Comparative Guides to Labor and Employment Laws in North America

# LABOR RELATIONS LAW IN NORTH AMERICA

Commission for Labor Cooperation
North American Agreement on Labor Cooperation

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# FOREWORD

One of the fundamental purposes of the North American Agreement on Labor Cooperation is to reinforce the labor laws of the signatory nations in the face of increasing pressures of competition due to free international trade. Open trade is intended to bring greater business opportunities and more efficient use of resources resulting in more employment and economic growth. But open trade also intensifies the pressures of competition. It forces many companies to make major changes in the way they do business; it causes new businesses to start up and some companies to go out of business. All competitors must make the maximum use of their resources and investments and obtain the maximum production from their workforce.

Labor laws channel the forces of competition away from negative responses (competitiveness based on exploitation of the workforce) to positive responses (competitiveness based on the productivity of the workforce). Labor laws set the floor for fair competition, creating the standard conditions within which all competitors must operate. Only if all observe the rules do the rules serve the common good. If it is possible to circumvent the rules, if some competitors observe the rules and others do not, then the rules hinder fair competition rather than enhancing it.

Thus, the greater the pressure of competition the more important is the consistent and effective application of the standards by which all competitors must operate.

In establishing their Agreement on Labor Cooperation as a complement to the North American Free Trade Agreement, the governments of

Canada, the United States and Mexico accepted the fact that each nation had evolved a different system of labor law and administration. They agreed that those systems should continue to evolve independently within each sovereign jurisdiction. But they also recognized the extremely important fact that these three systems were based on underlying principles which were held in common and which could be articulated. These are the 11 Labor Principles of the NAALC.

Each principle defines a sector of labor law, which is given concrete expression by the statutes and jurisprudence of the different jurisdictions. The parties to the NAALC undertake solemn obligations to ensure that their laws in these sectors are effectively enforced. Thus all competitors in the North American Free Trade area will operate under the law in regard to labor matters, administered openly and consistently. Such is a major objective of the NAALC.

The objective of this publication by the Commission for Labor Cooperation is to enable the public at large in North America, and not just specialists in comparative labor law, to know simply and clearly what those different labor law regimes are and how they are administered. The NAALC relies primarily on the public to draw attention to any deficiencies which may occur in regard to labor law administration. It is thus imperative that the public have ready access to the content of the laws and how they are meant to apply, organized following the schema of the NAALC.

Some may find the language of this publication rather technical at times; in fact, every effort has been made to produce a document that is highly accurate yet general, accessible to as many as possible yet sufficiently precise to be useful as an operational guide. The challenge was much greater than was originally imagined, not to mention the need to operate in three languages and to reflect the influence of different legal cultures. The countless hours of work by the staff of the Secretariat whose names appear in this book testify to this challenge. But the value of such an overview, we firmly believe, justifies the investment.

*John S. McKennirey*
Executive Director
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May 1999

# INTRODUCTION

## 1. GENERAL INTRODUCTION TO THIS VOLUME AND SERIES

### A. The Commission for Labor Cooperation and the North American Agreement on Labor Cooperation

The Commission for Labor Cooperation is a new international organization created by Canada, Mexico, and the United States under the North American Agreement on Labor Cooperation (NAALC). Along with an agreement on environmental cooperation, the NAALC is one of two supplementary or "side" agreements to the North American Free Trade Agreement (NAFTA). The NAFTA and the two side agreements came into force on January 1, 1994. The NAALC is the first international labor agreement linked to a trade treaty. It creates an international discipline on enforcement of domestic labor law, a major innovation in international labor affairs.

The NAALC sets forth objectives that include promoting 11 basic Labor Principles, promoting international cooperation in the labor arena, improving working conditions and living standards, and ensuring the effective enforcement and transparent administration of labor laws. Following these objectives, the NAALC countries agree to a set of six Obligations that relate specifically to the effective enforcement and transparent administration of labor law.

The NAALC's 11 Labor Principles and six Obligations define the scope of the agreement. These Principles and Obligations cover nearly all aspects of labor rights and labor standards.[1] The countries commit themselves to the Obligations and undertake to promote the Principles, but they have not established common laws or standards. However, the countries do agree to open themselves up to reviews and consultations among themselves on all labor matters within the scope of the Agreement.

In addition to review and consultation, the countries' obligations regarding the effective and transparent enforcement of labor law are subject to an evaluation by an independent committee of experts and, in certain circumstances, to dispute resolution by an independent arbitral panel.

The Agreement establishes an organizational structure for implementation. It creates the Commission for Labor Cooperation, headed by a Council of Ministers made up of the cabinet level minister or secretary responsible for labor matters in each nation, and an international Secretariat to support the Council. Each government has also established a National Administrative Office (NAO) within its department or ministry of labor to receive communications from the public in that country, to provide information, and generally to facilitate participation under the Agreement.

## B. The Role of the Secretariat

As the permanent staff organization of the Commission, the Secretariat has two main responsibilities. First, it assists the Ministerial Council in carrying out any of the Council's functions under the agreement, such as supporting an independent Evaluation Committee of Experts or Arbitral Panel which the Council may establish, or promoting cooperative

[1] The Principles and Obligations cover the following: freedom of association and protection of the right to organize; the right to bargain collectively; the right to strike; prohibition of forced labor; labor protections for children and young persons; minimum employment standards; elimination of employment discrimination; equal pay for women and men; prevention of occupational injuries and illnesses; compensation in cases of occupational injuries and illnesses; and protection of migrant workers.

activities, including working groups and conferences on labor-related matters. Second, under Article 14 of the NAALC the Secretariat prepares periodic reports and special studies. Periodic reports cover four broad areas: (1) labor law and administrative procedures; (2) the implementation and enforcement of labor law; (3) labor market conditions; and (4) human resource development issues. In addition, special studies can be called for at any time on any matter that the Council considers necessary.

## C. Comparative Guide to Labor Law

This volume is the first of a set of comparative guides to labor law in Canada, the United States, and Mexico. These volumes will describe how each NAALC member country addresses the six Obligations of the NAALC with respect to each of the Labor Principles that the NAALC commits its signatories to promote. They provide a concise description, for each NAALC member country, of the particular laws, practices, and administrative procedures which relate to each NAALC obligation. In so doing, their aim is to promote greater understanding of the legal systems of each country by providing an accurate picture of how each works and by facilitating comparisons between them.[2]

This guide covers basic labor and industrial relations: union organizing, collective bargaining, and the right to strike as set out in Labor Principles 1, 2 and 3 of the NAALC. Subsequent volumes will cover what the NAALC defines as "technical labor standards," contained in Labor Principles 4 to 11.

Labor Principles 1, 2, and 3 and the six NAALC enforcement Obligations are set out in full at the close of this introduction.

[2] The Secretariat is preparing this comparative guide to labor relations law under its NAALC Article 14(1)(a) mandate to produce background reports on the labor law and administrative procedures of the three NAALC member states. Accordingly the report presents a descriptive analysis of the laws, procedures and practices needed to understand the labor law systems of the three NAALC member countries. This report is not, however, an analysis of trends and administrative strategies related to the implementation and enforcement of labor law, topics addressed under article 14(1)(b) rather than 14(1)(a) of the NAALC.

These comparative labor law guides are intended to serve both the specialized interests of labor law practitioners and the general interests of nonpractitioners concerned with the social dimension of expanding trade relations under the North American Free Trade Agreement.

A separate comparative labor market report series, collectively titled *North American Labor Markets: A Comparative Profile*, also published by the Secretariat, addresses labor force characteristics, employment, earnings and income distribution, adjustment and training programs, and other critical labor market issues in the North American economy. Like this report, the *Profile* is intended for both a specialized audience of economists and labor policy experts as well as the general public.

## D. Format

The first part of this volume provides an introductory discussion of the three Labor Principles which are its focus. The next three parts set out for Canada, Mexico and the United States, respectively, a narrative summary of the law, practice and procedure relevant to those principles and the NAALC Obligations.

Each country part is divided into seven sections. Section 1 presents a general introduction to the country's basic labor policy, the domestic legal foundations of labor rights, dividing lines between labor law jurisdictions, legal background of individual employment contracts, and exclusions from labor law coverage. Sections 2 through 7 describe, respectively, the law and practice which relate to the Obligations found in the correspondingly numbered NAALC article. Thus, section 2 deals with the substantive rights and protections provided by the labor laws of the country in question. Section 3 describes government enforcement measures; section 4, private rights of action to enforce labor rights; and section 5, the due process protections and remedies available to ensure enforcement. Section 6 outlines practices with respect to publication of labor laws, procedures and administrative rulings. Section 7 provides a brief overview of public information available on labor law and enforcement and compliance procedures in the country.

Each section within each country part is divided further into subsections. Those subsections are organized to present the key components of

the relevant law and practice. In order to facilitate cross-country comparisons, the subsections in each country part closely parallel those of each other country part.

Thus, a reader who wishes to understand, for example, how workers in each member country exercise and enforce the right to organize will find, in each country part, a description of the relevant rights under national law (in section 2), a description of how those rights may be enforced (in sections 3 and 4), and a description of what remedies are available to ensure their enforcement (in section 5). The reader will also be able to quickly compare the law and practice of different countries by turning to the corresponding sections and subsections of other country parts. In addition, on many topics the text includes brief comparative summaries of key differences between the countries. These are placed at the end of each section or subsection and are printed in bold type.

Paragraphs in **bold** type highlight key comparisons between countries. The reader can see at a glance, without having to review another country section, a summary of how one country's law and practice resembles or differs from that of the other countries. Box insets provide legal detail, statistics, practical examples, and other background information. These items are intended to bring life to the often unavoidable technicalities and generalities of labor law discussion. The Secretariat wants its reports and profiles to be "reader friendly" as well as technically accurate, for use in workshops, seminars, trade union and employer training programs, classrooms, community organizations and other venues.

## E. Scope of the Guide

As a supplemental agreement to the NAFTA, the NAALC is most directly concerned with labor rights in sectors engaged in trade among the three countries. Accordingly, this initial guide focuses on the main labor law systems for the three countries' *private sector* employers and employees. Each country has separate, highly developed legal regimes for public sector labor relations. Further, they often have special provisions for certain private or mixed public-private enterprises, or for limited special categories of workers. However, except for the U.S. *Railway Labor Act*

(which is discussed because of the importance of the railway and airline industries to trade), those distinct labor law regimes are not treated here.

Even within the main body of private sector labor law, this guide cannot delve into every area of labor law and practice. The treatment or omission of treatment of any employment sector or any aspect of labor law in this volume in no way reflects an interpretation of the scope of the North American Agreement on Labor Cooperation.

**Box 1.1**

**Labor Principles 1, 2, and 3 of the NAALC**

1: Freedom of Association and Protection of the Right to Organize

*The right of workers exercised freely and without impediment to establish and join organizations of their own choosing to further and defend their interests.*

2: The Right to Bargain Collectively

*The protection of the right of organized workers to freely engage in collective bargaining on matters concerning the terms and conditions of employment.*

3: The Right to Strike

*The protection of the right of workers to strike in order to defend their collective interests.*

**Box 1.2**

**NAALC Part 2: Obligations**

Article 2: Levels of Protection

Affirming full respect for each Party's constitution, and recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations, each Party shall ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light.

Article 3: Government Enforcement Action

1. Each Party shall promote compliance with and effectively enforce its labor law through appropriate government action, subject to Article 42, such as:

a. appointing and training inspectors;
b. monitoring compliance and investigating suspected violations, including through on-site inspections;
c. seeking assurances of voluntary compliance;
d. requiring record keeping and reporting;
e. encouraging the establishment of worker-management committees to address labor regulation of the workplace;
f. providing or encouraging mediation, conciliation and arbitration services; or
g. initiating, in a timely manner, proceedings to seek appropriate sanctions or remedies for violations of its labor law.

2. Each Party shall ensure that its competent authorities give due consideration in accordance with its law to any request by an employer, employee or their representatives, or other interested person, for an investigation of an alleged violation of the Party's labor law.

Article 4: Private Action

1. Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial, judicial or labor tribunals for the enforcement of the Party's labor law.

2. Each Party's law shall ensure that such persons may have recourse to, as appropriate, procedures by which rights arising under:

a. its labor law, including in respect of occupational safety and health, employment standards, industrial relations and migrant workers, and
b. collective agreements, can be enforced.

Article 5: Procedural Guarantees

1. Each Party shall ensure that its administrative, quasi-judicial, judicial and labor tribunal proceedings for the enforcement of its labor law are fair, equitable and transparent and, to this end, each Party shall provide that:

a. such proceedings comply with due process of law;

b. any hearings in such proceedings are open to the public, except where the administration of justice otherwise requires;

c. the parties to such proceedings are entitled to support or defend their respective positions and to present information or evidence; and

d. such proceedings are not unnecessarily complicated and do not entail unreasonable charges or time limits or unwarranted delays.

2. Each Party shall provide that final decisions on the merits of the case in such proceedings are:

a. in writing and preferably state the reasons on which the decisions are based;

b. made available without undue delay to the parties to the proceedings and, consistent with its law, to the public; and

c. based on information or evidence in respect of which the parties were offered the opportunity to be heard.

3. Each Party shall provide, as appropriate, that parties to such proceedings have the right, in accordance with its law, to seek review and, where warranted, correction of final decisions issued in such proceedings.

4. Each Party shall ensure that tribunals that conduct or review such proceedings are impartial and independent and do not have any substantial interest in the outcome of the matter.

5. Each Party shall provide that the parties to administrative, quasi-judicial, judicial or labor tribunal proceedings may seek remedies to ensure the enforcement of their labor rights. Such remedies may include, as appropriate, orders, compliance agreements, fines, penalties, imprisonment, injunctions or emergency workplace closures.

6. Each Party may, as appropriate, adopt or maintain labor defense offices to represent or advise workers or their organizations.

7. Nothing in this Article shall be construed to require a Party to establish, or to prevent a Party from establishing, a judicial system for the enforcement of its labor law distinct from its system for the enforcement of laws in general.

8. For greater certainty, decisions by each Party's administrative, quasi-judicial, judicial or labor tribunals, or pending decisions, as well as related proceedings shall not be subject to revision or reopened under the provisions of this Agreement.

Article 6: Publication

1. Each Party shall ensure that its laws, regulations, procedures and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and Parties to become acquainted with them.

2. When so established by its law, each Party shall:

a. publish in advance any such measure that it proposes to adopt; and

b. provide interested persons a reasonable opportunity to comment on such proposed measures.

Article 7: Public Information and Awareness

1. Each Party shall promote public awareness of its labor law, including by:

a. ensuring that public information is available related to its labor law and enforcement and compliance procedures; and

b. promoting public education regarding its labor law.

## 2. INTRODUCTORY COMMENTS ON NAALC LABOR PRINCIPLES 1, 2 AND 3

### A. Labor Principle 1: Freedom of Association and Protection of the Right to Organize

*The right of workers exercised freely and without impediment to establish and join organizations of their own choosing to further and defend their interests.*

Freedom of association is the bedrock workers' right on which all other labor rights rest. It stems from a basic human need for society, community, and shared purpose in a freely chosen common enterprise.

Freedom of association is enshrined in every major international human rights instrument: the Universal Declaration of Human Rights; the

International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights; and the human rights charters of Europe, Africa and the Americas.

The consensus of the world community reflected in those instruments is that freedom of association is a fundamental right that must not be derogated for any ulterior motive, including economic development. The NAALC partners have made freedom of association and protection of the right to organize the first of the Labor Principles to which they commit themselves.

Freedom of association is not only important for workers. It reaches all forms of organization in civil society: political, religious, social, cultural and more. Independent, nongovernmental organizations such as trade unions and federations, business enterprises and employers' federations, churches, community organizations and other associations of many kinds play a vital role in the societies of all three NAALC countries.

In the workplace, freedom of association is manifested above all in the right of workers to organize themselves to promote and defend their interests in employment. There is a key distinction, however, between freedom of association and protection of the right to organize. In human rights discourse, freedom of association is often referred to as a "negative right." This means that for the right to be enjoyed by workers, the State should do *nothing* — place no "impediment" in their way, nor cause them to suffer any disadvantage for attempting to associate, as long as their activity is lawful. (The phrase "negative right" seems contradictory, but it is the terminology employed in human rights theory to distinguish it from "positive rights" such as those described below.)

Protection of the right to organize is a "positive right." For the right to be enjoyed, the State must act affirmatively, or positively, to protect the right. Governments do this by enacting laws which enable workers to establish and administer autonomous organizations, laws which give those organizations the legal capacity to act on the collective decisions of their members, and laws which prohibit both interference with those organizations and discrimination or other forms of retaliation against workers or their leaders who seek to organize. To be fully effective, these laws must provide both remedies for workers and unions harmed by such discrimination and also sanctions against violators.

The United States, Mexico and Canada, each in its own way and consistent with its own history, culture and values, have incorporated the principles of freedom of association and protection of the right to organize in their constitutions, charters, laws and national practices. All three countries have laws that forbid discrimination against workers who seek to form trade unions and that provide remedies for victims of such discrimination.

In the United States, the First Amendment of the Constitution protects rights of assembly and speech and the right to petition the government for redress of grievances. In Mexico, Article 9 of the Constitution protects the general right of association, and Article 123 establishes the right of workers and employers to defend their respective interests by forming trade unions and professional associations. In Canada, Section 2(d) of the *Charter of Rights and Freedoms* guarantees freedom of association. The courts of all three countries safeguard these basic constitutional rights.

Each country has adopted laws and regulations protecting the right to organize: the *National Labor Relations Act* (NLRA) in the United States, the Mexican *Federal Labor Law* (FLL), and Canada's provincial labor relations acts or codes and the federal *Canada Labour Code.*

These laws require vigilance for their effective application. Laws protecting freedom of association and the right to organize are preconditions to effective exercise of these rights, but these laws are not sufficient in themselves. With the dramatic economic changes of the late 20th century and the forthcoming challenges of the 21st century, the effective enforcement of these rights is critical to achieve the objectives set forth in the North American Agreement on Labor Cooperation.

## B. Labor Principle 2: The Right to Bargain Collectively

*The protection of the right of organized workers to freely engage in collective bargaining on matters concerning the terms and conditions of employment.*

The right to organize does not exist in a vacuum. Workers exercise their freedom of association for a purpose: to obtain just and favorable terms and conditions of employment when they have freely decided that collective representation is preferable to individual bargaining. Protect-

ing the right to bargain collectively guarantees workers a unified voice to engage their employer in an exchange of information, proposals and dialogue to establish wages, benefits, and other terms and conditions of employment.

Protecting the right to bargain collectively requires employers to enter into relationships with trade unions. Because protecting the right to bargain implicates the rights of employers in a profound fashion, its place in labor rights discourse is more complex than that of workers' freedom of association and protection of their right to organize. Different countries have developed a variety of methods for collective bargaining, based on their own history and culture of labor relations.

In some countries the law creates an affirmative duty to bargain in good faith. Such laws compel employers whose workers have chosen collective representation to bargain with their union, whether or not the employer voluntarily consents. Other countries avoid the imposition of involuntary bargaining. They allow the workers' right to strike or the prospect of state intervention in bargaining to induce employers to bargain out of practical necessity rather than legal compulsion.

To compel an employer to bargain, some countries require proof that a majority of workers desire collective representation. Other countries protect the right of a minority union to bargain with an employer, requiring only a minimum number of union members.

Labor laws in some countries favor a system of craft unionism, where unions of workers in different occupations bargain separately with an employer. Others favor industrial unionism, combining workers in different occupations in the same union to bargain as a group with their employer. Still others permit a combination of craft and industrial unions in the same workplace.

Some countries grant exclusive representation rights to one union through a system of union certification. Some of these countries will certify only a union that the majority of workers have chosen. Others will certify the most representative union, even without a majority. Other countries allow multiple unions in a single workplace, even in the same occupation or "bargaining unit."

