countries are far more favorable to union organization. The shift in Canada, for example, produced a 20\% decline in private sector union density from 1975 to 1985.\textsuperscript{19}

\textbf{First Contracts}

On the subject of the Commission's findings regarding first contracts, the \textit{Report} points to data addressing the difficulty the parties have reaching agreement in first contract situations. The Commission implies that this is a result of employers flouting their duty to bargain under the law by either engaging in surface bargaining or refusing to bargain altogether. The Commission then suggests that stronger remedies would correct this.

\begin{footnotesize}
\textsuperscript{17} Ibid., 615.
\textsuperscript{18} \textit{Report}, 78.
\textsuperscript{19} Leo Troy, "Is the U.S. Unique in the Decline of Private Sector Unionism?," \textit{11 Journal of Labor Research}, (Spring 1990), 111, 127.
\end{footnotesize}
Although the Commission has reached an unequivocal conclusion regarding this trend, the fact of the matter is that there is no universal time-series data available to test whether first contract failures are any more widespread today than they ever were. As is noted by the Commission, it has only been since 1986 that the FMCS has received notice and copies of new certifications. Studies conducted before 1986 were limited to sample populations with no tracking of those populations over any significant period of time. The 1966 study by Ross cited in the Report was based on a sample drawn from only six of thirty NLRB regional offices.

Because no one knows with any degree of certainty whether first contract failures have increased, let us assume for purposes of discussion that they have. As Prof. William Gould IV, a former member of this Commission and current Chairman of the NLRB, has written in *Agenda for Reform: The Future of Employment Relationships and the Law*:

> the fact is that employers have been able to convince workers not to join unions by providing them with benefits comparable in most respects (and sometimes superior to them) to those contained in collective bargaining agreements negotiated by unions. Thus . . . a kind of benevolent paternalism has helped to succeed in making workers disinterested in unions.\(^\text{20}\)

We would hardly describe competitive pay and benefits in modern companies as "benevolent paternalism," but Chairman Gould is correct in saying that companies spend a considerable amount of time ensuring both internal and external equity in their compensation programs. They do so, however, for reasons that have nothing to do with warding off organizing drives

and much to do with ensuring fairness and minimizing turnover. One byproduct of this attention to equity is that in order to win an election a union may find it necessary to promise the employees an economic package that the employer is not capable of delivering. We would remind the Commission that there has never been a "duty to agree" under the National Labor Relations Act, only a duty to bargain in good faith. Thus, neither the employer—who can only go so far in stretching labor costs to remain competitive—nor the union—which has to bring back an attractive wage/benefit package to justify its election victory—is breaking the law by engaging in hard bargaining.

We would also point out that it has been the experience of many LPA members that once union organizers successfully complete a campaign, they often move on to the next site. No experienced negotiator may be left behind to coach the employees on a day-to-day basis through their first negotiation. As a result, a first contract situation often involves a group of employees with very high expectations, but with little experience working with one another to achieve a contract. Under these circumstances, the fact that two out of every three first contract negotiations may result in an agreement (assuming that figure is correct) should be viewed in a positive light. Further, should the employer break the law and fail to bargain in good faith, the union has more at its disposal than simply going to the Board to get a bargaining order. It can call a strike. This particular strike will have even greater potency because, being an unfair labor practice strike, the employer is barred from hiring permanent replacements.

The "Dismal Side"

In Exhibit III-8, the Commission devotes four full pages to depicting "The Human Face of the Confrontational Representation Process," describing it as the "dismal side" of
labor relations. We would suggest that it should come as no surprise to the Commission that most things in the human experience have a dismal side and that the field of labor relations is no exception. We do not deny that there are some employers who, no matter how tough the labor laws are written, will make every attempt to undermine them using illegal behavior. The same is true, however, on the union side. For that reason, we do not see how the Commission expects there to be a serious debate regarding how worker-management relations are to be improved by turning a blind eye to union misconduct.

It was union corruption and violence that led to enactment of the Labor Management Reporting and Disclosure Act of 1959, yet a cursory review of recent NLRB decisions indicates such conduct is still very much a part of worker-management relations. For example:

- In *Swing Staging, Inc.* (29-CA-15756, August 5, 1994), an election was set aside by an NLRB administrative law judge because of union misconduct. During the course of a 1990 organizing drive by Teamsters Local 282 of Brooklyn, the Judge found that a hangman’s noose was placed on the president’s car and a nail driven through the radiator; the brakes of a company truck were damaged; the line to the company’s oil tank was cut; an employee was told he would lose his pension from another union if he voted against the Teamsters; employees were told that the "union boys" would beat up whoever didn’t vote for the union and break the windows of an employee’s car if he made waves with the union; and, employees were told that the union was connected to John Gotti who would "take care of" the
president if he gave the union a hard time. The reference to Mr. Gotti apparently was not a hollow threat. The ALJ pointed out that Mr. Gotti had been named as an unindicted co-conspirator with various officials of Local 282 for allegedly participating in a scheme to extort payoffs and kickbacks from various construction industry employers.  

- In Cedar Grove Manor Convalescent Center, 314 NLRB No. 106 (July 29, 1994), the employer refused to negotiate with District 1115 (H.E.R.E.), which had ousted the incumbent union in an election. The employer raised as an affirmative defense the union’s conduct, claiming that it rendered the election meaningless. The record indicated that District 1115 originally offered $1,500,000 in cash under the table to the incumbent union to buy the unit. Later, the director of District 1115 threatened the incumbent union’s business agent with bodily harm in order to dissuade the business agent from continuing to give testimony before the Board. The director and the business agent had the following conversation over the phone: "Why don’t you stop this nonsense with the Labor Board or else." "Or else what?" "You will get your legs broken . . . Listen, people . . ."

21 The procedural history of this case demonstrates the NLRB’s lack of concern with union violence. The union won the elections at the two worksites by votes of 11-5 and 6-3. Despite all this evidence of misconduct, the Regional Director, after an investigation, recommended that the employer’s objections be overruled and the union certified. The Board agreed, but the employer refused to bargain. The Board ordered the employer to bargain with the union, but the D.C. Circuit refused to enforce the Board’s order and remanded the case in order for a hearing to be held. Finally, almost four years after the election, the ALJ is now ordering that the election be set aside. The company, meanwhile, has gone out of business.
like you wind up in wooden boxes." Although the case revealed that this was not the first time Local 1115 agents had engaged in such conduct, a three-member panel of the Board (Gould, Devaney and Stephens) voted unanimously to require the employer to bargain with District 1115.

Often, union violence is not easily detected. In *A Troublemaker's Handbook: How to Fight Back Where You Work and Win!*\(^{22}\), a publication by the Labor Education and Research Project, the authors describe a so-called "in-plant strategy" that uses illegal on-the-job practices to apply pressure to an unnamed employer without having to engage in a strike. We would call the Commission's attention to one passage that describes the kinds of activities engaged in:

One of the key departments [the "solidarity committee"] identified was the foundry, the heart of the entire production operation. At the center of the foundry was a large forging machine that turned bar stock into coil springs. If a piece of bar stock got caught sideways in the machine, it would melt and immobilize the machine. For one reason or another, that began to happen more and more frequently.\(^{23}\)

Often, violence occurs when a particular company is on labor's "hit list" as is the case with BE&K, a non-union construction company. The Eighth Circuit Court of Appeals ruled in *BE&K Construction v. NLRB* against a Michigan Ironworkers local in which was implicated in a 1989 riot protesting the use of BE&K for a paper mill expansion in


International Falls, Minnesota. The riot involved 450 people who burned the BE&K workers' campsite and injured a number of people while causing $2 million in damages. Fear of a similar outbreak was the cause of BE&K losing a contract to perform construction on a pulp and paper plant near McGehee, Arkansas, following an illegal boycott by the United Brotherhood of Carpenters and the United Paperworkers. This boycott wound up costing the unions $20 million as a result of a federal jury award.

In the last few years alone, the national electronic and print media have reported in detail the violent strikes that occurred in the Greyhound, New York Daily News, Pittsburgh Press and similar bitter controversies. The United Mine Workers was fined $52 million by a Virginia state court for the violence that swept through the coal fields during the Pittston strike. The "human face" of labor relations in certain worksites is exemplified by Eddie York who was shot to death in November, 1993, for crossing a picket line. Mr. York was a backhoe operator, an independent contractor who was cleaning a reclamation pond in Logan County, West Virginia. This was work that was not performed by the union, but after he had been escorted off the property by two security vehicles and was driving along a public road, strikers began hurling rocks and then shots were fired from a wooded area. Mr. York's truck was hit at least three times, the third shot being fatal.

In the 163 pages of the Commission's Report, there is no mention of union violence nor its impact on collective bargaining and worker-management relations. Accordingly, we are submitting to the Commission a copy of a comprehensive study of workplace violence,

24 BE&K Construction Co. v. NLRB, 23 F.3d 1459, (8th Cir. 1994).


By refusing to acknowledge the on-going presence of violence in collective bargaining and labor relations in a review of the current state of workplace relations, it can be said that the Commission is impliedly condoning its continued use to achieve collective bargaining objectives. In our opinion, it is incumbent upon the Commission to use its "bully pulpit" to repudiate the belief that a certain amount of violence is acceptable in labor disputes. Acceptance of violence is seldom found in public discussions of any other ideological conflicts. For example, while there are far more beatings and murders on picket lines in labor disputes than those surrounding abortion clinics, Congress recently enacted the Freedom of Access to Clinic Entrances Act (Public Law 103-259) that makes violence, intimidation or obstruction which interferes with persons entering abortion clinics a federal crime. During consideration of that law, attempts were made in both the House and Senate to broaden the proscription to cover labor violence. Rep. Stenholm (D-TX), for example, argued:

> [I]f it is not appropriate for an abortion protester to intimidate a woman seeking her legal choice to reproductive health services, then I believe it should also be inappropriate for a striking worker to intimidate another worker attempting to cross the picket line to exercise his or her right to work.\(^{27}\)


The leadership in the House and Senate, however, prevented a vote on these amendments. In addition to proposing enactment of a measure similar to Public Law 103-259 applicable to labor dispute violence, the Commission should consider other worker protections as well. Currently, violence *per se* is not an unfair labor practice under the National Labor Relations Act. We urge the Commission to propose making the use or threat of violence by either a union or an employer to accomplish collective bargaining goals an unfair labor practice with injunctive relief similar to that available against secondary boycott activities. In addition, individuals engaged in violence aimed at furthering either the employer's or the union's goals could be rebuttably presumed to be acting as their agents, thus eliminating the problems inherent in establishing the necessary "chain of command" to obtain relief. At a minimum, individual employees who are victims of union violence should be able to obtain "make whole" relief from the union in the form of back pay for any wage losses caused by the violence. Surprisingly, the Board has refused to provide even this remedy.28

**Corporate Campaigns**

In addition to ignoring the dismal side of labor relations caused by union violence, the Commission's *Report* made no mention of the growth of the "corporate campaign" and the negative impact it has had on collective bargaining. Because certain aspects of corporate campaigns raise serious public policy questions, no thorough study of collective bargaining in America today would fail to examine this new phenomenon in labor relations. Given the Commission's deep concern about the tensions involved in and the level of resources devoted

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to organizing campaigns, it is surprising that the Commission chose not to focus on this area.