Many countries require employers to consult with employee "works councils" on decisions affecting workers, whether or not a trade union is present in the workplace. The European Union (EU) has adopted a Eu-

ropean Works Council Directive requiring consultation by any firm operating in two or more EU countries with a works council made up of worker representatives from workplaces in each of the countries where it operates.

In some countries the law specifies clauses that must be contained in a collective bargaining agreement or topics that must (or may not) be negotiated between employers and unions. Others leave the entire process to the bargaining parties. Certain countries extend the terms of collective agreements to nonunionized workers and enterprises in the same industrial sector. Others confine the terms of agreements to the parties that negotiated them. Many countries require arbitration of collective bargaining disputes under certain circumstances, while others prefer to let the free play of bargaining power in a market economy determine the outcome of disputes.

This is just a sample of the variety of requirements and structures shaped by different collective bargaining laws. Despite these differences, however, the right to bargain collectively stems unbroken from the principle of freedom of association and the right to organize. It is the primary means by which those fundamental rights emerge in the real life of workers and managers as they bargain over terms and conditions in the workplace and the means by which their agreements endure. In short, the right to bargain collectively is the "real" implementation in the economic and social setting of the "ideal" civil and political rights of association and organizing.

The United States, Mexico and Canada share certain key features of their collective bargaining systems: exclusive representation; government certification or registration of bargaining representatives; the importance of majority status; a mix of craft and industrial bargaining structures; government conciliation and mediation services, and more.

The three countries also have significant differences. For example, U.S. and Canadian laws impose on employers a "duty to bargain in good faith" when a majority of their workers have chosen union representation. This duty is enforced by the definition and prohibition (as unfair labor practices) of a "refusal to bargain" in the United States and a "failure to bargain in good faith" in Canada. In contrast, Mexican law promotes collective bargaining by protecting the rights of workers and their unions to strike and by allowing unions to seek the intervention of Con-

ciliation and Arbitration Boards to resolve collective bargaining disputes. Mexican law does not use the unfair labor practice concept and does not impose a formal duty to bargain on employers.

Mexican law provides for "law-contracts" which extend negotiated terms of employment, on a mandatory basis, to cover all workers and employers belonging to a specific industrial branch or region provided that certain thresholds of representation are met. In Canada, only the labor laws of Quebec provide for similar coverage of nonunionized workers and employers by a negotiated contract through the extension of collective agreements by legal decree. The laws of the United States do not provide for extending contract terms to outside parties.

With all their similarities and differences, the United States, Mexico and Canada all maintain the right to bargain collectively as an essential feature of their labor relations systems. As North American economic integration progresses, the pressures of international competition on the labor force will intensify. Labor laws provide workers with a means of coping with these pressures and defending their interests through collective action. These laws will increase in importance as the labor market forces engendered by international trade and capital movements also increase in intensity. Thus, the success of the North American Agreement on Labor Cooperation depends on continued effective enforcement of this basic right.

## C. Labor Principle 3: The Right to Strike

*The protection of the right of workers to strike in order to defend their collective interests.*

The right to strike concludes the fundamental labor and industrial relations principles of the North American Agreement on Labor Cooperation. Together, these first three NAALC Labor Principles form a foundation for the protection, enhancement and enforcement of workers' basic rights — a stated purpose not only of the NAALC but also of the NAFTA. This structure of rights cannot stand if any one of these three principles is diminished or compromised.

Without the right to strike there cannot be genuine collective bargaining; there can only be collective entreaty. Without genuine collec-

tive bargaining, freedom of association and the right to organize are devoid of any value in the real world of employment and labor relations. Thus, these three rights necessarily form a seamless whole of basic protection for workers. A strike is generally a mechanism of last resort and often not a preferred means of resolving disputes. Nonetheless, the possibility of its use is well recognized as a necessary underpinning to the collective bargaining process.

New complexities arise in the progression from the freedom of association to the right to strike, however. The right to strike affects legitimate concerns of parties outside the employment relationship. In a commercial setting, vendors, customers, distributors and other entities engaged in business with a firm whose employees exercise the right to strike may be affected by the strike. In turn, they may well affect the strike by continuing or not to do business with the struck firm. Other workers and unions might support a strike because they see their own welfare affected by its outcome. They may also support workers who strike in hopes of raising labor standards generally, or from a sense of solidarity among workers. In the larger social setting, segments of the general public might be affected by a strike. Some might oppose the strike, and some might support it. For these reasons, governments often actively regulate the right to strike, and the international community has recognized the legitimacy of many such forms of regulation.

Of the three NAALC countries, only Mexico constitutionally guarantees the right to strike. Some U.S. courts have identified a right to strike within constitutional guarantees of freedom of association, but the question has not been definitively decided by the Supreme Court. The Supreme Court of Canada has decided that the right to strike is not guaranteed by the freedom of association clause of the Canadian *Charter of Rights and Freedoms*.

Whatever their constitutional doctrine, the NAALC countries recognize that the right to strike is a necessary recourse for workers to promote and defend their employment interests. Each country's laws maintain the basic right of private sector workers to strike for a new collective agreement after legal requirements have been fulfilled. However, the United States and Canada have each established limits on the right to strike, and Mexico has a series of complex mandatory procedural requirements for exercising the right to strike.

In the United States, for example, a controversial "striker replacement" doctrine permits employers to permanently replace striking workers with newly hired employees, except where strike action is taken in response to unfair labor practices by the employer. In Mexico, strikes may be declared "nonexistent" by a Conciliation and Arbitration Board if legal requirements are not fulfilled. Such a decision forces workers to return to work or lose their jobs. In Canada, the law prohibits any strike during the term of a collective bargaining agreement.

Finding the proper balance between government's interest in minimizing the harm resulting from industrial conflict and its obligation to protect workers' right to strike in defense of their collective interests presents a challenge to legislators and labor law enforcers. The challenge is even greater in a rapidly liberalizing international economy, where the power of capital to freely cross borders contrasts with the relative immobility of workers and their families, who are grounded in their local communities. Protection of the right to strike is thus vital to the enhancement of workers' basic rights proclaimed as an objective by the North American Agreement on Labor Cooperation.

# CANADA

## 1. GENERAL INTRODUCTION

### A. Basic Labor Policy

All labor relations regimes in Canada share fundamental features protecting the right to organize, to bargain collectively, and to strike. Each jurisdiction has a labor relations board or, in Quebec, the Office of the Labour Commissioner General and the Labour Court, to administer, adjudicate and enforce laws on the rights to organize, to bargain collectively, and to strike. (For brevity, in this text the term "labor relations board" will include Quebec's Office of the Labour Commissioner General and the Labour Commissioners working under the direction of the Commissioner General, except where the context indicates otherwise.) Canada's various labor relations acts or codes recognize free association and collective bargaining as the basis for effective industrial relations and generally guarantee the right to strike to obtain or renew a collective agreement, once detailed procedural requirements are met. All jurisdictions require that a union have the support of a majority of any group of employees that it seeks to represent in collective bargaining (such a group is referred to as a "bargaining unit"). Majority support is certified by the labor relations board, where an employer does not voluntarily recognize the majority status of a union.[1]

[1] In Quebec a union may acquire bargaining rights on behalf of a bargaining unit only through certification by the Office of the Labour Commissioner General.

Within this common framework of labor principles, Canadian jurisdictions (the 10 provinces and the federal jurisdiction) vary significantly in procedures for certification of union majority support and in the regulation of strikes. Certain jurisdictions require elections to establish majority status. The majority rely on signed cards authorizing union representation. Most jurisdictions require conciliation or mediation by government authorities prior to any strike. Most also create conditions for binding arbitration in disputes over the first collective bargaining agreement of a newly organized union. While all jurisdictions prohibit permanent replacement of striking workers, temporary replacements are permitted in most jurisdictions.

In all Canadian jurisdictions, unfair labor practices are defined and prohibited in order to protect the exercise of labor rights from interference. While definitions vary in some respects, all jurisdictions prohibit any form of reprisal against workers for union organizing activity, as well as prohibiting bad-faith bargaining tactics.

## B. Labor Law Jurisdiction

The structure of labor legislation and enforcement in Canada is fundamentally different from that in the United States and Mexico. Federal labor law does not prevail over provincial labor law in Canada. Instead of being hierarchical, federal and provincial labor relations statutes apply in parallel across the different jurisdictions. Federal and provincial labor authorities have equal capacity to decide matters within their respective jurisdictions. As a result of the structure of Canadian federalism, Canada has 11 distinct labor relations regimes: one in each of the 10 provinces, and that of the federal jurisdiction (which also extends to the three territories, Yukon, Northwest Territories and Nunavut).

The power to enact labor laws in Canada is derived from the *Constitution Act, 1867,* Section 91 (federal powers) and Section 92 (provincial powers, except s. 92(10)), which set out the division of legislative powers. The Canadian Parliament has the authority to regulate labor rights for federal government employees and for employees in specific activities which are of national, international, or interprovincial importance, identified in Section 91. These include: broadcasting; banks; postal serv-

ice; airports and air transportation; shipping, navigation and cargo handling; interprovincial road, rail, ferry and pipeline transport; telecommunications; and key national industries such as grain handling and uranium mining. Approximately 10 percent of the nation's workforce is covered by the federal jurisdiction.

Provincial authority to regulate labor matters is derived from the power of the provinces to legislate on "property and civil rights" and on "local works and undertakings" provided in Section 92 of the Constitution. Labor rights are seen as regulating the civil right of freedom of contract, thereby falling within provincial jurisdiction. The provinces enjoy nearly complete sovereignty in labor law matters within their jurisdiction, constrained only by constitutional and criminal law considerations (criminal law is within federal jurisdiction). Approximately 90 percent of the Canadian workforce is covered by provincial labor laws.

Early attempts by the federal government to regulate labor relations on a national scale were frustrated by this constitutional division of powers underpinning the Canadian federation. In a landmark case in 1925, the Judicial Committee of the Privy Council in the United Kingdom (Canada's highest court of appeal at that time) held that provincial legislatures possessed primary legislative authority over labor relations.[2] This case remains the legal basis for the Canadian courts' restrictive interpretation of federal labor law jurisdiction.

> The United States generally maintains a single federal system of labor relations law and enforcement applying throughout the country with preemptive effect over state laws. Mexico has a single *Federal Labor Law* (FLL), which was enacted under authority granted to the federal government by the states of the Mexican Federation. Enforcement of the FLL is divided between federal and state authorities generally on the basis of the type of industry or service in question.

[2] *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396.

**Box 2.1**

**Private Sector Federal Labor Law Jurisdiction in Canada**

Excerpt from the *Canada Labour Code*:

Section 2: In this Act,

"federal work, undertaking or business" means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,

a) a work, undertaking or business operated or carried on for or in connection with navigation, shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada,
b) a railway, canal, telegraph or other work or undertaking connecting any province with any other province, or extending beyond the limits of a province,
c) a line of ships connecting a province with any other province, or extending beyond the limits of a province,
d) a ferry between any province and any other province or between any province and any country other than Canada,
e) aerodromes, aircraft, or a line of air transportation,
f) a radio broadcasting station,
g) a bank,
h) a work or undertaking that, although wholly situated within a province, is before or after its execution declared by Parliament to be for the general advantage of Canada or for the advantage of two or more of the provinces,
i) a work, undertaking or business outside the legislative authority of the legislatures of the provinces, and
j) a work, undertaking or activity in respect of which federal laws within the meaning of the *Canadian Laws Offshore Application Act* apply pursuant to that Act and any regulations made under that Act.

## C. Legal Sources of Labor Rights

Within Canada there are two types of legal system. The province of Quebec has a civil law system that applies to matters, like contracts and labor and employment relations, which fall within its provincial jurisdiction. In other Canadian jurisdictions, the legal system is based on the English common law tradition.

Within the common law tradition, legislative enactments such as constitutions, statutes, and regulations coexist with judge-made common law. Legislative enactments can also displace the common law. In the absence of such enactments, the common law continues to govern such matters as contractual relations and civil liability for torts such as negligence, nuisance and trespass. By contrast, Quebec's civil law system provides a legislated Civil Code which governs such matters. In both systems, legislative enactments form a hierarchy, with the Constitution taking precedence over statutes, and statutes taking precedence over regulations.

In Canada, the most important aspects of workers' rights to organize, associate freely, bargain collectively, and strike are recognized and made effective through labor relations statutes. In many key areas of labor law, these statutes do not set out detailed standards. Instead, the law in these areas develops through case decisions, where administrative tribunals and courts interpret the law as they apply it to specific cases that come before them. Case law establishes precedents to guide parties, tribunals and courts. Decisions of higher courts are considered binding by lower courts and administrative tribunals within the same jurisdiction. A decision of the Supreme Court of Canada is treated as a definitive interpretation of the law. Since every case contains different facts and circumstances, there is often a shift of nuance and interpretation of the law. From time to time, as well, tribunals may undertake a basic shift in policy that reverses the precedent of earlier cases. Similarly, courts may occasionally adopt a different interpretation of the law, reversing their own earlier decisions or the decisions of lower courts. In the Quebec civil law tradition, there is greater emphasis on detailed legal prescription. Nonetheless, many areas of labor law in that province have been left to develop through case law as well.

In the United States, labor relations boards and courts also operate largely by deciding cases that establish precedents to guide future conduct. On the other hand, tribunals and courts in Mexico, coming from a civil law tradition where conduct is guided by detailed legal prescription, place more emphasis on codes than on judicial or administrative tribunal precedents.

### *1) Constitutional Sources*

Canada's first constitutional instrument, the *Constitution Act, 1867*, did not contain express language guaranteeing workers' collective rights. After the patriation of the Canadian Constitution in 1982, freedom of association was specifically enshrined as a constitutional guarantee. The Canadian *Charter of Rights and Freedoms*, incorporated into the amended Constitution of 1982, contains language explicitly guaranteeing freedom of association, freedom of expression and the right of peaceful assembly in Canada. The right to freedom of association for workers in the trade union context was later interpreted by the Supreme Court of Canada as "the freedom to work for the establishment of an association, to belong to an association, to maintain it, and to participate in its lawful activity without penalty or reprisal."[3]

The Supreme Court declined to interpret the freedom of association clause of the Charter as including the derivative right of engaging in activities essential to the purpose of an association. Moreover, the court has ruled that the Charter applies only to government action, and thus does not offer direct protection against the actions of private parties. The rights of workers to organize, to bargain collectively and to strike rely mainly on statutory enactments.

The United States Constitution, like that of Canada, does not specifically address labor rights or labor standards and does not govern the actions of private parties. In contrast, the Mexican Constitution, particularly its Article 123, provides extensive, detailed guarantees on the right

[3] *Reference re Public Service Relations Act (Alta.)* (1987), 87 C.L.L.C. 14,021 (S.C.C.).

to organize and the right to strike, as well as a wide range of other rights and obligations which are intended to protect workers and which are directly binding upon public and private employers.

*2) Statutory Sources*

Protection of the right to organize, to bargain collectively and to strike was secured throughout Canada in the mid-1940s, when the federal government and most of the provinces adopted laws defining and prohibiting unfair labor practices and providing a legal framework for collective bargaining and the enforcement of collective agreements. The federal government first adopted collective bargaining legislation during the Second World War, when it exercised emergency powers to prevent labor unrest. When the federal emergency legislation was repealed after the war, the provinces themselves moved to adopt labor relations laws protecting the right to organize and bargain collectively and regulating strike activity.

The federal government maintains the *Canada Labour Code* and the Canada Industrial Relations Board (CIRB) for employees in federally regulated industries such as banking and interprovincial transportation and telecommunication services. Each province has enacted a labor relations statute and created an agency to administer it. The titles of each statute and corresponding agency are as follows:

Alberta: *Labour Relations Code*… Alberta Labour Relations Board
British Columbia: *Labour Relations Code*… British Columbia Labour Relations Board
Manitoba: *Labour Relations Act*… Manitoba Labour Board
New Brunswick: *Industrial Relations Act*… New Brunswick Labour and Employment Board
Newfoundland: *Labour Relations Act*… Newfoundland Labour Relations Board
Nova Scotia: *Trade Union Act.*.. Nova Scotia Labour Relations Board
Ontario: *Labour Relations Act, 1995*… Ontario Labour Relations Board
Prince Edward Island: *Labour Act*… Prince Edward Island Labour Relations Board
Quebec: *Labour Code*… Office of the Commissioner General of Labour (Labour Ministry) and, on appeal and in penal matters, the Labour Court
Saskatchewan: *Trade Union Act.*.. Saskatchewan Labour Relations Board

The United States maintains a single National Labor Relations Board (NLRB) to enforce U.S. law on the rights to organize, bargain collectively and strike. The U.S. NLRB operates through 33 regional offices around the country. Mexico maintains a Federal Conciliation and Arbitration Board (CAB), along with dozens of Federal Special Conciliation Boards located throughout the country to cover industries within the federal jurisdictions. In addition many local (state and Federal District) CABs operate within their local jurisdictions. In total over 100 CABs operate to enforce the *Federal Labor Law* within their respective jurisdictions.

### *3) Regulations and Rules*

Canada's labor relations boards generally have jurisdiction to interpret the relevant labor relations statute and to make their own rules of procedure. In exercising rule-making authority, the boards consult with employer and employee groups and their representatives. Labor board regulations, which set out among other things the forms and information requirements for making applications or bringing complaints, are published in official provincial gazettes.

## D. The Individual Employment Relationship

The legal relationship between an employer and an individual employee is established by explicit or implicit contract. Where an employee is represented by a union and that union holds or is negotiating to renew a collective agreement with his or her employer, the collective agreement legally supersedes and replaces his or her individual employment contract. However, in other circumstances the individual employee's contract of employment governs the employment relationship. Outside of Quebec, the law of employment contracts is inherited from the English common law. In Quebec, the general rules of contract established by the Civil Code apply to contracts of employment.

Under a doctrine developed by Canadian courts, employers in Canada must give "reasonable notice" of termination of employment, unless

the employment relationship is terminated for "just cause." The just cause doctrine permits employers to terminate the employment relationship in cases of sufficiently serious misconduct. Without either just cause or such notice, employers must provide pay in lieu of notice, usually equal to about one month's salary for each year of employment. Courts treat failure to give notice or to provide pay in lieu of notice as wrongful dismissal, and in response may award damages equal to pay in lieu of notice to an affected employee. This implied obligation on the part of the employer to provide reasonable notice can in some situations be limited by contract.

In addition to the reasonable notice doctrines developed by Canadian courts, in each jurisdiction employment standards legislation provides certain basic protections of employee interests, such as a mandatory minimum wage, minimum notice of termination of employment and the right to vacation time. Various statutes also provide protection against discrimination in employment by reason of trade union activity, race, sex, age, religion, disability, and other human rights grounds. Legislation in the federal jurisdiction, in Quebec and in Nova Scotia protects all employees with a specified minimum length of service (one, three and 10 years, respectively) and not covered by a collective agreement against wrongful dismissal, providing reinstatement as a possible remedy.

These statutory minimum protections generally cannot be removed by contract between the employer and employee. Outside of such statutory protections, the parties to an employment contract are free to agree to any terms and conditions of employment which do not violate public policies or laws which apply more generally outside of the specific context of employment.

> Under Mexican law, most employees are covered by the *Federal Labor Law*, which establishes limited and specific just causes for terminating any individual's employment, whether or not the individual is covered by a collective contract. In the United States, most nonunionized employees are employed "at will," which means that, subject to statutory exceptions such as antidiscrimination law and other limited "public policy" exceptions, their contract of employment can be terminated without notice or severance pay, at any time, for any reason.

### E. Exclusions from Coverage

All Canadian labor relations laws exclude from their coverage managers and those employed in a confidential capacity in matters relating to labor relations. Some labor relations statutes also exclude specific occupations such as domestic servants, agricultural workers, or members of such professions as law or medicine. In much of Canada, low-level supervisors and subcontractors who are in a situation of economic dependence on the party contracted with (often referred to as "dependent contractors") are covered.