A definition of the corporate campaign can be found in the AFL-CIO guidebook entitled *Developing New Tactics: Winning With Coordinated Campaigns* which describes how a coordinated campaign applies pressure to a target company:

> It means seeking vulnerabilities in all of the company's political and economic relationships—with other unions, shareholders, customers, creditors and government agencies—to achieve union goals.\(^{29}\)

Unlike traditional labor-management disputes, corporate campaigns go outside the company to generate public hostility and antagonisms towards the target corporation. In addition, they seek to manipulate federal regulatory agencies such that the target becomes enmeshed in enforcement actions. According to the AFL-CIO guidebook:

> Businesses are regulated by a virtual alphabet soup of federal, state and local agencies, which monitor nearly every aspect of corporate behavior. . . . Regulatory agencies exist to protect citizens, and unions can use the regulators to their advantage. An intransigent employer may find that in addition to labor troubles, there are suddenly government problems as well.\(^{30}\)

A Service Employees International Union Manual provides similar guidance:

> Moreover, even if the violations are completely unrelated to bargaining issues, your [union's] investigations may give management added


incentive to improve its relationship with you. Management officials may find that...the employer now is facing...

- Extra expense to meet regulatory requirement or qualify for necessary permits and licenses.
- Cost delays in operations while those requirements are met.
- Fines or other penalties for violating legal obligations.
- Damage to the employer's public image, which could jeopardize political or community support, which in turn could mean less business or public funding.\[31\]

It is not an uncommon experience for unionized companies about to enter collective bargaining negotiations to have a slew of charges filed against them at OSHA, wage-hour, EEOC and other federal agencies. There are more dramatic examples, however. In a July 26, 1994, decision by the Ninth Circuit Court of Appeals, *USS-Posco Industries v. Contra Costa County Building and Construction Trades Council*, No. 92-15497, the court found very troublesome the activities undertaken by a group of California construction unions to wipe out non-union construction in northern California. Again, the unions' target was the aforementioned BE&K, which had entered into a contract involving 800 jobs to update a steel facility. The company was subjected to numerous lawsuits, protests against permits, lobbying at the local level for new environmental ordinances requiring more permits, and

encouragement of subcontractors to protest nonexistent safety violations. Despite its concerns over the legitimacy of the union's activities, the court found that the union was protected against an antitrust action by an exemption for those petitioning the government for redress of grievances. While the exemption does not apply to so-called "sham petitioning," the court noted that fifteen of the twenty-nine filings of complaints with the government had proven successful. The fact that those complaints never would have been filed but for the unions' desire to harass the company was irrelevant.

We are also submitting to the Commission a copy of a book published in 1987 by the University of Pennsylvania entitled Union Corporate Campaigns by Prof. Charles R. Perry that provides several case studies of corporate campaigns and their impact on labor-management relations.

To summarize our concerns with the findings in Chapter III, the Commission states on page 78 of the Report that:

The Commission has not sought to determine the role of particular campaign tactics, legal or illegal, on the outcome of NLRB elections nor the reasons for the decline in the proportion of workers covered by collective bargaining in the United States.

That statement notwithstanding, the Commission did in fact reach certain conclusions, either explicitly or impliedly, about the role of particular tactics and the reasons for the decline. The problem that we have with the Report is that only one side of the story is presented, the story written by organized labor. Unlike Chapters II and IV, Chapter III makes no serious attempt at giving the American public a complete picture of the facts involved in contemporary worker representation and collective bargaining.
Another View of the Findings

While Chapter III provides mostly a one-dimensional view of collective bargaining in the United States, a reader willing to pick carefully through its paragraphs and footnotes will eventually be able to cobble together a much different set of facts than the ones adopted by the Commission, ones that lead to very different conclusions regarding where reforms in the National Labor Relations Act are needed. These alternative findings are as follows:

1. Collective bargaining, where it exists, is working very well. The *Report* states:

   "In most workplaces with collective bargaining, the system of labor-management negotiations works well."\(^{32}\) We agree with this statement, but it is troubling that it was buried in the text of the *Report* and not adopted as one of the principal findings. We recognize that commissions tend to (and should) focus on problems that need to be corrected, but in view of the apocalyptic statements elsewhere in the *Report* about the state of collective bargaining in America today, we believe this conclusion should have been elevated to the status of a major finding.

2. The National Labor Relations Act is being administered in a timely, effective manner by the National Labor Relations Board. Despite the inclusion in the *Report* of considerable statistical data to prove this point, the *Report* bends over backwards to avoid drawing this conclusion, including relegating to a footnote its own assessment that the

\(^{32}\) *Report*, 64.
Board's regional offices settle charges and issue complaints within 45 days, "a track record that just about any other labor or employment agency would be proud to have."33 (See Chart I). Because approximately 80-85% of all meritorious cases are settled, this "track record" merits more than a footnote. (See Chart II).

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33 Report, 71, footnote 7.
The Report's data regarding the Board's conduct of representation elections are no less impressive. A constant refrain by organized labor for the past two decades has been that employers have successfully manipulated NLRB procedures to ensure that the representation election occurs long after the certification petition is filed—sometimes years later. The Report attempts to bolster this complaint by asserting that 20% of elections take more than 60 days. Of course, this also means that 80% take less than 60 days, compared to 68.9% in 1975. (See Chart III). Moreover, Exhibit III-2 at page 82 of the Report shows that, in 1993, 94.7% were conducted within 90 days as contrasted with 89% in 1975, and that only 1.2% went beyond six months while 2.9% did so in 1975. In other words, the processing of elections by the Board has improved during the past 20 years.

More significantly, as the Commission observes (once again in a footnote), the data demonstrate that the NLRB is able to conduct those elections in a fair manner with 97-98% of all elections being free of any sustainable objections from either party. (See Chart IV).

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34 Report, 68.
In addition, the credibility of the Board with the Federal courts has soared in recent years, with its success rate climbing from 70-80% in the 1960s to 80-90% in the 1970s, 1980s and 1990s. The only notable exception was during the Carter Administration when, in 1979 and 1980, the rate slipped to 77% and 76% respectively. (See Chart V). We note that in 1968, the AFL-CIO testified to Congress that appellate court affirmation of NLRB decisions is the
"only measurable and objective test" of the Board's interpretation of the statute.\textsuperscript{35} Using that yardstick, the Board's interpretations have steadily improved since the Carter Administration.

We would, however, point out one area regarding the administration of the NLRB that does deserve the Commission's attention. While there has been considerable discussion of NLRB delays during the past two decades, the fact is that these delays involve about 2\% of the cases. The case backlog has improved in recent years—declining from 1,000 in 1983 to just over 300. However, the median time for a Board decision—17 months—would indicate a problem lies at the Board member level. One of the reasons for this delay is the constant turnover in Board members and difficulties the White House has in clearing new Board member appointments through the Senate confirmation process. In fact, since 1978 the NLRB has been at its full, five-member strength only 58\% of the time. One of the principal reasons for this occurrence has been organized labor's opposition to certain candidates proposed by Presidents Reagan and Bush, and the business community's opposition to particular persons nominated by Presidents Carter and Clinton. When labor or management become concerned with the balance on the Board, their only remedy is to block the confirmation until such time as an accommodation can be worked out between the parties. The Commission could perform a valuable service in suggesting a better method for the selection and confirmation of Board members than the system currently in place.

Rep. Major Owens (D-NY) has offered a proposal worth considering—H.R. 1466—which would alternate Board memberships by allowing organized labor and

\textsuperscript{35} Senate Subcommittee on Separation of Powers of the Committee on Judiciary, \textit{Congressional Oversight of Administrative Agencies (National Labor Relations Board)}, 90th Cong., 2d sess. 1968, 321 (statement of Thomas E. Harris, Associate General Counsel, AFL-CIO).
business to each select a Board member in succession. While the Owens bill may not be the perfect solution, it suggests a direction that would expedite the process considerably while ensuring balance at the Board. We strongly recommend that you take a close look at the Owens bill or any similar proposal that would achieve the same improvements over the current system.

3. The efficient administration of the National Labor Relations Act would be jeopardized by major changes in enforcement, including the remedies available. The Report clearly implies that the remedies available under the National Labor Relations Act are too weak, comparing them to the compensatory and punitive remedies available under other employment statutes. However, the likely result of expanding those remedies can be seen in Chapter IV, which demonstrates the effect of tort remedies on the judicial system. Clearly, the efficiency of any enforcement scheme is closely tied to its remedies. The success of the current NLRA process which we have just outlined could only be jeopardized by a move towards more punitive remedies. As the stakes are raised, the willingness of the parties to
enter into settlement decreases. That is the principal reason disputes at the NLRB where
back pay is the remedy are settled so much more quickly than disputes before the EEOC
where up to $300,000 in punitive and compensatory damages, over and above any backpay
that might be awarded, for each claim of discrimination is available. Further, if punitive or
compensatory damages were to be authorized under the NLRA, it would entail a right to a
jury trial, thus eliminating the current system of adjudicating matters before an administrative
law judge.

4. "Outsiders" frequently play an active role in union representation elections. The
Report attaches great significance to the "fact" (unsubstantiated) that management hires a
consultant in 70% of all elections.36 These outsiders (who often are labor law attorneys
hired to make sure that the employer complies with the highly technical provisions of the
NLRA) seem to be viewed by the Commission as somehow "tainting" the election process.
We would point out that "outsiders" in the form of union organizers are present in nearly
100% of all campaigns and are usually on the scene long before the management consultants
are brought in.

Response to Questions Posed by the Commission

On pages 79 and 80 of Chapter III the Commission poses a series of questions for
further discussion. Our response to these is as follows:

1. "How might cooperation in mature bargaining relationships be increased?" Given
the Report's conclusion that "the system of labor-management negotiations works well"

36 Report, 68. The source for this finding is not provided in the Report. Curiously, immediately after
citing this statistic, the Report states: "There are no accurate statistics on consultant activity." Id.
where collective bargaining is already in place—a conclusion with which we wholeheartedly agree—we are not sure how a mature relationship can be made more mature. If the question is directed at how a cooperative relationship can be instituted in an environment which has historically been characterized by an adversarial relationship of traditional collective bargaining, the experience of LPA members indicates that change in such circumstances may be possible only where both labor and management come to the realization that it is in their worst interest to continue dealing with one another on a confrontational basis. There are numerous examples in which the catalyst for positive change to a cooperative relationship was the parties being pushed to the brink, such as by a dire economic threat to the organization’s business, or a bitter strike over an issue that could have been easily resolved had the parties been willing to deal with one another on a basis of trust at the outset.

It will be very difficult to increase cooperation, however, so long as the leadership and policy departments of international unions actively encourage their members in the field to resist cooperative workplace ventures. There are dozens of examples within the LPA membership of union locals desiring to adopt more collaborative work systems, but the international is strongly opposed. The Teamsters, for example, teach courses to their field personnel on how to prevent the growth of employee involvement programs in the workplace. There are a number of union publications laying out strategies and tactics for dismembering employee involvement.37 As long as cooperative programs like employee involvement and employee participation are seen as a threat instead of a protection, it will be difficult to increase cooperation in traditional union work settings.

2. "Should the labor law seek to provide workers who want representation but who are a minority at a workplace a greater option for non-exclusive representation?" We can think of few recommendations that could be made by this Commission that would be more counterproductive to improving worker-management relations. The experience of our companies in other countries where minority representation is standard practice has shown that it can become very disruptive, with the potential for considerable confusion as to who speaks for whom.