> In addition to managers, agricultural workers and domestic employees, U.S. labor law generally excludes all supervisors and independent contractors. (U.S. law does not recognize a "dependent contractor" category — most dependent contractors covered under Canadian law would be excluded "independent contractors" under U.S. law.) Mexican labor relations law covers all workers who personally perform subordinate work for another individual or legal person in return for remuneration, except family members employed in a family business. Confidential workers (mainly managers, general supervisors and workers in a position of trust) may not join the same union as other workers, and in practice they seldom form unions.

## 2. LEVELS OF PROTECTION – SUBSTANTIVE LABOR LAWS

### A. Labor Principle 1 – Freedom of Association and the Right to Organize

#### *1) Legal Foundations*

As discussed above (see Legal Sources of Labour Rights, section 1C), Section 2(d) of the Canadian *Charter of Rights and Freedoms* provides that "everyone has … freedom of association," and that freedom was defined by the Supreme Court of Canada as "the freedom to work for the establishment of an association, to belong to an association, to maintain

it, and to participate in its lawful activity without penalty or reprisal."[4] This includes the right to establish, belong to, and maintain a union.

The Charter protects this right of individuals to organize collectively against any interference by government — federal, provincial, or municipal — regardless of whether the interference takes the form of legislation, regulation or public actions. Government actions that restrict the exercise of freedom of association are unconstitutional unless, as with all limits to constitutional rights, under Section 1 of the Charter they can be shown to be "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Quebec enacted its own human rights code in 1975, the *Charter of Human Rights and Freedoms.* Although it is not a constitutional document, it prevails over any other Quebec legislation. This instrument guarantees freedom of association and the right to exercise this freedom without discrimination, and it applies to the private sector as well as the public sector.

As noted above, however, in Canada constitutional rights protect only against government action. Practically speaking, the most important protections of workers' freedom of association and rights to organize are found in labor relations statutes that regulate the conduct of private entities. Modeled largely on the U.S. Wagner Act of 1935, Canadian labor law statutes were crafted in the 1940s. Most have been extensively revised since then. These statutes recognize the freedom of workers to associate and their right to organize unions to defend their interests. They protect those rights against interference, most significantly by defining and prohibiting a set of unfair labor practices. Canadian labor laws also provide a legal framework within which workers can define and act upon common objectives, by enabling unions to act as self-financing and self-governing organizations. The key statutes are listed in section 1C, above.

### *2) The Formation and Dissolution of Unions*

Canadian labor relations statutes protect the right of employees to form unions. No prior authorization, registration or other official act is required to form a union. Labor relations boards will generally treat an or-

[4] *Reference re Public Service Relations Act (Alta.)* (1987), 87 C.L.L.C 14,021 (S.C.C.).

ganization as having trade union status, giving it legal standing under labor relations legislation, provided that its purposes include the regulation of relations between employers and employees, and provided that it has a constitution adopted in accordance with any procedural requirements established by law. Most labor relations statutes have been interpreted as requiring that a union demonstrate that it is a viable entity for the purposes of collective bargaining, by democratically adopting a working organizational structure, in order to be treated as a union for the purposes of labor law. Some jurisdictions require that a union have a written constitution, rules or bylaws. Others require that an organization be local or provincial. In some jurisdictions an organization that is influenced or dominated by an employer cannot be a trade union. In others it can be; but in all jurisdictions such an organization is barred from being certified as exclusive collective bargaining representative for a group of employees (referred to as a "bargaining unit," see below). An organization that ceases to meet the requirements for trade union status may be treated by labor relations boards as without that status and thus without the rights which labor relations statutes grant to trade unions.

Once a union is formed, it may hold meetings, publicize its views and exercise many legal rights (see Legal Status of Unions, below). However, another step is required if a union is to achieve its main purpose — to bargain collectively on behalf of its members. In order to do this, a union must acquire bargaining rights (see Acquisition of Bargaining Rights, section 2B.2, below).

A trade union can be dissolved if: (1) an event occurs which the union constitution states will result in dissolution; (2) its members agree in a constitutionally valid vote that it can be dissolved; or (3) the foundation upon which the organization was based is lost or has been fundamentally altered.[5]

### *3) Legal Status of Unions*

Historically, the common law treated unions as voluntary associations,

[5] In Quebec a union may be dissolved if it is found by the Labour Court to have participated in an employer's interference with an employee's association (Article 149 of the Quebec Labour Code).

which do not have legal personality. Legal personality enables individuals or organizations to act legally, that is, to exercise legal rights including owning property, entering into contracts, or suing to enforce rights. Canadian labor legislation now grants unions the legal capacity to exercise, defend and enforce the rights granted under labor law, which include freedom of association and the rights to bargain collectively and to strike. Unions may also be called upon to respond to complaints under labor law. The question of whether unions in Canada have acquired more complete legal personality, including rights to sue and be sued, to own property, and to enter into contracts in their own name, is a subject of debate among Canadian jurists and would be answered somewhat differently in each jurisdiction. In Quebec the Code of Civil Procedure allows unions to institue legal proceedings in their own name. Many unions effectively acquire and sell property and carry out commercial transactions by designating union officers as trustees, who contract in their own names, or by establishing a not-for-profit holding company to buy and sell assets on behalf of the union.

Legal personality is not the same thing as bargaining rights, which enable a union to meet its main objective by requiring an employer to recognize and deal with it as the exclusive collective bargaining representative of a group of employees (see Acquisition of Bargaining Rights, section 2B.2, below).

*4) Union Self-Governance*

Unions in Canada are governed by the terms of their own constitutions, which they have the power to create and amend. Provided that they comply with their own constitutions, laws which seek to ensure basic union democracy (see Freedom of Association within Unions, section 2A.7, and Protections against Interference, section 2D, below), and general laws governing economic and political activity, unions are free to elect officers, hold meetings, set their union dues levels, and generally determine their own course of legal, political and strategic action.[6]

[6] Manitoba imposes some important restrictions on union political spending decisions. See Union Membership and Dues, below.

*5) Political and Legislative Activities of Unions*

Trade union political and legislative action is an exercise of freedom of association for Canadian workers. Canadian unions support political parties and candidates for office through financial contributions and campaign assistance such as telephoning, handbilling and canvassing. Some unions actively endorse a political party.

Unions participate in the legislative process by seeking to convince sympathetic legislators to introduce pro-labor bills, meeting with legislators to persuade them to support such bills, and testifying and submitting briefs to legislative committees. They also mobilize members for rallies, marches, demonstrations and other forms of assembly guaranteed by the Canadian *Charter of Rights and Freedoms*.

*6) Union Membership and Dues*

The majority of Canadian labor laws require that, at the request of the union, the employer deduct and remit to the union the amount of regular union dues from the wages of each worker who is a member of a bargaining unit that it represents, whether or not the worker is a union member. This arrangement is often referred to as the Rand Formula (see box 2.2). In provinces where compulsory dues payment is a matter for negotiation between the parties, most unions and employers reach similar union security arrangements. Canadian labor laws also permit unions and employers to agree to collective agreement clauses requiring membership in the union as a condition of employment. These clauses are often referred to as "union shop" clauses.

> In Mexico the FLL requires employers to deduct from union members' pay and remit to the union ordinary union dues payments. A worker who is not a member of a union may not be required to pay union dues. However, employers and unions may also agree to clauses requiring membership in the union as a condition of employment and requiring employers to dismiss workers who lose their membership ("exclusion clauses"). In the United States, matters of union security, union membership or compulsory dues or fee payment are left to the bargaining parties except in 21 "right-to-work" states. These states have exercised

an option under federal labor law to prohibit negotiation of a union security clause requiring either membership in a union or the payment of an amount equal to union dues by those workers in a union's bargaining unit who choose not to become union members.

**Box 2.2**

**The Rand Formula and Union Political Activities**

Named after former Supreme Court of Canada Justice I.C. Rand for his award in the Ford Motor arbitration case of 1946, the Rand Formula requires all employees in unionized workplaces to pay union dues, but does not require employees to become members of the trade union. Justice Rand observed that all employees in a bargaining unit, whether union members or not, share in improved wages, working conditions and benefits achieved by the collective action of the employees. He noted that it would be unfair for employees to benefit from the gains brought by union representation without contributing to the costs of maintaining the union.

The Rand Formula was upheld recently by the Supreme Court of Canada in Lavigne v. Ontario Public Service Employees' Union.[7] Lavigne was not a union member but was covered by the collective agreement. He argued that his right to freedom of association, protected by the Canadian *Charter of Rights and Freedoms*, was violated because he was forced to pay dues to a union to which he did not belong and which he did not support. Lavigne also objected to the union's contributions to a nuclear disarmament campaign and a political party. He maintained that his freedom of association included as well the freedom from association.

The Court denied Lavigne's claim and unanimously upheld the Rand Formula. Three of the seven justices concluded that freedom of association does not include freedom from compelled association, and that as a result, Section 2(d) of the Charter was not infringed. In a separate concurring judgment, three justices found that Section 2(d) did include freedom from association. However, they ruled that legally required dues contributions towards collective bargaining were a form of compelled association towards a common end, required to further collective social welfare, which fell within the class of required associations that are a necessary and inevitable part of membership in a democratic community.

[7] [1991] 2 S.C.R. 211.

The justices held that Section 2(d) did not protect against such legally required association. They also ruled that, for two reasons, permitting unions to spend such funds on political causes could be justified under Section 1 of the Charter as a reasonable limit on the Section 2(d) freedom of association. First, it allows unions to play a role in shaping the social, political and economic context within which collective agreements and labor relations disputes are negotiated and resolved. Second, it fosters union democracy by allowing unions to decide democratically, free of government interference, which causes to support. The seventh justice assumed without deciding that Section 2(d) protected freedom from compelled association. However, she found no violation of that section in this case, ruling that simply requiring an individual to pay dues to a union which later spends a portion of those dues on political causes does not associate that individual with the ideas and values of the union.

Recent amendments to Manitoba's *Labour Relations Act* require unions to inquire of each bargaining unit member whether he or she wishes his or her dues to be used for political purposes. If the member indicates that he or she does not want his or her dues to be spent in this way, the union must forward the portion of dues proposed to be used for political purposes to a registered charity designated by the employee. Manitoba is the only Canadian jurisdiction which imposes such restrictions on union spending decisions.

Mexican labor law permits unions to collect dues and make political spending decisions in accordance with internal union constitutional rules. In the United States, when a bargaining unit member who pays a representation fee but is not a member of the union objects to expenditures for purposes other than collective bargaining and contract enforcement, the union must reduce his or her fee payment by that portion of dues which is devoted to such expenditures.

### *7) Freedom of Association within Unions*

Labor relations statutes generally limit the effects of union shop clauses in certain cases, in order to protect workers' rights to participate in the union of their choice or to exercise other rights under the statute. An

employee generally cannot be dismissed, notwithstanding that he or she has been expelled from a union which is party to a union shop agreement, where his or her expulsion is related to: (1) participation in the affairs of another union; (2) refusal to pay unreasonable dues assessments; (3) participation in a labor law proceeding; (4) the exercise of other rights granted to employees under the labor relations statute. (See Protections against Interference, section 2D, below.)

Unions are required to conduct their elections in accordance with the rules established under their constitutions. A failure to abide by union constitutional rules can be remedied by a court on application by an affected party. A court may, among other things, declare an election to be null and void and stipulate conditions under which a new election must be held.

Canadian administrative law requires that, where a union member is subject to expulsion from the union, the expulsion must be authorized by the rules of the union, the proceedings must take place in accordance with procedural rules of natural justice, and the tribunal hearing the case must act in good faith.

Unions are generally required to file with the labor minister or the labor relations board a copy of the union's constitution and the names and addresses of the union's officers. In most jurisdictions unions are also required to file with the minister a copy of any collective agreement to which they are a party. These documents are often made available to the public. Most jurisdictions also require that unions file with the minister and/or the labor relations board and provide to their members a copy of the union's audited financial statements, either automatically at yearly intervals or on request.

> In the United States, the *Labor Management Reporting and Disclosure Act* includes a comprehensive union member's "bill of rights" regulating internal union democracy. The LMRDA protects free speech rights in union affairs, the right to vote on union dues, the right to run for union office, the right to obtain the union's charter, bylaws and a copy of the collective bargaining agreement, the right to obtain an accounting of union finances, and the right to union elections free of intimidation or fraud.
>
> In Mexico a union member may be expelled from a union only by a two-thirds majority vote of the total union membership, following pro-

cedures set out in the FLL and any procedures established by the union's constitution. The Mexican Constitution protects workers against dismissal for joining or attempting to form a union. Workers dismissed pursuant to an "exclusion clause" (see Union Membership and Dues, above) for joining or supporting another union during its formation or registration may seek reinstatement or severance pay by filing a claim with the relevant CAB. In addition, Mexican labor law provides a mechanism by which the membership can convoke a general meeting of the union if the board of directors fails to do so and requires that the board of directors provide members every six months with accounts of the administration of the union's assets.

## B. Labor Principle 2 – The Right to Bargain Collectively

### *1) Legal Foundations*

As noted above (see Legal Sources of Labor Rights, section 1C), Canadian law does not provide constitutional protection of the right to bargain collectively.

Neither Canadian common law nor Quebec's civil code imposes a duty on an employer to bargain collectively with a union representing employees. Before the enactment of statutes protecting the right to bargain collectively, a Canadian employer could legally refuse to recognize and bargain with a union. Workers had to strike to compel recognition and bargaining. When the government or the courts intervened, it was usually to protect employers' property rights. In most of Canada, with the exception of Quebec, even a union that achieved a collective bargaining agreement could not have it enforced in the courts, because a union had no legal status. Employers could break an agreement, and workers would have to strike anew.

In contrast, Quebec law, influenced by European labor jurisprudence that concerned itself more with the product of negotiation than with the process, granted legal status to unions in 1924 and made their collective agreements enforceable in court. Quebec law did not at that time, however, compel employers to bargain with unions if employers resisted bargaining.

When workers in most Winnipeg industries went on strike for union recognition in 1919, the federal government used its immigration and

criminal powers to deport or imprison strike leaders and used the Mounted Police and federal troops to force workers back on the job without recognition of their unions. In 1934, a two-month strike for recognition and a contract by 4,000 women workers against garment manufacturers in Montreal ended with various "understandings," but employers still refused to recognize and bargain with the union. In 1937, after the U.S. *National Labor Relations Act* was already in force, the Premier of Ontario threatened to use the provincial police to break a recognition strike by workers at the large General Motors plant in Oshawa. The strike ended without recognition of the autoworkers' union as the bargaining agent.

The modern right to bargain collectively was created by statute during World War II. The federal government and the provinces generally adopted laws modeled on the *National Labor Relations Act* to facilitate collective bargaining between employers and trade unions freely designated by a majority of employees as their bargaining representative. A process of certification of the bargaining agent was established as the basic mechanism for establishing bargaining rights, and unions were given the power to enter into legally binding collective agreements.

These new acts or codes created a legal duty to bargain in good faith and make every reasonable effort to reach a collective agreement. The employer is obligated to bargain exclusively with the union representing the employees and is prohibited from negotiating with another union or directly with employees in the bargaining unit.

The *Canada Labour Code* and the provincial acts or codes generally contain the following key elements:

* certification of unions as bargaining representatives of one or more defined bargaining units, in a majority of jurisdictions by checking membership authorization cards;
* exclusive representation of employees in the bargaining unit by the certified bargaining agent;
* the duty of employers to bargain in good faith with a certified union and make every reasonable effort to reach a collective agreement;
* the inclusion of certain mandatory clauses in a collective agreement;
* mandatory mechanisms for the resolution of disputes, ranging from government mediation and conciliation to, in some instances, compulsory arbitration.

United States collective bargaining laws are similar in many respects. However, under the *National Labor Relations Act* there is no certification by "card-check"; elections are required in every case where there is not a voluntary recognition agreement between the parties. U.S. labor law generally provides for fewer direct interventions in the collective bargaining process. It does not stipulate mandatory collective bargaining clauses. Under the *National Labor Relations Act* neither mediation nor conciliation is required.

Mexican labor law contains the principles of majority status and exclusive representation, but it does not create a duty to bargain collectively. Instead, it creates a context to stimulate bargaining by guaranteeing the right to organize and the right to strike. Voting to determine majority status may take place if one union challenges another for title to a collective contract. In deciding such challenges, a CAB may supervise a vote of the workers, known as a *recuento*, in order to obtain evidence of union majority support. A *recuento* will not necessarily be conducted if other evidence is sufficient to prove majority support. Mexican law establishes requirements for the content of a collective contract and makes conciliation mandatory once a union has delivered notice of its intention to strike.

### *2) Acquisition of Bargaining Rights*

Bargaining rights enable a union to legally require an employer to recognize and deal with it as the exclusive representative of a group of employees for the purposes of negotiating a collective agreement. Such a group of employees is referred to as a "bargaining unit." A union wishing to exercise bargaining rights must have been chosen by a majority of employees within the bargaining unit.

A union may acquire bargaining rights either through voluntary recognition by the employer or, more commonly, by a process of certification administered by the labor relations board of the relevant jurisdiction upon an application for certification by the union. In Quebec, a union may acquire bargaining rights only through certification, and certification procedures are administered by the Office of the Labour Commissioner General.

Generally speaking, there are two aspects to obtaining certification: (1) the union must demonstrate to the labor relations board that it has

sufficient support among the employees in a bargaining unit, and (2) the labor relations board must find that bargaining unit to be appropriate for the purposes of collective bargaining.

In a majority of Canadian jurisdictions, a union can prove sufficient support through either of two procedures. First, it can file with the labor relations board a set of authorization cards signed by employees within an appropriate bargaining unit. If the union presents valid cards signed by more than half of the employees within such a unit (a 55 percent super-majority is required in British Columbia), the union will be automatically certified. Second, the union can apply for a labor relations board supervised vote. Such an application usually requires that the union file with the board a statutory minimum number of signed authorization cards, which generally ranges between 35 and 45 percent of employees within the bargaining unit proposed by the union. Only employees within that unit are eligible to vote. If more than half of the employees who vote in the election choose the union as their bargaining representative, the union will be certified. In all procedures, names of employees who support the union are not revealed to the employer. Where votes on certification are held, they are conducted by secret ballot.

In Alberta, Nova Scotia, Ontario, Newfoundland and Manitoba a union seeking certification does not have the option of seeking certification by presenting the signed authorization cards of bargaining unit members. Rather, a representation vote must be held. In Newfoundland, a vote is mandatory unless the employer and the union agree otherwise. Where a vote must be held, legislation typically requires that it be held very soon after an application for certification is filed. In Ontario the vote must be held within five days of receipt of the application for certification, unless the Labour Relations Board directs otherwise. Nova Scotia's *Trade Union Act* contains a similar provision: normally a vote must be held within five working days of receipt of the application by the board and three working days after the employer receives notice of the application. In Alberta, the vote must be held "as soon as possible." In Manitoba, the time limit is set at seven days, except in exceptional circumstances.

In all jurisdictions, labor relations boards (in Quebec, certification agents and labor commissioners) are given a broad mandate to ensure that any bargaining unit which a union is certified to represent is appro-

priate for collective bargaining. In making this determination, labor relations boards typically look to whether a community of interest exists among the workers in the bargaining unit. They consider such factors as: collective bargaining history with the employer or in the industry in question; similarities in skills, interests, duties and working conditions; the nature of the employer's organization; and the wishes of the parties. The bargaining unit need not be the most appropriate one for collective bargaining; it need only be an appropriate one. Unions are given reasonable latitude in proposing bargaining units for certification. Labor relations boards generally try to make determinations on this matter with as little delay as possible to the certification process. For example, where a union can demonstrate sufficient membership support within either of two possible bargaining unit configurations, the labor relations boards will certify the union prior to hearings on the final configuration of the bargaining unit.