As was noted by the Warren Court in *Ladies' Garment Workers v. NLRB (Bernhard-Altmann Texas Corp.)*, freedom of choice and majority rule are the very "premise of the Act" as it is now written. An employer only has a duty to bargain with a union which has been certified by the National Labor Relations Board after being elected by a majority of the employees in the unit. An employer may also voluntarily recognize and bargain with a union, but only if the employer has objective evidence that a majority of the employees support that union. Proposals to expand employer obligations to include unions which represent less than a majority contradict this premise.

In his August 10 testimony, AFL-CIO Labor Law Task Force Director David Silberman contended that there was adequate precedent for the concept of minority representation, citing Executive Order 10988 signed by President Kennedy in January 1962. This Executive Order provided for "formal recognition" where a union in the Federal employee workplace represented at least 10% of the employees and "informal recognition" if it represented less. Unfortunately, Mr. Silberman failed to mention that those provisions of the Executive Order were abandoned in 1969 following a report submitted by Labor

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Secretary George Shultz, among others, which came to the following conclusions:

[Formal recognition] has produced problems which hinder the development of stable and orderly labor relations. It has contributed to excessive fragmentation of units, confusing and overlapping relationships, and difficulties in maintaining an appropriate difference in the rights and obligations under this form of recognition compared with those prescribed for exclusive. For these reasons, the majority of agencies have indicated that formal recognition should be discontinued.39

The report did observe that labor unions favored retention of "formal recognition" because they regarded it "as a significant form of assistance in further organizing the work force, particularly because it makes possible obtaining dues withholding privileges."40

If the majority of the employees in a bargaining unit has voted against third party representation, it would seem important to honor the will of the majority. Honoring that will has certainly been the doctrine organized labor adamantly pursued when private sector representation percentages were far higher earlier this century, and it should still be the case. We would note that while expressing support for a new form of minority "rights" in the area of union representation, labor still continues to oppose the right of the minority to decline to pay dues to a union which has been elected by the majority, but which the minority does not support.


40 Ibid.
From the standpoint of human resource practitioners, there are a number of practical problems with minority representation as well. First, it is much simpler to administer human resource policies when all employees can be treated similarly. We are not certain precisely what the AFL-CIO is proposing, but it appears to be a sliding scale of third party representation obligations depending on the level of interest in a particular workplace in such representation. Questions then arise as to how the employer is to know which group of employees fit into which category. For example, a union may claim to be representing 100 employees for purposes of informal consultation, but the employer may not know for sure without polling each of those employees—an action that may be considered an illegal coercive tactic under the labor laws. Further, without some clear determination regarding employee preference, some employees may vacillate between being represented by the union one month and not the other, depending on how they feel about its actions at the time.

The situation would be further complicated where more than one union was present. What if the employer is receiving conflicting signals regarding such important issues as work schedules, discipline, methods of payment, transfers, and the like from two or more minority unions in what would otherwise be a single bargaining unit. For example, one union may represent the more senior employees and be pushing for stronger seniority rights while another may be pushing for merit-based policies. The workplace may start looking more like the parliament of a Third World country than the cooperative environment which should be our objective.

3. "Should unions be given greater access to employees on the job during organizational campaigns, and if so how?" With respect to union organizers being given greater statutory rights to enter a workplace for the purpose of persuading employees to join a union, we believe that current law is already weighted in favor of unions by their legal
right to contact employees in their homes, a right not accorded management. Indeed, the 
AFL-CIO survey cited above found this to be among the most effective organizing techniques 
available to unions. According to the survey:

In cases where the organizer house called between 60 and 75% 
of the unit, the win rate was 78%. If the organizer made no 
home visits, the win rate was 41%.41

In contrast, where the use of mass meetings was the primary campaign tactic, the win rate 
was only 25%.42

Thus, there appears to be little justification to warrant the disruption of a company’s 
operations that would be created by requiring companies to open their doors to organizing 
rallies at the worksite. Moreover, if there is a genuine desire for unionization on the part of 
the workforce, what should be the most effective organizers—i.e., the pro-union members of 
the unit—are already working on the site and have all the access that is needed.

4. "How can the level of conflict and the amount of resources devoted to union 
recognition campaigns be de-escalated?" The solution to this will be difficult to achieve in a 
system which is premised on the belief that labor and management have fundamentally 
different interests that can only be reconciled through the adversarial process of collective 
bargaining. It will also be difficult to achieve as long as labor’s approach to an unorganized 
workplace is to identify the areas of disagreement between management and labor and then 
seek to exacerbate those disagreements. Commissioner Kreps may have phrased the issue 
best in her question to the head of the AFL-CIO Organizing Institute on August 10 when she

41 AFL-CIO Survey, 49.
42 AFL-CIO Survey, 50.
The Report suggests that one way of resolving these tensions is for management and international labor unions to agree between themselves that the employees will be represented by the international and that the employees covered by that agreement should be denied a voice in that decision. While some companies have entered into such agreements, as an Association we cannot support the elimination of the necessary element of democratic choice that forms the critical foundation for healthy labor-management relations in this country. Indeed, notwithstanding our complaints regarding Electromation, if there is anything in section 8(a)(2) that should be retained, it should be the prohibition against a company choosing a labor union for its employees.