In several jurisdictions, where the labor relations board finds an employer to have committed unfair labor practices which render it unlikely that the true wishes of the employees can be determined by a vote, the board may certify the union without one. Such an order can be made whether or not the union was able at any time to prove that it had the support of a majority of bargaining unit employees.

Canadian labor law generally provides that when a union's application for certification is unsuccessful, that union may be temporarily barred from making another application for certification for substantially the same bargaining unit. The length of the bar varies by jurisdiction but is most often less than one year. In some jurisdictions a bar is imposed automatically, while in most jurisdictions the labor relations board has some discretion not to impose one or to abridge the duration of the bar.

> U.S. labor law provides that no union representation election may take place within one year of an earlier election in the same bargaining unit. In Mexico, a registered union can at any time seek support from members of another union that holds title to a collective contract and make an application to the relevant CAB to obtain title to the collective contract.

A union may not be certified where it is dominated or influenced by an employer (see Protections against Interference, section 2D, below). In addition, in most jurisdictions a union may not be certified where its constitution discriminates on the basis of grounds such as race, creed, color, nationality, ancestry, sex, or place of origin.

> Under the U.S. *National Labor Relations Act*, an election is ordinarily required to serve as the basis for certification of majority support and the resulting acquisition of bargaining rights. However, the National Labor Relations Board may order an employer to bargain with a union without an election if the employer's unfair labor practices have made a fair election impossible.
>
> In Mexico a union requires a minimum of 20 members in active employment in order to obtain registration. "Registration" in Mexico is not the same as "certification" in the United States and Canada. Registration gives a union the legal capacity to enter into contracts and act as a party to legal proceedings. It is obtained through an administrative procedure which does not require proof that the union represents a majority of any group of workers. Once registered, a union can demand a collective contract from an employer, and if the employer refuses to execute the contract, give a strike notice to induce bargaining and obtain conciliation by government authorities.

### *3) The Collective Bargaining Process*

Collective bargaining can be initiated by the union or by the employer to conclude a first collective agreement or to renew, modify or terminate an existing agreement. Generally speaking, nothing prevents the parties from agreeing to bargain collectively over any matter at any time. However, for legal and practical reasons collective bargaining is normally limited to the time around the expiry of an existing collective agreement or following the certification of a union as a new bargaining agent.

#### (i) Obligation to Bargain

Collective bargaining is normally initiated by one party delivering to the other a "notice to bargain." Canada's labor relations statutes each speci-

fy a period of time during which notice to bargain can be given if a collective agreement is currently in force. That period is limited to a number of days (generally between 90 and 30) prior to the expiry of the collective agreement.

Once the union has acquired bargaining rights and given the employer notice to bargain for a collective agreement, labor relations statutes in each jurisdiction compel the employer and union to meet, bargain in good faith, and make every reasonable effort to reach a collective agreement. The requirements of good faith and reasonable efforts are procedural ones designed to ensure that (1) the employer recognizes the union as exclusive bargaining agent, and (2) the parties engage in a "full, free, honest and rational" discussion of their differences. Within these requirements the parties remain free to bargain hard and to steadfastly disagree.

In a majority of jurisdictions, there is generally no continuing duty to bargain during the term of a collective agreement. In the federal jurisdiction, British Columbia, Manitoba, New Brunswick, and Saskatchewan, however, various forms of significant mid-contract changes can give rise to a duty to bargain. The definition of the types of change giving rise to the duty varies with each jurisdiction.

Labor relations boards have in their decisions identified a number of patterns of action which will lead them to find a breach of the duty to bargain. For example, boards have distinguished between "hard" bargaining, which is permissible, and "surface" bargaining, which is unlawful, when evaluating whether employers have met their duty to bargain in good faith. The Ontario Labour Relations Board, in its decision in the *Daily Times* case, characterized "surface bargaining" as "going through the motions, or a preserving of the surface indications of bargaining without the intent of concluding a collective agreement. It constitutes a subtle but effective refusal to recognize the trade union."[8]

Similarly, an employer may not in general deal directly with bargaining unit employees with respect to matters that are subject to collective bargaining, nor convey the message that employees will suffer economically as long as they are represented by a union. Employers may not attempt to dictate or negotiate the composition of a union's bargaining

[8] [1978] 2 O.L.R.B. Rep. July 446.

committee, fail to disclose relevant information requested by a union, refuse to provide a full justification of a bargaining position when asked to do so, refuse to consider or hear the union's objections to its bargaining position, refuse to attend or be persistently unavailable for negotiation meetings, or send a negotiator to the table who has no real authority to negotiate.

> U.S. labor laws contain a "good faith bargaining" obligation and create an equivalent unfair labor practice of "refusal to bargain." Many of the indicators of such a refusal are similar to those in Canada. In contrast, Mexican labor law does not contain the unfair labor practice concept. It does not declare the right to bargain collectively or impose a duty to bargain. Instead, by protecting workers' right to strike, the law seeks to induce bargaining by giving workers the right to strike if the employer refuses to conclude a collective contract with their union.

(ii) Disclosure of Information

The duty to bargain includes a duty on both the employer and the union to disclose information necessary to the other to reach informed decisions in bargaining. Generally speaking, there is no duty to disclose information in the absence of a request for it. However, in many jurisdictions, labor relations boards have ruled that an employer must disclose information regarding a decision which it has already made, and which the union could not have anticipated, which will have a significant impact on terms and conditions of employment, such as a plant closing.

(iii) Changes to Working Conditions during Negotiations

In all Canadian jurisdictions, the labor relations statutes freeze the terms and conditions of employment of all members of the bargaining unit once the union gives notice to the employer to bargain for a collective agreement. It is an unfair labor practice for an employer to violate this statutory freeze. The freeze does not require that all conditions of work remain static, but rather that the employer carry on business as before, without changing terms and conditions of work that would not normally have been subject to change. The main purpose of the freeze is to pro-

vide a period of stability during which collective bargaining can take place. Generally the statutory freeze lasts until the union and the employer acquire the right to strike or lock out (or exercise it, in Quebec), or until the union loses the right to represent the employees in the bargaining unit.

> Under U.S. labor law an employer is not permitted to change any aspect of workers' wages, hours and working conditions without first bargaining in good faith to the point of impasse with the union. This rule continues to apply even when a collective bargaining agreement has expired, except that an employer may at that point refuse to deduct union dues and participate in the arbitration of grievances.
>
> Under Mexican law an employer may not unilaterally change the terms of a collective contract or an individual employment contract. Once filed with the relevant CAB, a collective contract that meets basic legal requirements for minimum contents is treated as a judicial order of the CAB itself and is enforceable as such. Collective contracts generally have an unlimited duration. A union may strike in response to unilateral changes to a collective contract. In cases of economic necessity a collective contract may be suspended or terminated, subject to CAB approval, if the employer can prove the existence of one of the legally recognized grounds for such measures.

### (iv) Scope of Bargaining and Contents of Agreement

All Canadian jurisdictions require that certain clauses be included in all collective agreements. Legally mandatory collective agreement clauses generally include: clauses forbidding strikes and lockouts during the term of the agreement, clauses providing for access to binding arbitration of all differences relating to the interpretation, application or alleged violation of the collective agreement,[9] and a minimum collective agreement duration of one year. In a majority of jurisdictions, Rand Formula union dues check-off clauses (see Union Membership and Dues, section 2A.6, above) are effectively mandatory.

Except for those provisions that the law deems to be included in every collective agreement, all other terms and conditions of employment may

[9] Such a clause is legally required in all Canadian jurisdictions except Saskatchewan.

be negotiated and are subject to the legal duty to bargain. Unlike the U.S. system of collective bargaining, there is no distinction in Canadian labor law between mandatory and "permissive" subjects of bargaining. However, a limited set of issues may not be pressed to the point of impasse, and thus may not be the subject of a strike or lockout. These issues include: demands that the scope of a union's bargaining unit be narrowed or expanded; a demand for recognition by an uncertified union; and demands related to a dispute between one union and another over their respective jurisdictions.

> U.S. labor law distinguishes between "mandatory" subjects of collective bargaining, to which a duty to bargain applies, and "permissive" subjects, to which no duty applies. Mexican labor law, like Canadian labor law, has no doctrine equivalent to U.S. labor law's concept of "permissive" subjects of bargaining.
>
> Mexican law stipulates a number of subjects that a collective contract must address, such as wage rates, hours of work, rest days and vacation leave. U.S. labor law does not specify any clauses or types of clause that must be included in a collective bargaining agreement.

### (v) Conciliation, Mediation and Arbitration of Bargaining Disputes

*Compulsory First-Contract Resolution*

First-contract arbitration is made available in most jurisdictions. Generally speaking, a key purpose of first-contract arbitration is to prevent an employer from "stonewalling" a new bargaining agent. The underlying rationale of first-contract arbitration is the facilitation of collective bargaining. A new union runs a risk of being decertified by a membership that has not yet determined the union's ability to represent its interests before the employer.

In deciding whether to grant an application for first-contract arbitration, labor relations boards generally consider such factors as: the presence of bad faith or surface bargaining; conduct of an employer which demonstrates a refusal to recognize the union; a party adopting an uncompromising position without reasonable justification; a party failing to make reasonable or expeditious efforts to conclude a collective agreement; unrealistic demands or expectations arising from the intentional

conduct or inexperience of a party; or the existence of bitter and protracted negotiations in which it is unlikely that the parties will be able to reach a settlement by themselves. Some labor boards place much greater emphasis on the presence or absence of actual bad faith bargaining. Others are more likely to grant an application in cases similar to an ordinary impasse in negotiations. In Quebec, the Minister of Labour may assign a first-contract dispute to arbitration upon the request of either party to the dispute. Only Alberta, New Brunswick, Nova Scotia, and Prince Edward Island[10] provide no access to board-imposed settlements in first-contract disputes.

> U.S. and Mexican labor laws make no distinction between first-contract disputes and other contract disputes. Under U.S. law the issue of "good faith" in bargaining, raised in a case concerning unfair labor practices, may be more closely scrutinized by the NLRB and the courts in a first-contract negotiation where the employer strongly resists unionization than in negotiations between a union and an employer with a longstanding bargaining relationship. However, the main remedy available to the NLRB is an order to resume bargaining. Mexican law applies the same rules in a first-contract negotiation as in the revision of an already existing contract. However, a first collective contract may not contain terms less favorable to workers than those contained in their individual employment contracts.

*Conciliation and Mediation*

Canadian labor legislation has traditionally been distinguished by a commitment to government-provided conciliation and mediation services. Conciliation is mandatory as a precondition to striking in Ontario, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland, and the federal jurisdiction. In Alberta no strike may take place until the formal appointment of a mediator. In the other provinces a conciliator or mediator may be appointed at the request of either party or at the discretion of the minister or other competent authority.

[10] Amendments adding first-contract arbitration provisions to the P.E.I. *Labour Act* were assented to on May 19, 1994, but have not yet been proclaimed in force. See Statutes of P.E.I. 1994, c.32 s. 10.

The various Canadian jurisdictions provide a range of conciliation models. Conciliators, special mediators, labor boards, conciliation commissioners, special boards, individual fact-finders, and other actors undertake investigations, inquiries and hearings as part of a mediation or conciliation effort. They normally issue a report and recommendations, usually followed by acceptance, rejection or a vote on such report or recommendations. In turn, these are often followed by "cooling-off" periods and other opportunities for reconsidering each side's position. These steps are all designed to avoid the ultimate conflict of a strike or lockout.

> In the United States, unions may proceed to a strike upon the expiration of a collective bargaining agreement without mandatory mediation or conciliation. The U.S. *National Labor Relations Act* generally limits government intervention to mediation at the request of both parties. The U.S. Federal Mediation and Conciliation Service may enter a dispute only if both parties request it, and the FMCS has no procedural requirements for fact-finding, reporting, recommending, or the like. Only a genuine "national emergency" can provoke stronger government intervention. The *Railway Labor Act*, however, requires mediation before any strike in railroad and airline labor disputes. It also provides for farther-reaching government intervention, even by the President or the Congress of the United States, in these industries.
>
> In Mexico, the parties together may at any time voluntarily request conciliation by the labor authorities, or arbitration by a third party. Conciliation by the relevant CAB is mandatory once a union delivers notice of its intention to strike. In addition, once a union has filed a strike notice with the CAB, it has the choice of submitting the dispute to the CAB for settlement or going forward with the strike.

### (vi) Extension of Agreement Coverage

In Quebec, the terms and conditions of a collective bargaining agreement between the major union and the major employers in specified industrial sectors or occupations are extended by government decree to all employers and employees in that sector, whether or not they are unionized and whether or not they participated in bargaining.[11] Extension of collective agreements does not occur in Canada outside of Quebec.

[11] As of May 1999, 27 decrees were in force.

Extension of collective bargaining agreements does not occur in the United States. Law-contracts which extend negotiated terms of employment to cover an entire sector or region are an important feature of Mexican labor law.

*4) Enforcement of Collective Agreements*

(i) Binding Effect of Collective Agreements

A collective agreement is legally enforceable by either party (the union or the employer). Its terms govern relations between the parties unless they are waived or amended by mutual agreement.

(ii) Enforcement Procedures

The primary means of enforcing collective agreements in Canada is through private arbitration. Labor relations boards will in some cases have jurisdiction to enforce collective agreements. In limited circumstances, collective agreements may be enforced in court by prosecution or by injunction.

*Arbitration*

Collective agreements typically contain a grievance procedure to resolve disputes arising out of the application and operation of the agreement. These grievance procedures usually include a multiple-stage process of discussion between union and employer representatives. The vast majority of grievances are settled privately by the parties through this process. If the parties fail to settle a grievance, however, Canadian laws generally mandate that it be settled through binding arbitration by a neutral third party. Parties typically agree upon an arbitrator, but relevant acts or codes may enable the labor minister, at the request of either party, to appoint an arbitrator or an arbitration board.

The individual employee usually has no standing to personally bring to arbitration a complaint arising out of the collective agreement. Only the union has status to enforce the terms of a collective agreement, unless the agreement specifically grants to individual employees the power to directly seek enforcement of collective agreement rights.

If necessary, arbitral awards can generally be enforced through summary court procedures. The Supreme Court of Canada has held that courts should generally defer to arbitral decisions and set them aside only upon such grounds as bias, fraud, breach of fair procedure, or patent unreasonableness of the decision.

*Labor Relations Boards*

Unions or employers will sometimes deal with alleged breaches of a collective agreement which also involve a breach of the labor relations statute by filing a complaint with the labor relations board. Labor relations boards will often postpone taking action on such complaints until the alleged collective agreement breach has been addressed by an arbitrator. In such cases, the arbitrator's decision generally disposes of the matter. Boards in each jurisdiction have developed their own criteria for deciding when to defer to arbitration. In general, they will not defer a matter where the substance of the complaint goes to the heart of the public policy values embodied in the labor relations statute (e.g., where the case alleges blatant reprisals against employees who supported a newly certified union).

In a minority of jurisdictions, the labor relations board also has a more general power to interpret and enforce collective agreements in certain circumstances, which vary by jurisdiction. For example, in Saskatchewan the Labour Relations Board must hear and determine any dispute referred to it pursuant to an agreement between an employer and a union representing a majority of employees in a bargaining unit.

*Courts*

From a legal standpoint, a breach of a collective agreement is a violation of the labor relations statute, which may be prosecuted in provincial courts as an offence. However, such prosecutions may be undertaken only with the consent of the proper authority (generally the labor relations board or the relevant government minister). Consent to prosecute is seldom granted except in cases of persistent and knowing disregard of the collective agreement.

The Supreme Court of Canada has ruled that courts have the power to issue injunctions to restrain breaches of a collective agreement, except where there is legislation which prevents court actions on a collective

agreement. Injunctions will generally not be granted, however, where an equally effective remedy is available through the arbitration process.

*5) Successor Employers*

Canadian labor law seeks to balance an employer's right to rearrange its business affairs with the need to protect employees from sudden changes in their bargaining rights. When a business or enterprise is sold or transferred, collective bargaining rights flow through changes in ownership so long as there is continuation of the same business. This means among other things that, following the sale or transfer of a business, the employer taking over the business must honor the terms of any collective agreement between a union and the predecessor employer. Where no collective agreement was in force at the time of the sale, the successor employer is required to bargain in good faith with a view to reaching a collective agreement with any union representing employees of the predecessor employer. Generally, a successor employer is also bound by all labor relations law proceedings (such as certification applications) to which its predecessor was bound.

In determining whether a "business" has been transferred, labor relations boards look beyond the legal form of business transactions. Each board has developed its own jurisprudence and legal tests. Generally labor relations boards will consider such matters as whether substantially the same work is being performed in relation to substantially the same goods or services, and whether what was transferred is a functioning organization rather than simply a collection of assets. The test generally does not turn on whether the employees of the predecessor enterprise were hired by the successor employer, though that may be a factor in the determination.

> The laws of Mexico likewise require that the terms and conditions of a collective bargaining agreement carry over to an employer continuing the business of a previous employer. In the U.S. a successor employer has only a duty to bargain with the union, and must do so only if the successor employer hires a majority of the former company's union-represented workers. Otherwise there is no duty to bargain. The collective agreement does not carry over to a successor employer.

*6) Obligations of Unions towards Represented Workers*

Most Canadian labor statutes impose a duty of fair representation on the union. The duty requires unions to represent all bargaining unit members fairly and not engage in arbitrary, discriminatory or bad faith conduct. The acts in Nova Scotia, New Brunswick and Prince Edward Island do not. However, in those jurisdictions a common law duty of fair representation can be enforced through the courts. If a union unfairly refuses to process a grievance, an individual employee may file a complaint or bring a court action against the union (depending on which jurisdiction the employee is in) for an alleged violation of the duty of fair representation.

In a number of jurisdictions the statutory duty of fair representation applies to the union's role in negotiating as well as in administering the collective agreement. However, unions are given wide latitude in collective agreement negotiations and may reach agreements which are more advantageous to some bargaining unit members than to others. At the federal level and in Alberta, Manitoba, Newfoundland and Saskatchewan, the duty applies only to the union's role in administering the collective agreement, that is, its role in deciding how employee complaints that the collective agreement has been violated will be pursued or settled. These five jurisdictions appear to share a concern that labor relations board supervision of collective bargaining for a new agreement would give rise to the danger of the board second-guessing the substantive fairness of the union's demands.

> U.S. law provides for a similar duty of fair representation. The duty requires unions to represent all bargaining unit members without arbitrariness, bad faith, or discrimination. It applies to the union's administration of rights under the collective bargaining agreement and also applies to the negotiation of that agreement. In Mexico, Article 375 of the *Federal Labor Law* requires unions to represent their members in defending their individual rights, unless the individual chooses to act directly and without the assistance of the union.

### *7) Termination of Bargaining Rights*

Canada's labor laws create periodic opportunities during which employees are allowed to change their union representation or to terminate the bargaining rights of their union if it no longer enjoys the support of a majority of bargaining unit members. In the interests of labor relations stability, most jurisdictions have limited the periods within which such termination can take place. Labor legislation typically gives unions a secure period of one year within which to negotiate a first collective agreement. Where a collective agreement is in place, a union may in general be decertified only during specified open periods, typically within two months of the expiry of the collective agreement. Labor relations boards will take steps to ensure that, if workers signify that they no longer wish to be represented by a union, they have done so voluntarily and without employer interference.

> The U.S. *National Labor Relations Act* provides for similar methods of decertifying or changing the bargaining representative. Under Mexican labor law any duly registered union may challenge another union's title to a collective contract at any time by filing a claim to that title with the relevant CAB. If an incumbent union does not prove its majority support during such proceeding, it will lose title to the collective contract and thus lose the right to administer and negotiate revisions to it.