5. "What new techniques might produce more effective compliance with prohibitions against discriminatory discharges, bad faith bargaining, and other illegal actions?" Since most organizing activity is now focused on smaller companies who often do not have the resources to obtain quality legal advice, and since most of the violations are now occurring in those companies, we believe there is a greater need today for education, training and counseling of employers of their rights and obligations under the law. A small employer who cannot afford to be counseled by a labor lawyer regarding the intricacies of the National Labor Relations Act is at a disadvantage with the union, which has the legal resources of the union's lawyers as well as the NLRB General Counsel operating at public expense. We do not question this system. Indeed, we believe NLRB enforcement data and timetables have proven it to be effective. However, we think it is time to eliminate the "surprise" factor from this process for the small employer and provide early intervention to prevent violations, rather than punish them after they have already occurred.
One solution may be to have the NLRA amended to provide an "Office of Employer Counsel" at the NLRB that could conduct training programs and offer advice to employers regarding their rights, liabilities and obligations under the Act. We do not believe that adding expensive penalties to the NLRA is the solution because the problems of excessive litigation discussed in Chapter IV can be attributed in large part to the availability of these remedies. The potential for significant monetary damages simply makes litigation more attractive to the parties, ultimately triggering more delays in the system overall. We note the absence of any discussion in Chapter IV of NLRB remedies being inadequate.

Clearly, the Board has at its disposal severe remedies that may be used against a recalcitrant employer. In the classic case of J.P. Stevens, the Board was not limited to back pay and bargaining orders. The company was also ordered to reimburse the union for its bargaining expenses, including clerical costs and salary and mileage expenses incurred during the violation period. Further, the company was ordered to reimburse the union and the Board for litigation costs and, in the case of the union, even its organizing expenses. In addition, the Board issued company-wide orders that applied to all locations where the union was present and not just those involved in the immediate litigation.43

Finally, where swift measures are necessary, the Board has the power to seek an injunction. Although the Report states that NLRB section 10(j) injunctions are "pursued infrequently each year," the Board has significantly increased the use of these injunctions in recent months. According to Chairman Gould, the Board has sought 50 injunctions in the past five months, compared to 42 for all of last year. Moreover, he claims a success rate of

43 J.P. Stevens & Co., 244 NLRB No. 407 (1979).
6. "What, if anything, should be done to increase the probability that workers who vote for representation and their employers achieve a first contract and on-going bargaining relationship?" Both labor and management have long proclaimed the virtues of "free collective bargaining"—i.e., bargaining without governmental involvement—and we consider any efforts to abandon this approach unwise. Our system of collective bargaining was never set up in a way that would guarantee that bargaining would always produce an agreement nor should it be amended to do so. If it were, it would no longer be free collective bargaining. Sometimes, "hard bargaining" by both sides results in no agreement as seen in recent years in a number of highly visible strikes (e.g., Caterpillar, Massey, Phelps Dodge) that have been triggered by the union's unyielding demand that the employer sign the same agreement as all other employers in the industry. When the union refuses to discuss any variations from the pattern, one could reasonably argue that, in these cases, it is the union's insistence that leads to the impasse. Is this "hard bargaining" or is it "surface bargaining?"

Conclusion

The Commission on the Future of Worker/Management Relations provides a unique opportunity for the development of a balanced set of recommendations regarding improving federal policies governing relationships among employees, employers and unions. In Chapters II and IV of its Fact Finding Report the Commission has prepared the necessary factual foundation on which substantive discussions of policy changes can be built. Both

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Chapter II dealing with employee involvement and Chapter IV addressing the need for improved dispute resolution systems represent a good faith effort to describe the present situation in such a manner that all persons with a stake in the outcome of the Commission's deliberations can be assured that its final recommendations are likely to address their concerns fairly.

Unfortunately, the same cannot be said of Chapter III. The Commission's treatment of union representation and collective bargaining lays out a biased set of facts that only represents organized labor's point of view. Unless the Commission is willing to look at both sides of the worker-management equation on these critically important issues, its forthcoming recommendations in this area almost certainly will not provide the basis for a meaningful dialogue on proposed policy changes.
May 5, 1989

Dear Affiliates:

I have enclosed the results of a survey completed by the AFL-CIO in which they interviewed organizers involved in 189 NLRB elections in units over 50, which were held from July 1986 through April 1987. The interviews concentrated on the unions' tactics, the employers' tactics and characteristics of the involved workforce. It is clear from the results of this survey that certain factors in the unions' and employers' campaigns, as well as the nature of the industry and workforce, determine the likelihood of union success in organizing. These findings should be helpful in planning your organizing strategies.

I have also enclosed the schedule of organizing courses offered at the George Meany Center for 1989 and 1990. Many Locals have inquired about organizing courses being offered, and the week-long sessions at the Meany Center would be beneficial for beginning as well as more experienced organizers.

Please do not hesitate to contact me, if I can be of any assistance in your organizing efforts.

In solidarity,

Vicki Saporta
Director of Organizing

VS/ksmp

Enclosures
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I</td>
<td>INTRODUCTION and OVERVIEW</td>
<td>1</td>
</tr>
<tr>
<td>II</td>
<td>UNION CAMPAIGN TACTICS</td>
<td>3</td>
</tr>
<tr>
<td>III</td>
<td>CHARACTERISTICS OF THE WORKFORCE</td>
<td>6</td>
</tr>
<tr>
<td>IV</td>
<td>EMPLOYER ANTI-UNION TACTICS</td>
<td>8</td>
</tr>
<tr>
<td>V</td>
<td>CONCLUSION</td>
<td>10</td>
</tr>
</tbody>
</table>
INTRODUCTION AND OVERVIEW

This report summarizes the findings of a study by the AFL-CIO Department of Organization and Field Services of 189 NLRB elections in units over 50 that took place during July 1986 through April 1987. In order to obtain this data, lengthy interviews were conducted with the lead organizers in these campaigns, during which questions were asked concerning the union’s tactics, the company’s tactics, and characteristics of the workforce.

This study is similar to a survey of elections held in 1982-83, and, where relevant, comparisons are made to the results obtained from this earlier survey.