## C. Labor Principle 3 – The Right to Strike

### *1) Legal Foundations*

As noted above (see Legal Sources of Labor Rights, section 1C), the right to strike, although necessary to the pursuit of the objectives of a labor organization, is not constitutionally protected in Canada.

No express right to strike exists at common law in Canada. In general, Canadian law followed British rulings, and strikes were outlawed well into the 19th century as an illegal restraint of trade. Worker protests and shifts in public sentiment gradually led to laws legalizing trade union activity. Following a bitter strike by Toronto typographical workers in

1872, the federal government passed the *Act to Amend the Criminal Law* that decriminalized strikes and peaceful picketing.

Throughout the late 19th and early 20th centuries, the federal government and the provinces continued to develop new laws to channel industrial conflict toward peaceful solutions, most notably the 1907 federal *Industrial Disputes Investigation Act.* These laws shaped the first governmental conciliation and mediation machinery and created a general premise of legitimacy for workers' right to strike.

With a confluence of pressures that included the need for wartime production, continued worker mobilizations for trade union rights, and the example of the U.S. Wagner Act, Canada and its provinces moved on new legislation in the 1940s that adopted collective bargaining as national policy and recognized the right to strike as an essential element of this policy.

Strikes are treated as "lawful union activities" and are thus protected by provincial and federal labor laws when undertaken in compliance with procedural requirements. Discrimination against workers for exercising the right to strike is an unfair labor practice.

Canadian labor law seeks to balance the rights of workers against efficiency concerns and the rights of employers to manage their business. Though the core right of workers to strike for a new collective agreement after a previous agreement has expired is generally protected for private sector workers under Canadian labor laws, the right to strike is nonetheless restricted by various legal provisions designed to limit the disruptive effects of work stoppages.

### *2) Protected Strike Activity*

Canadian labor laws employ a broad definition of the term "strike," which typically includes most concerted refusals, cessations or slowdowns of work and other concerted activities designed to restrict or limit output. Since lawful strike activity is restricted to certain times in the collective bargaining cycle, disputes over whether specific actions constitute a strike generally arise when a labor board (the Labour Court in Quebec) is asked to determine whether those actions constitute a strike during the term of a collective agreement and are therefore unlawful (see

Regulation of the Right to Strike, below). However, if undertaken at times when strikes are legally permitted, work slowdowns, work-to-rule campaigns, and similar measures are fully protected as lawful strike activity (except in Quebec).

> The U.S. *National Labor Relations Act* does not include partial or intermittent strikes or work slowdowns within the concerted activities that it protects. Mexican labor law defines protected strike activity as "the mere act of suspending work," and thus would not protect work slowdowns. However, both U.S. and Mexican labor laws allow workers and unions to strike for purposes other than the settlement of collective agreement bargaining disputes, in contrast to Canadian labor laws.

*3) Regulation of the Right to Strike*

(i) No-Strike Clauses

A statutory prohibition on strikes during the term of a collective agreement, which prevails in all Canadian jurisdictions, cannot be altered by negotiations between the parties. No strike or lockout is permitted while a collective agreement is in effect. All disputes that arise during the term of an agreement are subject to the dispute resolution procedures of the agreement. Labor relations statutes provide for mandatory independent arbitration of such disputes, which is normally seen as the *quid pro quo* for removing the right to strike during the life of the collective agreement (see Scope of Bargaining and Contents of Agreement, in section 2B.3, above).

> While no-strike clauses are contained in most collective bargaining agreements in the United States, they are a matter for negotiation and are not required by law. Some unions and employers retain the right to strike or lockout over unresolved grievances during the term of an agreement. Under Mexican law, there is no prohibition on strikes during the term of a collective contract, though by custom Mexican unions generally restrict industrial action to the time each year when their wage terms are up for renewal, or every two years when nonwage contract issues are negotiated.

(ii) Compulsory Conciliation

As discussed above (see Conciliation, Mediation and Arbitration of Bargaining Disputes, section 2B.3), conciliation or mediation is a mandatory precondition to striking in the majority of Canadian jurisdictions.

(iii) Unlawful Strikes

A strike may be lawful or unlawful. Strikes are lawful only for the purpose of seeking to conclude a collective agreement and only after statutory procedural requirements have been met. Workers are prohibited under Canadian federal and provincial labor laws from striking for union recognition. Secondary strikes (see Picketing and Other Supportive Action, section 2C.4, below) are generally treated as unlawful by the Canadian labor boards and courts.

Canadian law generally prohibits a union from calling, counseling, supporting, or encouraging an unlawful strike or threatening any of those. Labor relations boards can issue a variety of remedial orders against unions and employees participating in an unlawful strike. Many labor boards in Canada have been given the power to issue cease and desist orders which can have the same effect as an injunction if they are registered in the appropriate superior court.

Employers may also proceed against employees engaging in an unlawful strike in the common law courts and by arbitration. Common law courts have retained power to issue an injunction against unlawful strikes and strikers, ordering an end to the unlawful activity in question. But courts will generally not award damages in the case of an unlawful strike, requiring the employer to pursue damages before an arbitrator. Such claims for damages may be based on the no-strike clause of the collective agreement.

Unions may also be liable for damages for breach of the collective agreement or of the labor relations statute. Workers do not cease to be employees by participating in an unlawful strike. Nonetheless, they may be subject to discipline, up to and including dismissal, in accordance with the terms of a collective agreement.

> Canada's no-strike policy contrasts with U.S. and Mexican law. In the United States, workers may strike for union recognition, but the union must petition for a certification election within 30 days. In Mexico, union recognition does not assume the same importance. Workers have the right to form a union and to strike to obtain a collective bargaining agreement. As long as the union formation and the strike are carried out in accordance with legal requirements, there is no need for recognition of majority support in the U.S. or Canadian sense.

(iv) Essential Services

Some Canadian jurisdictions make special provision for advance notice of a strike and maintenance of essential services where a strike affects the public interest. Generally, "essential services" exceptions to the right to strike are limited to work the interruption of which poses a danger to public safety and health. For example, in the federal sector, striking workers must continue work to the extent necessary to prevent an "immediate and serious danger" to the safety or health of the public.

> Mexican labor law requires longer advance notice of strikes in public service sectors and requires that transportation workers and health care workers complete certain tasks before joining a strike. U.S. law makes no provision for essential services or equipment maintenance during a strike, except for a 10-day notice of any strike in a health care facility. U.S. unions and companies may negotiate over equipment maintenance or other safeguards during a strike, but have no statutory obligation to do so.

(v) Back-to-Work Legislation

On occasion, Canadian governments have enacted *ad hoc* back-to-work legislation in order to bring an end to otherwise lawful strikes, generally in economically important enterprises. For example, the government of Canada passed back-to-work legislation in the federal jurisdiction 30 times between 1950 and 1999 in order to end work stoppages such as railway, postal service, port operations, shipping and grain handling

strikes.[12] Back-to-work legislation typically threatens workers who continue to strike with substantial fines and often requires mandatory arbitration of outstanding contract negotiation disputes.

(vi) Strike Votes

All Canadian labor relations statutes require a secret ballot strike vote (usually by all workers represented in the bargaining unit, whether or not they are union members) before a strike may occur. In some cases, a majority of the bargaining unit must vote in favor of the strike; in most cases a majority of those voting is required.

Most Canadian jurisdictions also empower the labor relations board or the labor minister to require that the employer's last contract offer be put to a vote of the union's members before a strike may begin or, in some cases, after a strike has begun. An employer in Alberta, British Columbia, New Brunswick, Manitoba or Ontario may apply to the relevant public authority for a vote on its last offer.

In some cases, the union is allowed to conduct these votes through its own internal procedures, subject to challenge by union members if the vote is conducted in violation of secret ballot, eligibility and other requirements. In other cases, the relevant labor board oversees the voting process.

> Canada's mandatory strike votes or last-offer votes contrast with U.S. labor law regarding strikes. No U.S. law requires a strike vote or a last-offer vote by workers before taking strike action or after a strike has begun. As a matter of democratic practice, however, most U.S. unions' constitutions and bylaws require a strike vote, sometimes with a two-thirds majority needed to launch a strike. The government has no role in overseeing such a vote. In Mexico, once a strike has started, employers, workers, or interested third parties may request that the CAB certify the legal existence of the strike. This requires the CAB to determine, among other things, whether a majority of workers support the strike, for which purpose a strike vote of workers (called a *recuento*) may be held in order to determine whether the strike enjoys majority support. If the strike does not enjoy majority support it will be declared "nonexistent," and work must be resumed.

[12] Source: Workplace Information Directorate, Human Resources Development Canada.

*4) Picketing and Other Supportive Action*

(i) Picketing

The Supreme Court of Canada has ruled that peaceful picketing designed to communicate information is lawful[13] and that, as a means of free expression, it also carries a measure of constitutional protection.[14] In most jurisdictions, picketing is not directly regulated by the labor relations act or code. It may, however, give rise to civil law suits for trespass, nuisance (generally defined as "substantial and unreasonable interference with an occupier's interest in the beneficial use of his or her land"), or wrongful interference with economic relations. Such lawsuits are brought in court rather than before the labor relations board. The party bringing the action will usually seek an injunction restraining further picketing, along with compensation for economic losses suffered as a result of the picketing. Claims for such compensation are seldom pursued once an injunction has been issued. Many commentators have noted that in such cases courts have often avoided both the spirit and the letter of the Supreme Court's ruling declaring peaceful informational picketing to be legal.

In addition to regulating picketing of an employer whose employees are on strike, the courts have generally held that secondary picketing, which is directed at a neutral third party to the labor dispute, is not legal. The labor relations statutes of Alberta, New Brunswick and British Columbia specifically prohibit secondary picketing. In Ontario, the Labour Relations Board may issue a cease and desist order against such secondary picketing where it finds that such picketing causes or is intended to cause an unlawful strike or lockout. In British Columbia, the Labour Relations Board has exclusive jurisdiction to regulate primary and secondary picketing, except in cases of immediate danger of serious physical injury or actual obstruction or physical damage to property.

In some jurisdictions the prohibition on secondary picketing covers not only picketing *per se*, but also distributing leaflets or handbills to workers or customers at secondary locations. In other jurisdictions

[13] *Williams v. Aristocratic Restaurants* (1947) Ltd., [1951] 3 D.L.R. 769 (S.C.C.).
[14] *RWDSU Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573.

leafletting at the site of a secondary employer for the purposes of persuading customers not to purchase the products of the primary employer may be permissible so long as it does not prevent the employees of the secondary employer from working or interfere with other contractual relations of the secondary employer. The dividing line between prohibited secondary picketing and expressive activity protected by the *Charter of Rights and Freedoms* has not been fully clarified through case law. However, at least one provincial court has stated that expressive activities such as press releases, letters to affected third parties, television or newspaper advertisements, or leaflets distributed at support rallies or left on cars in mall parking lots would not be prohibited as secondary picketing.[15]

> Canadian laws regarding picketing are generally similar to those of the United States. The picketing issue does not arise in the same way in Mexico, where companies are required to totally close operations during a lawful strike, except for necessary equipment maintenance or conservation of raw materials, which are the responsibility of the striking union.

(ii) Secondary Strike Action

Canadian labor laws do not specifically prohibit (as in the United States) or permit (as in Mexico) a secondary strike by a union at a supplier or customer of a company whose workers are engaged in a primary strike. However, since only a strike by a certified union seeking a new collective bargaining agreement is lawful, secondary strikes are generally found to be unlawful by Canadian labor boards and courts.

*5) Limits on Striker Replacement*

The issue of striker replacement is debated in Canada as passionately as in the United States, but the locus of the debate is different. No Canadian jurisdiction allows the permanent replacement of strikers, as is per-

[15] *United Food and Commercial Workers, local 1518 v. K Mart Canada Ltd.* (1995), 96 C.L.L.C. 210-007 (British Columbia Supreme Court).

mitted in the United States. In some provinces and in the federal jurisdiction, there is a specific statutory prohibition on permanent replacement or a specific guarantee of the right of a striking worker to return to his or her job at the conclusion of a strike if the job still exists. In other provinces, and in the federal sector, the labor boards have found permanent replacement to be a reprisal against workers for the exercise of a lawful right and thus an unfair labor practice. Moreover, the use of replacements for the purpose of destroying the union's representative capacity is in general considered an unfair labor practice and is specifically prohibited in the federal jurisdiction.

In 1977 Quebec became the first Canadian jurisdiction to adopt an "anti-scab" law prohibiting even temporary replacement workers in a strike. The prohibition reaches not only new employees, but also the use of employees from the striking bargaining unit who would be willing to cross the picket line to return to work and other employees, managers or supervisors from other plants of the same employer. Only managers and supervisors employed at the struck facility before the outset of negotiations may be used to perform the work of striking employees.

Quebec has established additional specialized institutional measures to deal with strikes. The Minister of Labour may name an examiner to verify whether the employer complies with the prohibitions on use of replacement workers. The special examiner has wide powers of investigation, including the ability to inspect the workplace accompanied by union and management representatives. At the end of the strike, the failure to recall an employee may be the subject of mandatory arbitration.

British Columbia is another Canadian province that sharply curtails the use of replacement workers during a strike. Its policy differs from that of Quebec only to the extent that it permits members of the bargaining unit to cross picket lines to perform work. As in Quebec, however, the employer is prohibited from engaging temporary replacement workers.

Ontario had a similar anti-scab law from 1993-1995, but it was repealed after a change of provincial government, which reverted to the previous law permitting the employment of new (but temporary) hires and use of other company managers or supervisors to perform the work of striking employees.

**Box 2.3**

**Canada's Federal Task Force Addresses Striker Replacement**

The federal government's 1996 special task force to review the *Canada Labour Code* devoted much of its work to the question of striker replacements. It concluded its review with a recommendation that there should be no general prohibition on the use of temporary replacement workers, but that where the use of replacement workers in a dispute is demonstrated to be for the purpose of undermining the union's representative capacity rather than the pursuit of legitimate bargaining objectives, this should be declared an unfair labor practice and the CIRB should be given the specific remedial power to prohibit the further use of replacement workers in the dispute. A minority report argued that the use of replacements inherently undermines the union and should be prohibited outright. The majority report formed the basis for recent amendments to the *Canada Labour Code*.[16] The amendments reaffirm the right of employees who are on strike or locked out to resume employment in preference to replacement workers.

Mexican law requires a company to cease operations during a strike, except as necessary to maintain equipment and preserve raw materials, tasks which are performed by the members of the unions on strike, which is responsible for the installations of the company during the strike. By contrast, U.S. labor law permits the permanent replacement of striking employees, except where the strike is undertaken in protest against employer unfair labor practices.

## D. PROTECTIONS AGAINST INTERFERENCE

### *1) Prohibition of Employer Unfair Labor Practices*

The various federal and provincial labor relations statutes protect the right of private sector employees in Canada to associate, organize a

[16] Bill C-19, *An Act to Amend the Canada Labour Code (Part1) and the Corporations and Labor Unions Returns Act and to Make Consequential Amendments to other Acts*, First Session 36th Parl., 1997-1998 (assented to June 18, 1998).

union of their choice, bargain collectively and strike by defining and prohibiting various unfair labor practices. While the wording of these prohibitions varies from jurisdiction to jurisdiction, each statute includes general prohibitions of the following:

(1) Intimidation, coercion, threats, promises or other forms of interference with workers' exercise of labor rights.

Employer actions found to have breached these prohibitions include: payment by the employer of the legal costs incurred by employees in petitioning for decertification; interrogation of employees about their voting intentions in a certification election; surveillance of union activities by spies; prevention of employees from distributing prounion literature and soliciting support for a union on the employer's premises during nonworking hours and outside of work areas; attempting to influence or dictate who may act as a union official.

All Canadian jurisdictions prohibit employer coercion or intimidation in communications related to union organization or activities. Labor relations boards have applied this prohibition relatively stringently. While factual statements or comments about an employer's ability to remain competitive or about the issue of job security may not in themselves constitute illegal communications, Canadian labor relations boards have tended to view employer references to job security in the context of a certification campaign with suspicion. In one important case, the Ontario board stated its concerns as follows:

> Views which equate membership or nonmembership in a union to continued job security, cease to be mere personal views and may become intimidatory or coercive if the person expressing them is perceived to be seized of special knowledge, or position, such that raises the statement from a matter of opinion to one of probable fact.[17]

[17] *Somerville Belkin Industries Ltd.*, [1981] 1 Can. L.R.B.R. 100, at p. 109.

**Box 2.4**

**Balancing Employee Freedom of Association and Employer Free Speech: A Decision of the British Columbia Labour Relations Board**

In October 1996 the British Columbia Labour Relations Board issued an important decision clarifying the scope of lawful communication by employers to employees during union organizing drives.[18] The decision reconsidered two cases, one arising out of an organizing drive at a bus transportation company, the other out of a unionization drive at an automobile dealership. The board reconsidered the two cases because the initial decisions in those cases had arrived at different interpretations of then-recent amendments to the B.C. *Labour Relations Code.*

In the bus company case, a supervisor had made a series of statements to workers, including the following: the attempt to organize was silly because the employer could easily close its operations and move them to another location; the owner of the company would not let unionization happen. The owner himself issued a bulletin to all employees, which included the following statement: "Will Union Membership Guarantee Me Job Security? No. No one can guarantee you job security. Security depends solely upon how well you do your job and how successful our business is."

In the car dealership case the employer convened a series of mandatory meetings of employees. (Such meetings are commonly referred to as "captive audience" meetings.) Over the course of these meetings the owner made a number of statements that directly or indirectly pointed out the economic dependence of his employees and subtly suggested that supporting a union would be disloyal to him. In particular, he said that he was wealthy at a young age and could have retired but instead chose to start the car dealership; in the first year and a half of the dealership he had lost a significant amount of money but had never bounced a pay check; now that he was making money some employees may hold his wealthy lifestyle against him. He reviewed the terms of a collective agreement at a competitor dealership, asked all employees to vote, and said that they should vote their conscience. At one of the meetings a labor relations consultant hired by the employer also spoke. The consultant stated that the employer wanted to "keep its relationship with its employees" and

[18] *Re Cardinal Transportation B.C. Inc.* (1996), 34 C.L.R.B.R. (2d) 1.

ensure that "walls did not develop between employees and management." During the course of the union's membership drive a manager also told an employee that a union would not make a difference in wage rates and that union dues would take up any difference in pay.

The B.C. Labour Relations Board ruled that employer free speech, including speech expressly protected by the *Labour Relations Code*, must be understood as limited by the prohibitions on coercion set out in the Code's unfair labor practice sections. The board examined the nature of employer coercion in the context of union organizing campaigns. It reviewed its own experience, the law in other Canadian jurisdictions, the legislative history of the current B.C. provisions, and some evidence concerning experience with union certification votes in the United States. The board said the following about its general approach to the balance between employee freedom of association and employer free speech:

> Underlying the public policy of protecting employees at the initial stage of the collective bargaining process, is the recognition of the economic dependence and vulnerability of employees to their employer…
>
> Captive audience meetings will continue to be given a strict level of scrutiny. Statements that would otherwise be permissible may, in the context of a captive audience meeting, be impermissible. This is especially true in the areas of the economic dependence of employees and union membership requirements.
>
> The longstanding policy of this board and other labour boards in Canada is that an employer is not entitled to engage in an antiunion political-style campaign in an effort to prevent the union from certifying. The greatest point of resistance by employers to trade unions is at the initial point of employees attempting to exercise their statutory choice in favour of collective bargaining. A statutory choice has been made to restrict employer speech at this point in favour of ensuring employees' freedom of association. An employer's vigorous presentation of its antiunion views may be reasonably perceived by most employees as one that it is not "safe to thwart." The [United States] experience seems to verify this.[19]

[19] *Ibid*., at pp. 43 and 57.

In the bus company case the board decided that the supervisor's statements constituted an unfair labor practice and that in the context of those statements the references in the owner's bulletin to job security also constituted an unfair labor practice.