Overview

Unions had an overall win rate of 43% in units over 50. This is identical to the win rate in the 1982-83 survey. It is slightly lower than the overall percentage of election victories during this time period, because this survey excluded units under 50 in size. With units of all sizes included, unions won 48% of the NLRB elections held in 1986 and 49% of the elections held in 1987.

Unions clearly have a problem organizing larger units. As the unit size increases, the win rate declines considerably. In units of 75 and under, unions win 51% of the elections. When the size increases to 75-150, the win rate drops to 47%. For units with between 150 and 250 eligible employees, the union success rate is 32%. And for units between 250 and 500, the win rate is 21%. There were no victories in units over 500 in this sample.

The manufacturing sector is the most difficult to organize, according to both this survey and the earlier survey. The union win rate in manufacturing units is 40%, as opposed to 50% in the non-manufacturing sector, which includes services, health care, and retail. In health care, the win rate is 55%, and in retail the win rate is 56% (although the latter sample was very small.)

The northeast, particularly New England, is the most inhospitable region for union organizing. The win rate in the northeast is 32%. The greatest percentage of organizing success is in the west/southwest, where there is a 51% rate of victory. In the southeast, the win rate is 42%, and in the midwest the rate is 46%.

Unions were able to obtain a contract after winning an election in 73% of the cases. This is an improvement over the 63% rate of achieving first contracts observed in the earlier survey. However, in units over 150, the success rate in achieving first contracts is only 40%.
It is clear that certain factors in union and employer conduct, as well as in the nature of the industry and workforce, correlate to a greater likelihood of union success in organizing. The following chapters of this report summarize some of the conclusions which can be drawn from the survey data.
UNION CAMPAIGN TACTICS

There is a clear correlation between certain features of the union's campaign strategy and the union's ability to win NLRB elections in units over 50.

Committee

The most significant factor leading to union success, according to the organizers, is active campaigning by an effective, representative committee. In the absence of an effective committee, the win rate is only 10%. Where the organizing committee does engage in active campaigning, the win rate is 62%.

It appears that a larger committee is required than was indicated by the 1982-83 survey. A committee should be optimally 15% of the unit or more. A committee of less than 5% of the unit correlates to a win rate of only 27%.

Cards

There appears to be a negative impact when organizers release authorization cards prior to the formation of this committee. Where cards are released prior to forming a committee, the win rate is only 30%.

The number of authorization cards obtained has a direct relationship to the likelihood of the union prevailing. It is not until the union obtains signatures from 75% or more of the unit that the union has more than a 50% likelihood of winning the election. This is higher percentage than was required in the 1982-83 survey, where the union had an even chance of winning if 65% of the unit signed cards. This may be indicative of increasing intensity or sophistication in employer campaigns. According to the current survey, if less than 40% of the unit signs cards, the union wins only 8% of the time. Where the union obtains cards from 40-50% of the unit, the union wins 33% of the campaigns. If 50-60% of the unit sign authorization cards, the union wins 45% of the elections. When 60-75% of the unit sign cards, there is a victory rate of 49%. With 75% or more of the unit signed up, unions win 60% of the campaigns.
Personal Contact

The survey provides some clear indicators of the importance of personal face-to-face contact between organizers and the employees as the preferred method of communication during the union campaign.

The most frequently cited reason for losing campaigns is a lack of sufficient personal contact with employees, and insufficient staff. In 26% of the campaigns, there was no full-time organizer. In 55% of the campaigns studied, there was one organizer or less.

House calls are an effective means of establishing personal communication. In cases where the organizer house called between 60 and 75% of the unit, the win rate was 78%. If the organizer made no home visits, the win rate was 41%.

Attempts to communicate with employees through means other than personal contact seem to impact unfavorably on the ability to win union campaigns:

- In campaigns where the union mailed letters as a primary means of campaigning, the win rate was only 39%, as opposed to a win rate of 55% when the union did not campaign through the mail.

- When organizers used the telephone as a primary means of campaigning, the win rate was only 40%. If the telephone was not used in this manner, the win rate was 52%.

- The use of videotapes by organizers was correlated to only a 36% win rate. Use of the mass media as part of the campaign was associated with 46% rate of victory, although both of these involved small samples.
Mass Meetings

General or mass meetings offer opportunities as well as dangers, according to the survey. There is a direct correlation between average attendance at the general meetings and the victory rate. If less than 25% of the unit attends mass meetings, the win rate is 29%. If attendance is between 25-40%, the win rate is 33%. If the average attendance is between 40-50% of the unit, the win rate rises to 55%. If 50-60% attend the mass meetings, the win rate is 67%. And more than 60% attended the mass meetings on average, the win rate is 72%. This would suggest that unless the organizer expects to have at least 40% of the unit in attendance at a mass meeting, it may be harmful to call the meeting. This is consistent with other studies which suggest the importance of the employees’ perceptions about the level of union support among their co-workers as a factor in their decision about whether to vote for the union. The use of mass meetings as the primary campaign tactic was related to a win rate of only 25%.

Issues

Where wages are the primary union issue, the win rate is only 33%. Other issues are associated with a much higher rate of victory. The three most effective union issues are:

- Working Conditions - Where working conditions are a top union issue, the win rate is 69%.
- Grievance Procedure - Where the desire for a procedure to achieve fairness on the job is a top issue, the win rate is 67%.
- Dignity - Where dignity on the job is a key issue, unions have win rate of 55%.