In the car dealership case the board found that the statements by the labor relations consultant and the manager were unfair labor practices. The board also said that in the context of those statements and of the captive audience meetings the owner's statements provided a basis for additional unfair labor practice findings.

Canadian labor law regulates employer conduct in union organizing campaigns in a much stricter fashion than U.S. law covering most private sector employers. Under the employer "free speech" provision of the U.S. Taft-Hartley amendments to the *National Labor Relations Act*, employers have been allowed to aggressively campaign against union organization. In one U.S. case, for example, the employer guaranteed that if the union came in he would be out of business within a year and said, "The cancer will eat us up and we will fall by the wayside … I only know from my mind, from my pocketbook how I stand on this." This statement was found unlawful by the National Labor Relations Board, but the NLRB was overruled by the U.S. Court of Appeals, which held that the statement was "consistent with respectable economic theory."[20] In contrast, under the *Railway Labor Act*, covering the rail and airline industries, the National Mediation Board constrains employers to a more limited role in election campaigns than that of unions and more closely regulates employer behavior and statements during such campaigns (see Appendix 4A).

(2) Any form of discrimination or reprisal against workers for exercising their right to organize, or for pursuing legal recourse to enforce this right.

Canadian labor relations boards generally prohibit employers from acting, even in part, on the basis of antiunion motives, regardless of the presence of valid business justifications for their actions. Examples of

[20] See *NLRB v. Village IX, Inc.*, 723 F.2d. 1360 (7th Cir.1983), at 1367.

employer actions found to violate the prohibition on antiunion discrimination include: disciplining union officials who criticize the employer during the course of a labor dispute (this does not protect malicious or knowingly false statements); relocating, transferring or closing operations, in whole or in part, for reasons which include a desire to avoid a union or unionization; and changing terms and conditions of employment or otherwise threatening or penalizing employees for union activity.

> Under the U.S. *National Labor Relations Act*, an employer's antiunion motivation must be a substantial or motivating factor behind an action before that action will be found to be discriminatory.

(3) Any employer support for or domination of a trade union.

Canadian labor law seeks to ensure the independence of unions. It is an unfair labor practice for an employer to support a union financially, to favor one union over another, or to exert control over the internal operations of a union. Organizations which receive the overt or tacit support or approval of an employer cannot be certified (see Acquisition of Bargaining Rights, section 2B.2, above). Nor can they become party to a collective agreement.

(4) Changes to terms and conditions of employment during the period following an application for certification or delivery to the employer of notice to bargain.

In all Canadian jurisdictions, the labor relations statute provides additional protection at these two critical junctures by imposing a temporary "statutory freeze" on terms and conditions of employment. The freeze does not require that all conditions of work remain frozen, but rather that the employer carry on business as before, that is, without changing terms and conditions of work that would not have been subject to change in the normal course of business. The main purpose of the freeze is to provide stability during the sensitive period while the union is seeking certification or to negotiate or renegotiate a collective agreement. In the case of a certification application, the statutory freeze lasts until the

union is certified as exclusive bargaining agent or its application for certification is dismissed. In the case of collective bargaining, the freeze lasts in general until the parties either reach a collective agreement or reach a legal strike or lockout position following good faith bargaining. Finally, the duty to bargain includes implied prohibitions against certain actions by employers which interfere with the ability of a union to represent bargaining unit members (see Obligation to Bargain, in section 2B.3, above).

*2) Prohibition of Union Unfair Labor Practices*

Unions, like employers, are prohibited from using coercion or intimidation to influence the decision of an employee to become or not to become a union member, to become a member of another union, or to exercise other rights of free association. While all jurisdictions permit clauses in collective bargaining agreements which require union membership as a condition of employment (see Union Membership and Dues, section 2A.6, above), labor relations acts and codes generally prohibit unfair use of such clauses by providing that an employee who is expelled from a union may not be dismissed in certain circumstances. While the wording of each statute varies, in general an employee cannot be dismissed, notwithstanding that he or she has been expelled from a union which is party to a union shop agreement, if his or her expulsion is related to: (1) participation in the affairs of another union; (2) a refusal to pay unreasonable dues assessments; (3) participation in a labor law proceeding; or (4) the exercise of other rights granted to employees under the labor relations statute. This protection is generally not extended to employees who are expelled for strikebreaking by returning to work over the objection of fellow workers and the union. Labor relations statutes generally require that a disciplinary decision to expel a member not be discriminatory.

*3) Civil Rights and Protection*

Without civil and political rights there can be no normal exercise of

trade union rights. The Canadian *Charter of Rights and Freedoms* provides certain fundamental guarantees to Canadians. Like other Canadian residents, unions and union members enjoy constitutional protection of their freedom of assembly, provided that the exercise of this freedom does not pose a significant danger of substantial harm to property or physical safety. Unionists have the freedom to travel within and outside the country that is granted to all residents and have the right to attend national and international trade union meetings with full freedom and independence. Similarly, unions and employees have the constitutional right to express their views and opinions publicly and to receive and impart information through any media, like other Canadian residents.

Unions and employees engaged in union activity, like all Canadian residents, have in general a constitutional right to be free from search and seizure of their property without a judicial warrant issued following a determination that reasonable and probable cause exists to believe that evidence for criminal proceedings will be found on the premises. Similarly, unionists enjoy constitutional freedom from arbitrary arrest or detention without a warrant and without charges being brought. Unions and their members are entitled to full protection of the criminal laws which prohibit physical assaults and damage to property and to the same police protection from such harms as other Canadian residents.

## 3. GOVERNMENT ENFORCEMENT

### A. Structure and Functioning of Canadian Labor Relations Boards

Canada's labor relations statutes each establish a labor relations tribunal, generally referred to as a Labour Relations Board (in Quebec, the Office of the Labour Commissioner General) to interpret and administer the law (see Legal Sources of Labor Rights, section 1C, above, for a list of the relevant tribunals). Some provinces maintain separate labor boards for private and public employees; however, most maintain a single board

for both private and public sector labor relations in order to minimize administrative costs.

Enforcement is generally complaint-driven. Upon an alleged breach of a labor relations statute, the aggrieved party may file a complaint with the board. Most boards have labor relations officers or investigation officers who investigate and attempt to settle cases prior to hearings. If settlement efforts are unsuccessful, the board holds a single set of hearings and issues a final decision. The board's decision is generally not appealable to the courts. Most boards will reconsider such decisions only in unusual cases. Board orders can be enforced through government police powers upon their being filed in the appropriate superior court. Property may be seized to satisfy court orders, and refusal to comply with a court order can be sanctioned through prosecution for contempt of court, an offence punishable by fine or even imprisonment.

Labor relations statutes can also be enforced through prosecution and the imposition of penal sanctions, though such procedures are generally reserved for cases of apparently flagrant and deliberate violations of the law and generally require the prior consent of either the labor relations board or the minister of labor. The boards do not prosecute; rather, charges must be laid by interested parties, or in some cases by the minister of labor or an inspector appointed by the minister.

> The U.S. National Labor Relations Board's procedures are less streamlined than those of Canadian labor relations tribunals. The U.S. NLRB's enforcement procedures can involve several steps: the filing and investigation of a complaint; the issuance of charges or dismissal of the complaint; hearings before an administrative law judge; appeal to the National Labor Relations Board; and court proceedings for enforcement or appeal of the NLRB's order. Like Canada's labor relations tribunals, Mexico's Conciliation and Arbitration Boards are structured to process cases in a single administrative proceeding. The orders of Mexico's CABs are judicial orders which are immediately enforceable without further proceedings.

## B. Examples of Canadian Labor Relations Boards

### *1) The Alberta Labour Relations Board*

The Alberta Labour Relations Board is an independent, tripartite agency established to oversee three labor relations statutes, including the *Alberta Labour Relations Code*. The board adjudicates disputes under the Code and processes applications for certification, supervising representation votes and determining bargaining units appropriate for certification. An order of the board may be filed with the Alberta courts and enforced as a court order.

The board comprises a chair, four vice-chairs, and 25 part-time board members. Board members are appointed by the Alberta government for their experience and knowledge of labor relations, giving equal representation to labor and management. The board has a staff of 26 employees, including the chair and vice-chairs. The staff includes labor relations officers who investigate and assist the parties in reaching voluntary settlements of disputes brought to the board. In addition, the board uses the services of 25 deputy returning officers located throughout the province, each assisted by several polling clerks, in an effort to expeditiously conduct votes in response to applications for certification anywhere in the province.

In addition to making legal determinations, the board makes available a number of publications under its statutory mandate to educate the labor relations community and the public of their statutory rights and obligations. These include information bulletins outlining the board's policies and procedures and its *Guide to the Labour Relations Code.* The board also has a site on the World Wide Web, which contains board member and staff profiles, rules, information bulletins, recent decisions and other publications.

### *2) The Manitoba Labour Board*

The Manitoba Labour Board is an independent and autonomous quasi-judicial body responsible for adjudicating and administering applications made to it under the *Labour Relations Act* and other legislation.

The board conducts hearings throughout the province and often travels to rural centers for that purpose. An order of the board can be filed with the Manitoba courts and enforced directly as a court order. The board also provides information to the labor relations community to assist it with the collective bargaining process and in making applications to the board.

The board comprises a full-time chairperson, three part-time vice-chairpersons, and 24 board members. There is equal representation of labor and management views. The board employs a staff to provide field services and administrative support services. The field services section includes labor relations officers who investigate the factual basis of applications to the board by gathering documents and other evidence relevant to the case and endeavoring to identify all of the major issues involved. In addition, labor relations officers often assist the parties to reach a settlement of disputes.

The board maintains a small library of texts and journals dealing with industrial relations and labor law. Since 1985, all arbitration awards and collective agreements must be filed with the board. Copies of these may be viewed at the board's office. The board also produces a number of publications including a summary of all arbitration awards rendered in the province and filed with the board during the calendar year, a *Guide to the Labour Relations Act*, an index of written reasons for decisions issued by the board, and information bulletins dealing with the board's practice and procedure.

### *3) The Ontario Labour Relations Board*

The Ontario Labour Relations Board is the primary provincial agency for enforcement of rights to organize, to bargain collectively and to strike in Canada's most populous province. The board mediates and adjudicates a wide variety of labor relations disputes under a number of employment statutes.

Statutorily independent of the Labour Ministry, the OLRB is composed of a chairperson, an alternate chairperson, 15 vice-chairs, and 10 board members – five each of employer and employee representatives. Many serve part-time, maintaining separate employment. The chair, al-

ternate chair, and vice-chairs have usually been experienced lawyers respected by both management and labor.

The board employs 20 labor relations officers as its full-time staff. Upon receipt of a complaint of an alleged contravention of the *Ontario Labour Relations Act*, the board will appoint a staff officer to investigate the complaint and report to the board. In practice, officers are trained to encourage the parties to settle the matter and avoid further legal proceedings. More than three-quarters of cases are resolved without the need for a hearing. For cases that do not settle, a three-member *ad hoc* panel hears the case following the investigation. Where a three-member panel is established, the chair appoints one representative each from employer and employee members of the board, as well as a vice-chair to preside over the panel.

If the board finds that there has been a contravention of the Act and the infringing party fails to comply with the board's remedial order, the order may be filed in the Ontario Court (General Division), whereupon it is immediately enforceable as an order of the court. Failure to comply is then treated as contempt of court, and the public authority may incarcerate the violator and seize assets to satisfy a judgment.

### *4) The Quebec Commissioners and the Labour Court*

While the *Quebec Labour Code* is like other Canadian labor relations laws in the way it defines and prohibits unfair labor practices, labor law enforcement is structured differently. Quebec does not have a labor relations board with comprehensive jurisdiction over labor relations matters. Rather, Quebec's enforcement is carried out through two separate agencies: the Office of the Labour Commissioner General, which makes determinations and issues restorative remedies, and the Quebec Labour Court, where appeals and penal remedies are sought.

#### (i) The Office of the Labour Commissioner General

The Office of the Labour Commissioner General is a bureau of the Quebec Ministry of Labour. The office is composed of the Labour Commissioner General, an Assistant Labour Commissioner General,

labor commissioners, and certification agents who variously determine appropriate bargaining units and investigate allegations of unfair labor practices. It is the task of the individual labor commissioner, vested with all the powers and privileges of investigation accorded public inquiry commissions, to receive evidence and rule on the conformity of the employer's conduct with the *Labour Code*. A commissioner is empowered to order an employer to cease and desist from unlawful conduct and to reinstate with full back pay an employee who has been discharged on the basis, in whole or in part, of anti-union motives. The decisions of labor commissioners may be appealed to the Labour Court.

(ii) The Labour Court

The Labour Court is composed of judges chosen from the Court of Quebec after consultation with the General Counsel of the Quebec Bar and the Consultative Labour and Employment Council, a labor-management advisory body created by law.

As part of the judiciary, the court hears appeals from final decisions of a labor commissioner and can affirm, amend, or substitute its own decision for any commissioner's decision. The court's decision is final. The Labour Court also has exclusive competence to decide whether to impose penal sanctions for violation of the *Labour Code*. Except in a case where the procedures of the Labour Court offend the rules of natural justice or jurisdictional limits, its decisions are final and binding, with the same obligatory effect as a decision of the Superior Court. As with any such decision, noncompliance can be addressed through contempt of court proceedings.

## 4. RIGHTS OF PRIVATE ACTION

### A. Access to Administrative Tribunals

Private parties have access to administrative, quasi-judicial or labor tribunals by filing unfair labor practice charges, applications for certifica-

tion to obtain collective bargaining rights, or other legal orders with the relevant labor boards or, in Quebec, with the Office of the Labour Commissioner General. Individual workers, trade unions or employers who claim that their rights have been infringed may file charges directly. For example, an individual worker may bring charges against a union under the law's duty of fair representation provision. The labor boards and commissioners are empowered to investigate complaints, to hear the parties with respect to the dispute, and to direct a remedy. The parties are responsible for their legal representation and costs.

> In the United States, following a preliminary investigation of charges a complaint may be issued, and at that point the Office of the General Counsel of the NLRB prosecutes the case on behalf of the charging party (worker, union or employer). The board attorney effectively serves as the charging party's counsel in proceedings before an administrative law judge and in any appeal to the full board or the courts. Mexico maintains an Office of the Labor Public Defender, which provides free legal representation and advice to workers bringing complaints before a CAB.

## B. Access to Courts

The various Canadian labor authorities normally have exclusive jurisdiction to exercise the powers conferred by the appropriate labor acts or codes and to determine all questions of fact or law in labor relations cases. Disputes arising out of the rights and privileges stipulated in labor relations statutes are almost completely barred from adjudication by the general divisions of the courts. Decisions by Canada's labor boards are generally final and may not be appealed to the courts. However, they may be subject to judicial review on constitutional or administrative law grounds (see Appeals and Judicial Review, section 5B, below). In cases of flagrant and deliberate violation of the law, private parties may seek to initiate a prosecution to impose penal sanctions (see Structure and Functioning of Canadian Labor Relations Boards, section 3A, above).

# 5. PROCEDURAL GUARANTEES AND REMEDIES TO ENSURE ENFORCEMENT

## A. Due Process

Constitutional and administrative law and statutory rules of due process apply in labor law proceedings in all Canadian jurisdictions.

Canadian administrative law is a body of law which, among other things, provides a set of procedural due process protections that apply to actions by administrative tribunals, such as labor relations boards, which affect a party's legal rights or interests. Those due process protections are generally referred to as rules of procedural fairness or natural justice. The rules of natural justice or fairness are divided into two parts. The first is the duty to give a person affected by a decision a reasonable opportunity to present his or her case. The second is the duty to listen fairly to both sides and reach a decision free of bias.

### *1) Procedural Protections*

Notice of legal proceedings must be afforded to a party with interests affected by the proceedings. Parties have a right to present evidence and arguments in support of their positions, either orally or in writing. Parties also have the right to know and respond to the evidence and arguments of other parties. Parties to disputes are typically represented by counsel.

Labor relations boards are empowered to use subpoenas to secure evidence and testimony in a case. In most unfair labor practice cases and many certification cases, parties have the right to a full hearing of evidence with examination and cross-examination of witnesses, particularly where they do not agree on the facts giving rise to the case and the tribunal must determine whose evidence is more credible.

Hearings are open to the public. Board, commissioner or tribunal decisions are issued in writing and made public. Decisions generally set out the reasons for conclusions reached, citing relevant facts and analysis of the relevant law and its application to the facts. One provincial court

ofappeals has ruled that the failure of a labor relations board to give reasons for its decision when that decision resolves "substantial issues" is a breach of natural justice.[21]

In all Canadian jurisdictions, witnesses in any hearing under labor relations acts or codes are protected from dismissal, threat of dismissal, discrimination, intimidation, coercion, or any other form of reprisal by the employer and from discrimination, intimidation or coercion by the union for giving evidence at such hearing.

The federal government and British Columbia, Manitoba, Ontario, Quebec, and Prince Edward Island have adopted legislation placing the onus of proof on the employer to disprove some or all types of allegation of unfair labor practice. In Nova Scotia the employer bears the burden of proof in cases where the complainant establishes that it is reasonable to believe that there may have been a failure by the employer to comply with the prohibition on antiunion discrimination. The other Canadian jurisdictions retain the common law principle of placing the burden of proof on the party alleging an unfair labor practice.

> In the United States, the burden is upon the charging party and the NLRB's general counsel to make a *prima facie* case of an unfair labor practice, whereupon the burden shifts to the employer. Under Mexican labor law, the burden of proof in cases involving freedom of association and the right to organize rests with the employer. That is, the employer must prove that any discharge or other adverse action against an employee meets one of the statutorily defined "just cause" definitions.

### *2) Independence and Impartiality of Decision Makers*

The rules of natural justice in Canadian administrative law require that tribunals be and appear to be independent at the institutional level. In

[21] *Future Inns Canada Inc. v. Nova Scotia (Labour Relations Board)*, 97 C.L.L.C. 220-089 (N.S.C.A). Leave to appeal to the Supreme Court of Canada was refused on September 25, 1997. However, since the Supreme Court has not ruled definitively on this issue, earlier contrary rulings may arguably continue to apply in jurisdictions outside of Nova Scotia.

particular, tribunal members must have a combination of security of tenure, security of remuneration, and administrative control sufficient to ensure the independence of their decision making.[22] Lack of independence can void the decision of a tribunal. Members of Canadian labor relations tribunals are generally appointed for terms fixed in the relevant labor relations statute or established in government practice. One court of appeals has ruled that a government order arbitrarily terminating a labor relations board member's appointment prior to the expiry of its term is null and void at its inception.[23]

Canadian administrative law requires that tribunal members be free from compulsion or pressure which could compromise their ability to decide cases according to their own conscience and opinions. A decision of a tribunal that has been subject to pressure from persons outside the tribunal, be they government officials, private organizations or individuals, can be declared void on judicial review. Procedures for consultation within a tribunal must be carefully designed to ensure that the tribunal members who hear a particular case remain free to decide that case without pressure or compulsion to follow the views of other tribunal members.[24]

A tribunal member can be disqualified from serving in the event that there is a reasonable apprehension of bias on that person's part. Actual bias need not be proven. Any pecuniary interest in the subject matter of proceedings results in a presumption of bias. On tripartite hearing panels, the union or employer representatives may not have a close relationship to the litigants. For example, an employee of one of the litigants would generally be disqualified from serving on the hearing panel. The neutral chair presiding over the hearings should not have had any recent

[22] *Matsqui Indian Band v. Canadian Pacific Ltd.* [1995] 1 S.C.R. 3.

[23] *Hewat v. The Queen in Right of Ontario* (1998), 98 C.L.L.C. 220-37 (Ont. C.A.). In this case the appointments of three board members were terminated prior to their expiry and without showing just cause. The terminations were very controversial within the Ontario labor relations community. The court did not reinstate the board members in question because little or no time remained in their term appointments when the judgment was rendered. However, the court's ruling implies that, in future, injunctive reinstatement may be available against similar terminations. This decision may be persuasive but is not binding in other jurisdictions, since decisions of provincial courts of appeal have persuasive but not binding authority in other provinces.

[24] *Consolidated Bathurst Packaging Ltd. v. International Woodworkers of America Local 2-69*, [1990] 1 S.C.R. 282.

professional relationship with either litigant. Tribunal members must decide cases on the basis of evidence presented and the relevant law, without unreasonable hostility towards a party or case being presented.

### B. Appeals and Judicial Review

Canada's federal and provincial labor boards have the power to reconsider a decision. Their initial rulings are usually final and binding, however, as grounds for reconsideration are quite restricted. Those grounds are generally limited to matters such as the submission of important new evidence that was not presented earlier for good and sufficient reasons or argument that the original decision turned upon an incorrect conclusion of law or policy.

In Quebec, an application for leave to appeal a commissioner's decision can be brought, within 10 days of the decision, to the Labour Court. A worker who obtains a commissioner's reinstatement order following the determination of a discriminatory dismissal must immediately be reinstated, notwithstanding the appeal. The Labour Court is empowered to summarily reject appeals that it finds abusive or dilatory. It must render its decision within 90 days of taking the case under consideration, normally after receipt of post-hearing briefs.

Except in Quebec, there is no right of appeal to a court. There is in all Canadian jurisdictions, however, a limited access to judicial review. Grounds for judicial review include: breach of administrative fairness or natural justice; constitutional grounds; exceeding of the powers granted to the board by the legislature; error of law in interpreting a law beyond the scope of the board's expected area of expertise; and patent unreasonableness of a decision made within the scope of the board's expected area of expertise. Courts have exercised restraint in reviewing board decisions and normally defer to the specialized expertise of labor board officials in balancing the competing interests in labor-management matters.

> In the United States, parties may appeal an administrative law judge's decision to the National Labor Relations Board, which reviews the record and may affirm or reverse, in whole or in part, the administrative law judge's ruling. Decisions of the NLRB are appealable to feder-

al appeals courts and may be appealed from there to the U.S. Supreme Court, by what is known as a writ for *certiorari*. However, decisions by a regional director refusing to issue a complaint or to settle a case with the charged party may be appealed only to the general counsel, who infrequently overrules a regional director. In Mexico, CAB decisions are final and subject to judicial review only through an action for *amparo*. Such actions may be based only upon certain limited grounds, the most important of which are error of law, breach of due process, and exceeding legally authorized powers.

## C. Sanctions and Remedies

Canada's labor boards are granted broad powers to remedy unfair labor practices. Those powers typically include but are not limited to the ability to issue cease and desist orders, orders to rectify the acts complained of, and orders to reinstate or hire the employee concerned, with or without compensation for lost earnings. Labor boards can order remedies for legal violations by employers or unions.

In practice, Canada's labor relations boards and commissioners have used their remedial powers flexibly in response to a wide variety of situations. Some labor boards have ordered employers to post notices or board decisions in the workplace advising employees of unfair labor practice findings. In more serious cases of interference with the right to organize, boards have ordered employers to provide unions with access to updated lists of names and addresses of all bargaining unit employees, and/or direct access to employees on the employer's time and premises, and have awarded money compensation to unions and employees for many forms of economic loss, including wasted organizing and negotiating costs and associated legal fees, prospective losses incurred in organizing employees at new locations where a plant had been unlawfully moved to escape union organizing activity, and lost union dues. In severe cases of antiunion discrimination, individual workers have been awarded damages for antiunion harassment suffered at the hands of their employers. In the federal jurisdiction, British Columbia, Manitoba, New Brunswick and Nova Scotia, the board has the power to certify a union without a representation vote, if the true wishes of the employees

are no longer likely to be ascertained by that vote, generally as a result of employer unfair labor practices.[25]

The duty to bargain in good faith has been enforced through orders that contract proposals put forward in bad faith be struck from the bargaining table and orders that a party that has refused to bargain prepare and present a collective agreement which it is willing to sign.

Labor relations boards can also provide a range of remedies to safeguard the rights of workers in their relationship with a union. Where a union denies membership to a worker on discriminatory grounds or in a manner otherwise contrary to the labor relations act, the board may order the union to change its admission procedures or, in some cases, may require it to accept the worker as a member. Similarly, labor relations boards can order unions to comply with statutory requirements to furnish independently certified union financial statements at the request of a union member. To remedy a situation in which a union has disciplined or expelled a member for reasons that are discriminatory, unreasonable or unfair, labor relations boards may order such measures as reinstatement of the worker as a union member or that the union pay compensation to the affected worker. Labor relations boards may also take a wide range of steps to remedy union breaches of the duty of fair representation. For example, a board can award compensation for losses incurred by the complainant or require that a worker's case be taken to arbitration by a union that had unfairly dropped it.

Union members may also apply to court for a remedy in cases where they believe that their union has violated its own constitution. Courts can issue awards for monetary compensation, injunctions preventing certain actions, or declarations that actions are illegal; they may also require an accounting of funds. Where the conduct of a union election has been found to be in breach of a union's constitution, a court may issue a declaration or an injunction, award damages for lost election expenses, or order a union to organize new elections in accordance with its constitution.

Though sometimes designed with deterrence in mind, labor board

[25] Recent amendments to Ontario's *Labor Relations Act*, 1995, have removed the Ontario Labour Relation's Board's long-standing power to grant this remedy. See Bill 31, *Economic Development and Workplace Democracy Act.* 1998, 2nd Session, 36th Legislature, 1998 (assented to June 26, 1998).

remedies in Canada are compensatory and not punitive in nature. Nonetheless, certain provisions of the labor relations acts in Canada can be enforced by prosecution. Similarly, a failure to comply with a labor relations board order can also be enforced by prosecution. Generally speaking, however, it is necessary to obtain the consent of the labor relations board or the minister of labor in order to initiate such prosecutions, and they are seldom used. Fines are the most common form of sanction. For example, a violation of the *Ontario Labour Relations Act* may be punished by fines of up to $2,000 against an individual and $25,000 against a union or corporation.

Labor relations board orders are generally enforceable as court orders upon their being filed in the appropriate superior court. Property may be seized to satisfy court orders, and refusal to comply with a court order can be sanctioned through prosecution for contempt of court, an offence punishable by fine or even imprisonment.

## 6. PUBLICATION MEASURES

### A. Publication of Laws, Regulations, Procedures and Administrative Rulings

Laws and regulations of the federal government and the provinces are published in their respective statute books and related official government registers and gazettes. All are generally available in public libraries and law libraries and from the government offices themselves. They are also available online in commercial databases. Many are available on government Internet sites.

Canada's labor relations boards publish periodical reports containing the full text or summaries of labor board and labor court decisions. The Quebec Society for Juridical Information publishes court decisions, as well as a specialized publication containing decisions of the labor commissioners and the Labour Court.[26] Commercial houses also publish la-

[26] *Décisions du commissaire du travail, du Tribunal du Travail et de la Commission de la reconnaissance des associations d'artistes* (CT/TT/CRAA).

bor law decisions from around the country, notably the *Can. L.R.B.R.* (*Canadian Labour Relations Boards Reports*) and the *C.L.L.C.* (*Canadian Labour Law Cases*, CCH Publications). Decisions are also available online through commercial services.

### B. Notice and Opportunity for Comment

Proposed changes in laws are generally published in advance and subject to public comment through hearings, briefs presented to and meetings with legislators, and appearances by witnesses before legislative committees. Trade unions and employer groups maintain offices and staffs to make their views known to public officials on proposed legislation.

## 7. PUBLIC INFORMATION AND AWARENESS

### A. Availability of Public Information

Canada's several labor boards and authorities publish various guides, booklets and bulletins explaining in lay persons' terms the provisions of the labor relations acts or codes and the practices of the relevant boards or ministry and judicial branches. For example, the Alberta Labour Relations Board has published 20 *Information Bulletins* covering all major aspects of its activities. Other provinces provide similar information. Concerned workers, employers or individuals may visit offices of the labor relations boards and commissioners to obtain advice and assistance from staff employees.

The labor boards and labor ministries also publish annual reports. These typically explain the organization of the board and its legal mandate. They also provide an overview of the board's operations, short biographies of tribunal members, a summary of revenues and expenditures, and summaries of significant labor law decisions for the year. The reports generally contain statistical tables. These typically show the numbers of each type of case processed by the board during the year.

The reports of the Ontario, Alberta and British Columbia boards also include statistics on the length of time required for different types of proceeding.

## B. Public Education

Labor relations officials and staff in all Canadian jurisdictions sponsor or participate in conferences, workshops, seminars and other public events to inform the labor relations community of their policies, rules and procedures. Each office maintains a public information official to respond to inquiries from the press and the public.

## C. Private Information Sources

Trade unions and employer organizations regularly publish reports and newsletters for their members on labor relations matters. Canadian labor lawyers representing unions, employers and individual workers, along with labor law professors, produce the quarterly *Canadian Labour and Employment Law Journal* with articles analyzing labor law developments. Law schools and industrial relations schools and programs publish academic and policy journals dealing with labor issues including the right to organize, the right to bargain collectively, and the right to strike.

## D. NAALC Cooperative Activities

The Canadian National Administrative Office, in collaboration with the NAOs of Mexico and the United States, has undertaken an extensive program of cooperative activities relating to the industrial relations principles of the NAALC. Members and staff of various Canadian federal and provincial labor agencies have participated in these activities. Information on such programs can be obtained from the NAO of Canada.

# MEXICO

## 1. GENERAL INTRODUCTION

### A. Basic Labor Policy

The *Political Constitution of the United Mexican States*, promulgated in the city of Queretaro on February 5, 1917, is the country's basic legal instrument. The early 20th century was marked by social and political movements that culminated in the Mexican Revolution of the 1910-1917 period. The revolution's original objectives were to remove then-President Porfirio Diaz from office and to establish constitutional recognition of the principle that a president may not be reelected. This movement expanded to become a genuine national revolution that gave rise to an entirely new constitutional order.

Article 123 of the Mexican Constitution of 1917 was the first in the world to enact social and economic rights in a country's basic charter. Article 123 guarantees the right to organize, to bargain collectively and to strike. It also secures a set of workers' social and economic rights, including the eight-hour day and the six-day week, pregnancy and childbirth leave and pay, minimum wages, profit sharing, overtime pay, severance pay, worker housing and recreation, and occupational safety and health.

A basic objective of Mexican labor law is to ensure stability in the employment relationship and, in particular, to provide protection to workers against unjust dismissal. Article 123 of the Mexican Constitution

contains protections against unjust dismissal and dismissal for joining a union or a lawful strike. The *Federal Labor Law* (*Ley Federal de Trabajo*, hereinafter FLL), which is the key labor relations statute in Mexico, specifies 15 reasons for which an employer can dismiss a worker justifiably and without liability (see The Individual Employment Relationship, section 1D, below). Any reason for discharge not encompassed by those specified in the FLL is *per se* unjustified. Since union activity is not among the lawful justifications for discharge, discharge for union activity is contrary to the FLL. Just cause protection provides to some extent a functional equivalent to the unfair labor practice doctrines found in U.S. and Canadian labor law.

## B. Labor Law Jurisdiction

Article 123 of the Constitution originally granted state legislatures the power to enact their own labor laws. However, this system created uncertainty and, in 1929, Articles 73-X and 123 of the Constitution were amended to grant the federal Congress exclusive power to enact labor laws.

Article 123 of the Constitution and the *Federal Labor Law* are both in force throughout the country. However, the responsibility for enforcement of Mexico's labor law is shared between the federal government and local governments, that is, the 31 states and the Federal District (D.F.). The authority of local governments is contained in Section XXXI of Article 123, which states that "labor law enforcement belongs to the authorities of the states in their respective jurisdictions." Except in key industries or sectors reserved by the Constitution for the federal jurisdiction (see box 3.1), all enterprises fall within the enforcement jurisdiction of local authorities.

Maquiladora industries are concentrated along the U.S.-Mexico border, where more than 3,000 factories employ over one million workers; because of their location, the maquiladora plants generally come under the jurisdiction of state labor authorities and the state-based Conciliation and Arbitration Boards (CABs) in Baja California, Sonora, Chihuahua, Coahuila, Nuevo Leon, and Tamaulipas.[1]

[1] See Secretaría del Trabajo y Previsión Social (STPS), *Estadísticas Laborales - Primer*

Box 3.1

Federal Labor Law Enforcement Jurisdiction

Article 123, Section XXXI of the Mexican Constitution states:

"Labor law enforcement belongs to the authorities of the states in their respective jurisdictions, but the following matters remain within the exclusive competence of the federal authorities:

a) Branches of Industry and Services:

| | | |
|---|---|---|
| 1. Textile | 2. Electrical | 3. Cinematography |
| 4. Rubber | 5. Sugar | 6. Mining |
| 7. Foundries and steel mills… | 8. Energy | 9. Petrochemical |
| 10. Cement | 11. Limestone | 12. Automotive… |
| 13. Chemical… | 14. Pulp and paper | 15. Vegetable oils |
| 16. Packaged food processing… | 17. Brewing… | 18. Railroads |
| 19. Lumber… | 20. Glass… | 21. Tobacco… |
| 22. Banks and credit unions | | |

b) Enterprises:

1. Those administered directly or in decentralized form by the federal government.
2. Those operating by virtue of a federal contract or concession, and connected industries.
3. Those operating in federal zones or under federal jurisdiction, in territorial waters or in those included in the exclusive economic zone of the nation.

Also within exclusive competence of the federal authorities are enforcement of labor laws in matters related to disputes that affect two or more federal entities, collective contracts that have been declared manda-

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*Trimestre 1998* (México, D.F.: STPS Subsecretaría "B", CGPEET, 1998), at p. 17, Cuadro I.6; and Instituto Nacional de Estadística, Geografía e Informática (INEGI), *Industria Maquiladora de Exportación - Indicadores Mensuales, Número de Establecimientos por Entidad Federativa* and *Personal Ocupado Según Categoría*,(México, D.F.: INEGI, http://dgcnesyp.inegi.gob.mx/BDINE/J15/J150001.HTM, December 15, 1998).

tory in more than one federal entity, employer obligations in education matters under the terms of the law, and with respect to employers' obligations in matters of training and skills development, as well as safety and health in the workplace, for which the federal authorities shall have the assistance of state authorities when it concerns branches or activities within state jurisdiction, according to the terms of the relevant regulatory law."

The United States maintains a single federal system of labor relations laws and enforcement applying throughout the country with preemptive effect over state laws. The United States maintains a single National Labor Relations Board to enforce U.S. law on rights to organize, bargain collectively and strike. By contrast, in Canada, federal labor law does not prevail over provincial labor law; federal and provincial labor relations statutes apply in parallel across different jurisdictions. Canada has 11 distinct labor law regimes. Each Canadian jurisdiction maintains its own separate agency to enforce its labor relations laws.

## C. Legal Sources of Labor Rights

Article 133 of the Mexican Constitution establishes a hierarchy among different types of law. The Constitution itself, followed by laws which emanate from the Constitution and duly ratified international treaties, form the supreme law of the land. These laws take precedence over regulations,[2] local (state or D.F.) constitutions, and local statutes. However, there are no local labor law statutes in Mexico (see Labor Law Jurisdiction, section 1B, above).

The law governing the labor relations of private sector workers in Mexico is found in several legal instruments. The key sources are the *Political Constitution of the United Mexican States*, the *Federal Labor Law*, regulations made thereunder, and international treaties approved by the federal Senate and signed into law by the President of the Republic. In addition, where there is no express provision in those sources or in their provisions covering similar cases, Article 17 of the FLL provides that the

[2] Regulations serve to implement a particular statute, generally by providing further detail with respect to and establishing rules for the application of the law. A regulation is issued by the executive branch of the government.

general principles of law, the general principles of social justice deriving from Article 123 of the Constitution, case law and precedent, custom and equity will be taken into account.

In Mexico's civil law system, court decisions do not necessarily create binding precedent which governs the decisions of lower courts and tribunals. The Mexican Supreme Court and the federal appeals courts (Collegiate Circuit Courts) create binding precedent, referred to as *jurisprudencia firme*, only when they issue five consecutive consistent decisions on the same point. In the absence of such a series of decisions, a court ruling binds only the parties to a particular case in question and need not be followed in other cases. Instead of relying on prior decisions, Mexican courts and tribunals tend to base decisions upon a doctrinal analysis of sections of relevant statutes, articles of the Constitution, or regulations, as the case may be. Mexican courts may also give significant weight to the doctrinal opinions of respected jurists, who are usually law professors or legal researchers.

> The U.S. National Labor Relations Board and Canadian provincial labor relations tribunals operate largely by deciding cases that establish precedents to guide future conduct. However, the Canadian province of Quebec, like Mexico, comes from a civil law tradition which places more emphasis on codes than on judicial or administrative tribunal precedents.

*1) The Federal Constitution*

Article 9 of the Mexican Constitution establishes the right of all citizens to freely associate for lawful purposes. In addition, Article 123 provides specific labor rights. Article 123(A), Section XVI (*Articulo 123, Aparta - do A, Fracción XVI*) states that "both employers and workers shall have the right to organize for the defense of their respective interests, by forming unions, professional associations, etc." The introductory clause of Article 123 has been construed to protect the right to bargain collectively, as it empowers the federal Congress to enact laws governing "every contract of employment." Section XVII of Article 123 guarantees workers the right to strike, and Section XVIII defines a lawful strike as one

that has as its objective "[obtaining] balance between the different factors of production, harmonizing the rights of labor with those of capital." Article 123 also establishes the organization and competence of the Conciliation and Arbitration Boards (CABs), the federal and state labor boards with jurisdiction over labor disputes.

The rights contained in Article 123 directly govern relations between employers, employees and unions. Thus, for example, a union could enforce directly against an employer its constitutional right to strike. However, since the FLL deals with labor relations matters in greater detail than the Constitution, it is more often the key point of reference in labor relations.

> In Canada and the United States, the constitutional rights of workers, unions or any other private parties generally do not offer direct protection against interference by other private parties. Constitutional rights protect only against interference by government action. They do not directly govern relations between private parties and cannot be enforced against private parties.

### *2) The* Federal Labor Law

The first comprehensive *Federal Labor Law* was passed in 1931. Its most important forerunners were laws and regulations adopted in various states and cities in the early 20th century. The textile industry and other key sectors were the focus of early efforts to organize and bargain collectively. During the period between the 1917 Constitution and passage of the first FLL in 1931, these sectors were regulated mainly by the states and municipalities. In 1925, the federal government sponsored a convocation of workers and employers in the cotton textile industry to standardize terms and conditions of employment in the sector. Terms and conditions were then overseen by labor-management factory committees, district committees, and a joint national commission.

The revised FLL of 1970 defines the individual and collective employment relationship and regulates organizing, collective bargaining and strikes. The FLL also governs the makeup and functioning of the tripartite CABs that administer labor justice and provide conciliation,

mediation and arbitration services. In addition to labor and industrial relations, the FLL also covers minimum wages, hours of work and overtime, child labor, protection for working women, workplace safety and health, profit sharing, job training, and other labor matters.

### *3) International Treaties*

Under the Mexican Constitution, international treaties signed by the President of the Republic and ratified by the Senate, including those dealing with labor matters, are considered "self-executing" and become an integral part of domestic law insofar as they do not contravene the Constitution. In addition, Article 6 of the FLL provides that treaties concluded and approved under Article 133 of the Constitution shall apply to labor relations insofar as they are to the workers' advantage.

The most important, albeit not the only, such international treaties are the Conventions of the International Labor Organization (ILO). The key ILO conventions relating to freedom of association and the rights to organize, to bargain collectively and to strike are the Freedom of Association and Protection of the Right to Organize Convention (No. 87) and the Right to Organize and Collective Bargaining Convention (No. 98). Mexico has ratified Convention No. 87.