Timing

Unions do not seem to benefit from long, drawn-out pre-petition periods. Where there is 15 days or less from the date of the first contacts to the filing of the petition, the win rate is 55%. The win rate then drops, but if the petition is filed from 60-90 days after the first contract, the win rate goes up again to 65%. If the length of time from the initial contacts to the filing of the petition extends beyond 90 days, the win rate drops dramatically to 41%. If the pre-petition period lasts more than 6 months, the win rate drops even further to 33%.
CHARACTERISTICS OF THE WORKFORCE

There are certain features of the workforce that appear to be associated with a higher probability of union success.

As stated in the introduction, union success is greater in the service sector than in manufacturing. The highest win rates are in health care and retail establishments (55% and 56% respectively.)

Low Wage Workers

Low wage employees are more likely to vote to form a union, than higher paid employees. Unions win 58% of the elections among workers earning $5 an hour or less. (This is despite the fact that when wages are the primary issue the win rate is very low.)

There does not seem to be a clear connection between the quality of the company's benefit package and the ability of the union to win the election.

Women

The presence of a large proportion of female workers significantly increases the union's chance of success. In units where women comprise less than half of the workforce, the win rate is only 33%. Where women make up more than 75% of the unit, the union's win rate is 57%. More than half of the union election victories feature a workforce with a majority of women.

It is interesting to note that this support for unions by women occurs despite the fact that organizing is an overwhelmingly male profession. Only 9% of the organizers in this survey are women. However, the success rate for women is 61%, as opposed to a 41% success rate for male organizers.

Minorities

Unions have the greatest chance of success if the workforce is more than 75% minority. In such cases, the win rate is 65%. In units where less than 25% of the workers are minorities, the win rate is only 38%. Similarly, where only a slight majority of the workers are minorities, the win rate is only 37%. This may point to the employer's ability to divide a workforce along racial lines where there is a fairly even division by race or ethnic group.
Younger Workers

A workforce with a substantial number of younger workers is more likely to be organized. If the average age is 35 or less, the win rate is 48%, as opposed to a win rate of 30% if the workforce is over 35. However, an extremely young workforce, where more than 75% of the workers are under 25, is associated with a win rate of only 29%.

Immigrants

The presence of undocumented immigrants in the workforce indicated a strong likelihood of success. Such units had a win rate of 63% (although the sample was small).

Prior Union Exposure

Familiarity and prior experience with unions has an ambiguous effect on the ability of unions to win NLRB elections. If there are no former union members in the unit, the win rate drops to 39%. If former union members make up a small portion of the workforce, the win rate rises slightly. However, if former members made up more than half of the workforce, the win rate is only 29%.

It is harmful to have another unit organized at the same site. In such cases, the union has a win rate of only 36%. On the other hand, an organized unit at another facility of the same company brings the win rate up to 47%. In communities where union density is only moderate, the win rate is very low -- 25%. Unions fare better in communities with either very high union density or very low unionization levels.

Prior campaigns at the facility seem to have a negative impact on the union's ability to win, particularly if the campaign does not go to an election. Where the workforce has experienced a union campaign without an election, the win rate is 30%. If there was a previous election, the win rate was 39%.

Rural/Urban

The union victory rate is lowest in rural areas (39%). Small towns have the highest rate of success (57%), and urban areas have a win rate of 43%.
THE EMPLOYER ANTI-UNION CAMPAIGN

The degree of employer resistance is a major factor in the ability of unions to win NLRB elections. If the employer does not wage a significant campaign against the union, the win rate is 80%. Even a moderately serious campaign by the employer is associated with a 63% union success rate. But where the employer wages an intense campaign against the union, the win rate is 35%.

In the vast majority of campaigns, the employer hires an anti-union consultant (76%). The absence of a consultant is related to 55% union victory rate.

Management's arsenal contains a variety of effective tactics — both of a positive and negative nature.

On the positive side:

- If the company makes promises to improve conditions, the win rate for unions is 34%, as opposed to 56% if such promises are not made.
- Changes in management are associated with a union win rate of only 38%.
- If employees receive a wage increase during the campaign, the win rate is 31%.
- The presence of quality of work life programs are disastrous for unions; only 17% of elections were successful where such programs are present.

Discharges

The discharge of at least one union activist occurs in 29% of the elections. Interestingly, unions seem to have a higher success rate (46%) where there is a firing than where there is not a firing (41%). This might indicate that companies resort to firings where they are fearful of losing the campaign.

The likelihood of the employer firing a union activist increases substantially as the percentage of minorities in the unit increases. If there are no minorities present in the unit, the likelihood of discharge is only 22%. But as minorities approach 50% of the unit, the likelihood of a discharge goes up to 46%. This likelihood remains approximately the same as the percentage of minorities rises above this point.
Issues

The three most powerful company issues, in order of effectiveness, are:

1. Asking for another chance
2. Predicting lay-offs or company closings
3. Warning of the likelihood of a strike

Delay

Delay is an effective tactic on management's part. In campaigns where the election took place within 60 days or less of the filing of petition, the union win rate was 50%. If the election took place within 60-90 days, the win rate was only 31%.
CONCLUSION

In the vast majority of cases, unions face stiff resistance from management during NLRB election campaigns. These anti-union campaigns feature both "sweet talk"—promises, raises, etc.—and scare tactics about strikes and closings. These two sides of management's campaign are equally effective, and indeed complement each other.

In order to be successful, the union organizer must establish ongoing personal contact with a representative organizing committee. This committee should consist of optimally 15% or more of the unit, and must actively campaign to win the support of 75% of the workforce. House calls are an effective means of communicating with employees; where organizers rely instead on letters or phone calls to communicate with employees, the campaign suffers. This need for personal communication implies that for unions to be successful at organizing larger units, there must be an increase in current staffing levels.

Unions will find the greatest success in working with people who most want to organize—low wage workers, women, minorities, immigrants, young workers. The issues that serve union organizing the best are the desire to improve working conditions, have a fair procedure for resolving problems, and dignity on the job.