> Canada has ratified the Freedom of Association and Protection of the Right to Organize Convention (No. 87), but the text of that Convention has not been incorporated directly into Canadian domestic law. Canada has not ratified Convention No. 98. The United States has ratified neither Convention No. 87 nor Convention No. 98.

## D. The Individual Employment Relationship

The individual employment relationship in the private sector in Mexico is governed by the Constitution and the *Federal Labor Law*. Detailed aspects of every employee's job are defined and regulated by law. The Constitution, as already noted, guarantees the rights to organize, bargain and strike, the eight-hour day and the six-day week, paid pregnancy and

childbirth leave, overtime pay, profit sharing, housing funds, health and safety protection, and compensation for unjust discharge. In addition to such matters the FLL regulates work shifts, holidays, vacations, promotion standards, and other working conditions.

In Mexico every employee works under an individual contract of employment incorporating minimal terms specified in the Constitution and the FLL, whether or not the contract is written and whether or not the employee is also covered by a collective agreement. Individuals can negotiate for terms and conditions superior, but not inferior, to those required by law for all individual contracts of employment.

Under Mexican law, collective contracts between a union and employer exist alongside each worker's individual contract of employment. The collective contract can be a standardization of the individual contracts. Under general principles of Mexican labor law recognized under the FLL (see Legal Sources of Labor Rights, section 1C, above), a collective contract takes precedence over an individual contract, given the superior general interest of workers in the collective contract. Mexican law does not recognize modifications or exceptions to collective contract terms that are negotiated between an employer and an individual worker.

> In Canada and the United States, union-represented employees cannot have individual employment contracts; their terms and conditions of employment are set solely by the collective bargaining agreement and any legislated minimum labor standards.

Every Mexican worker who enters into employment has a contract of employment for an indefinite term unless the parties agree at the time of hiring to a specific contract duration. A contract for a specific duration can be made only in situations stipulated in the FLL, such as where the work to be done is of a temporary nature, or where the contract is to provide a temporary substitute for another employee (art. 37). A worker is presumed to have a permanent employment contract which can be terminated or modified — including changes in pay or job duties – only in accordance with the law and subject to legal proceedings.

Employment contracts can be changed on agreement of the parties. However, a general labor law norm applicable under the FLL provides that the employment contract of a worker cannot be amended so as to

render its terms less advantageous to the worker. Moreover, a worker whose wages are reduced by his or her employer is entitled to terminate his or her employment and claim severance benefits (*indemnización*). A Conciliation and Arbitration Board may, however, on application by an employer, modify working conditions in an individual employment contract where economic circumstances justify such action, provided that no contract may provide terms less advantageous to an employee than the conditions of work stipulated in the FLL. Conversely, a CAB may, on application by a worker, modify the worker's conditions of work if the worker's wages are not sufficiently remunerative, his or her hours of work are excessive, or there are special economic circumstances justifying such action.

Article 123, Section XXI of the Constitution and Title II of the FLL provide that a worker may not be dismissed without just cause and may claim reinstatement or compensation to remedy unjust dismissal. The FLL specifies 15 just causes for discharging a worker without liability (see box 3.2, below).

> In the United States, most nonunionized employees are employed "at will," which means that, subject to certain statutory exceptions such as antidiscrimination laws and other limited "public policy" exceptions, their contract of employment can be terminated without notice or severance pay, at any time, for any reason. By contrast, unionized employees are typically covered by collective bargaining contract clauses stipulating that they may be discharged only for "just cause." In Canada, the employment-at-will doctrine does not apply. Those covered by collective agreements (approximately 35 percent of the labor force) can generally have their employment terminated only for "just cause." Moreover, statutory termination notice requirements are applicable to all employees, as are antidiscrimination laws and a common law judicial requirement of reasonable notice (or pay in lieu of notice) for any termination of an employment contract which is for an indefinite term.

Any discharged worker can challenge his or her discharge by filing a complaint with the relevant CAB. At the time that the worker files the complaint, he or she must elect either to claim reinstatement or to claim a payment of three months' wages (*indemnización*). The CAB will first

seek to settle the case and, if the case is not settled, will hold a hearing to determine whether the employer can prove one of the 15 just causes for discharge. If the worker claims reinstatement and the employer fails to prove cause for discharge, the CAB will order that the worker be reinstated in his or her employment and be paid wages in arrears from the date of discharge to the date that the employer complies with the order.

In discharge cases the CAB will either uphold the discharge without compensation or, depending on which remedy the worker has elected to pursue, order the reinstatement or *indemnización* of the worker. It will not review the reasonableness of the penalty of discharge.

> In some Canadian jurisdictions workers may claim statutory rights to severance pay, but only in the event of mass terminations of employment. There is no statutory right to severance pay in the United States. On the other hand, in both Canada and the United States government-sponsored unemployment insurance programs replace a part (in Canada 50-55%, in the U.S. generally about 50%) of a worker's wages for a period of time (in Canada between 14 and 45 weeks, in the U.S. generally up to a maximum of 26 weeks) in the event of involuntary termination of employment. There is no counterpart to these programs in Mexico.

Many cases of unjust discharge are processed each year by the more than 100 federal and state CABs throughout Mexico. Workers are entitled to free legal assistance from the Federal Office of the Labor Public Defender of the Mexican Department of Labor and Social Welfare (STPS) (in matters of federal jurisdiction) and from similar functionaries of the state departments of labor (in matters of state jurisdiction). Many workers also turn to private attorneys who specialize in such cases and who are paid from the proceeds of the severance pay won by such workers.

Workers usually accept severance pay in liquidation of their claim for reinstatement. According to data from the Federal Office of the Labor Public Defender, only one worker among 154 who won a claim for unjustified discharge in 1995 opted for reinstatement.[3] In a case study of

[3] Information supplied to the Secretariat by the Federal Office of the Labor Public Defender of the Mexican Department of Labor and Social Welfare.

two state CABs, researchers examined 75 cases of individual claims of unjustified dismissal. None of the workers who prevailed in those cases opted for reinstatement.[4]

In addition to any severance pay to which he or she may be entitled, a worker who has 15 or more years of service with an employer is entitled, upon resigning or being discharged for any reason, to a statutory seniority allowance of 12 days' pay per year of service. The upper limit for the daily salary amount used to calculate this payment is two times the daily minimum wage.

Under Article 49 of the FLL, an employer is exempted from the obligation to reinstate certain types of worker. These include workers employed in the enterprise for less than one year, confidential employees, domestic servants, and casual workers. In such cases the CAB will order the employer to give the worker compensation comprising a payment of three months' wages, a payment of 20 days' wages per year of seniority, the statutory seniority allowance (12 days' pay per year of service) and arrears of wages from the date of discharge to the date on which compensation is paid.

The FLL specifies nine justified reasons for a worker to quit employment and still receive statutory severance pay (*indemnización*), which is normally three months' pay plus 20 days' pay for each year of service (see boxes 3.2 and 3.3). A worker may claim any severance pay owing after resignation by filing a complaint with the relevant CAB in order to collect it. The CAB will seek to settle any case brought before it. If the case is not settled, the CAB will hold a hearing, receiving and evaluating the evidence to determine whether the reason for quitting falls within one of the definitions of just cause. If the CAB finds that the worker was justified in quitting, it will order the employer to pay the amounts owing.

[4] See Kevin J. Middlebrook and Cirila Quintero Ramirez, "Conflict Resolution in the Mexican Labor Courts: An Examination of Local CABs in Chihuahua and Tamaulipas" (1995), available from the U.S. National Administrative Office.

Box 3.2

Just Cause for Termination of Employment in Mexican Labor Law

Article 47 of the FLL defines the following 15 just causes for terminating an individual contract of employment:

- falsification of documents or statements on which the worker bases his or her application for employment;
- misconduct at work directed at the employer, members of the employer's family, or managers;
- misconduct directed at coworkers that upsets workplace discipline;
- misconduct outside of work directed at the employer, members of the employer's family, or managers;
- intentional material damage;
- material damage through negligence;
- inexcusable breach of workplace safety;
- immoral acts in the workplace;
- revelation of trade secrets;
- three absences within 30 days without permission or without just cause;
- disobeying management orders without just cause;
- refusal to obey health and safety rules;
- working under the influence of alcohol or drugs (except medical prescriptions);
- imprisonment under sentence of law;
- any equally grave act with similar workplace consequences.

The employer must provide the worker with a written statement of reasons for discharge. If the worker refuses to accept it, the employer must file it with the CAB within five days.

Article 51 of the FLL specifies nine just causes for a worker to terminate employment and receive severance pay of three months' pay plus 20 days' pay for each year of service:

- deception by the employer about working conditions;
- mistreatment by the employer or agents of the employer within the workplace against the worker or members of the worker's family;
- mistreatment by the employer or agents of the employer outside the workplace against the worker or members of the worker's family;
- reduction in the worker's salary;

- failure to provide proper pay on the agreed date and location;
- malicious damage by the employer to the worker's personal tools or equipment;
- the existence of a serious danger to health and safety of the worker or his or her family;
- negligence by the employer in compromising health and safety;
- equally grave actions with similar consequences.

## E. Exclusions from Coverage

In general, the labor rights contained in the Constitution extend to all workers within the national territory regardless of occupation or status.

Under the *Federal Labor Law*, any person who personally performs subordinate work for another individual or legal person in return for remuneration, except family members employed in a family enterprise, has the rights to organize, to bargain collectively, and to strike. Workers whose jobs are legally classified as "confidential," such as managers, general supervisors or workers in a position of trust, are legally prevented from joining other workers' unions and in practice rarely form unions.

> In addition to managers, supervisors, agricultural workers and domestic employees, U.S. labor law generally excludes all independent contractors. Canadian labor relations statutes exclude managers and those employed in a confidential capacity in matters relating to labor relations. Some Canadian jurisdictions also exclude specific occupations such as domestic servants, agricultural workers, or members of such professions as law or medicine. In much of Canada, low-level supervisors and contractors in a position of economic dependence are covered by labor relations law.

# 2. LEVELS OF PROTECTION – SUBSTANTIVE LABOR LAWS

## A. Labor Principle 1 – Freedom of Association and the Right to Organize

### *1) Legal Foundations*

As noted above (see section 1C, Legal Sources of Labor Rights), the Mexican Constitution guarantees freedom of association and the right to organize.

The *Federal Labor Law* of 1970 defines unions as "the association of workers or employers, constituted for the study, betterment and defense of their respective interests" (art. 356) and establishes "the right to form unions without need for previous authorization" (art. 357). Article 359 declares that "unions have the right to adopt their own constitutions and bylaws, to elect freely their representatives, to organize their administration and activities and to formulate their program of action." Unions require legal registration to obtain the status needed to engage in contractual activities or legal proceedings on behalf of their members (see Legal Status of Unions, section 2A.3 below).

Workers may also form a temporary "coalition" to defend their interests, without going through the formality of forming a trade union. Such coalitions do not have the same legal capacity as a registered union to enter into contracts or engage in business transactions, but they may act much as unions do in participating in profit sharing and health and safety committees and negotiating for improvements in working conditions. They may also undertake a strike to achieve their demands, even without the same juridical capacity as a formal union.

### *2) The Formation and Dissolution of Unions*

Under the FLL, any group of 20 or more workers in active employment may form a trade union without the need for previous authorization.

(i) Types of Union in Mexico

The FLL specifies various types of trade union. Unions must meet one of these definitions:

1) an enterprise union, made up of workers in a single company;
2) a guild union or craft union, made up of workers in the same occupation, craft or specialty, who may work for different companies;
3) an industrial union, made up of workers in two or more companies in the same industrial sector;
4) a national industrial union, made up of workers in one or more companies in the same industrial sector operating in two or more states;
5) a general labor union, made up of workers with different occupations in those small localities where the 20-worker minimum for union formation cannot be met by workers in the same occupation.

Trade unions may join together in federations and confederations. Federations are normally formed at the state level. Confederations are formed at the national level or at a multistate level.

The dissolution of a union must be done by majority vote of at least two-thirds of the union membership in an assembly called for this purpose. Only a CAB order can ultimately dissolve a union.

*3) Legal Status of Unions*

Article 374 of the FLL expressly defines unions as “persons” before the law, with legal capacity to acquire property, enter into contracts, and defend their legal rights before courts and tribunals.

(i) Registration of Unions

In Mexico, trade unions, like any other legal “person”, including businesses, civic associations, cooperatives and all other nongovernmental

organizations, require a public act of state called "registration." In practice, a union requires registration to obtain the status needed to engage in most legal, contractual or commercial activities on behalf of its members. Without registration, unions can still hold meetings, elect officers, make demands on employers, issue public statements and the like, in keeping with the principle of freedom of association. However, other parties need not respond to their actions, since unregistered unions are treated as lacking the required legal capacity.

Union registration is the key to collective bargaining in Mexico. Once registered, unions can obtain title to collective contracts with employers (see Acquisition of Title to a Collective Contract, section 2B.2, below), acquire property, and otherwise undertake action in keeping with the defense of their members' interests, including legal action.

Article 365 of the FLL requires unions within the federal jurisdiction to register with the STPS General Directorate of Registry of Associations and Unions within local (state or Federal District) jurisdiction to register with the local-level CABs. In the federal jurisdiction, the STPS informs the relevant federal CAB of the union's registration.

The legal requirements for obtaining registration are minimal, and the granting of registration should be a purely administrative act. Article 366 of the FLL states that union registration may be refused only if: (1) the union does not have the aims and objects required by Article 356 of the FLL; (2) the union does not have the number of constituent members required by Article 364 of the FLL; or (3) the documents listed in Article 365 of the FLL are not submitted to the CAB or STPS, as the case may be. As long as the union complies with filing requirements, a union can be denied registration only if its stated purposes deviate from those related to the nature of a trade union, or when the union cannot prove that it has met legal minimum membership requirements.

Article 356 defines a trade union as an association of workers (or employers) set up for the study, improvement and defense of their respective interests. Article 365 requires that an applicant for registration submit in duplicate: (1) an authorized copy of the minutes of the constituent assembly; (2) a list showing the number of members indicating their names and addresses and the names and addresses of their employers, enterprises, or establishments in which they are employed; (3) an authorized copy of the union's bylaws; and (4) an authorized copy of the

minutes of the meeting at which the board of directors was elected. Article 364 provides that any group of 20 or more workers in active employment may register a union of which they are members. A union must be one of the five types listed in Article 360 of the FLL (see The Formation and Dissolution of Unions, section 2A.2, above). This means that the group of workers registering the union must be composed of the type of workers of which the type of union that they seek to register must consist. For example, those registering a craft union must be workers of the same occupation, trade or craft, and those registering an enterprise union must all be employed in the same enterprise. An industrial union must consist of workers who are employed in two or more enterprises in the same branch of industry. Provided that they meet the above requirements, the workers registering a union need not constitute a majority of any particular workforce.

There is controversy in Mexico over whether CABs have a discretion to deny union registration on grounds not specifically set out in Article 366. Some CABs have refused registration on the basis that a registered union already exists in the workplace of the workers seeking to register the new union, and some authorities maintain that this approach complies with Mexican labor law. Other experts disagree. The Supreme Court of Mexico has recently stated that limiting the number of unions that may exist in a workplace is contrary to the constitutional protection of freedom of association and the right to organize and that denying registration on the basis that a union already exists in a workplace would also violate those protections.[5] These decisions are not yet *jurisprudencia firme* however (see Legal Sources of Labor Rights, section 1C, above). Some CABs have used denial of registration to enforce the substantive requirements for the contents of union bylaws such as those set out in Article 371 (see Freedom of Association within Unions, section 2A.7, below). This interpretation of the FLL is also controversial.

The CAB will generally verify that a registering union meets the minimum of 20 workers in active employment by consulting employer payroll records, though other means of proof may be used. Some Mexican

[5] *Amparo* Decision 337/94, Union of Academic Personnel of the University of Guadalajara, and *Amparo* Decision 338/95, Solidarity Union of Employees of the State of Oaxaca and Decentralized Agencies.

experts have questioned the legality and effectiveness of relying upon inspection of employer records or employer testimony to verify the employment status of union members.[6] Article 364 of the FLL requires that the CAB include in its count those workers whose employment was terminated or who received notice of dismissal at any time between 30 days preceding the date on which the application for registration is made and the date on which such registration is granted.

Once a union has been registered, it may obtain title to a collective contract on behalf of appropriate groups of workers. For example, an enterprise union may hold an agreement only on behalf of workers in the same enterprise. A union registered as a craft union may hold title to any number of collective contracts made on behalf of persons in the same occupation. An industrial union may hold collective contracts with any number of employers within the same industry.

The authorities must resolve registration applications within 60 days. If they fail to respond, registration is considered to have been approved for all legal effects.

Federations and confederations must register as labor organizations with the STPS. Registration of a trade union federation or confederation is an administrative process in which officials simply verify that the bylaws of the federation or confederation address the subjects required by articles 371 and 383 of the FLL.

Dissolution or cancellation of union registration cannot take place by a simple administrative act. Instead, there must be a legal proceeding before the relevant CAB, fulfilling strict requirements for procedural and financial termination of union affairs. A union's registration may be cancelled only if the union ceases to fulfill the statutory requirements for its objects and organizational form or if it is properly dissolved by its members.

[6] See, for example, National Administrative Office of Mexico, *Report of the National Administrative Office of Mexico, U.S. NAO Submission 94003*, Part IV, Study by the Group of Independent Experts (Mexico City, 1995).

*4) Union Self-Governance*

Under Mexican labor law unions are free to act within the mandate of their constitution and bylaws under the direction of their own leadership. This principle of trade union autonomy is an important element of Mexican labor law. Except for the intervention of the authorities with respect to union registration, government interventions are not contemplated in the FLL. As already noted, Article 359 of the FLL grants unions the right to establish their constitution and bylaws, to freely elect their representatives, to organize their administration and activities, and to formulate their program of action.

Article 378 of the FLL provides that unions cannot intervene in religious activities or engage in for-profit commercial ventures. Some unions, however, have negotiated with employers to obtain the right to administer subcontracting arrangements for parts of the employer's business. In practice, these arrangements have brought problems in their administration, so many unions have abandoned these ventures.

*5) Political and Legislative Activities of Unions*

Workers and unions in Mexico may engage in political and legislative activity in accordance with Article 9 of the Constitution, which guarantees the right of association for any legal objective. Unions may establish in their own constitution and bylaws the extent and nature of their political activities and are free to decide how to spend union funds. In practice, many unions are aligned with particular political parties and work closely with them on their legislative and administrative agendas.

*6) Union Membership and Dues*

The FLL provides that no one is required under the law to belong or not belong to a labor organization. However, Article 395 of the FLL permits an employer to agree with a union, in a collective bargaining contract, to hire only members of that union. The employer may also agree with the union to discharge any employee who resigns or is expelled from the

union. This agreement is known as an "exclusion clause" in Mexican labor discourse. A union's internal rules may provide for the expulsion of members who join or support another union. In general, an employee who is discharged pursuant to an exclusion clause may not claim severance pay or reinstatement. However, under Article 123, Section XXII of the Constitution a worker may claim such remedies if he or she is dismissed pursuant to an exclusion clause for joining or supporting a union during the process of forming and seeking to register that union. An exclusion clause may not be applied to require the dismissal of employees in the service of the employer before such a clause was negotiated. However, an employer and a registered union may agree to implement such a clause prior to the hiring of any workers at the employer's establishment.

The exclusion clause is a controversial element of Mexican labor law. Supporters believe that the clause is necessary to maintain worker unity to effectively confront employer power. Critics argue that the clause serves as an instrument of control over potential union dissidents. Some jurists consider exclusion clauses to unconstitutionally interfere with freedom of association guarantees.

> In the United States an employer may not discharge or discriminate against an employee because that employee has lost or been denied union membership, unless the employee lost or was denied membership due to his or her failure to pay uniformly required union dues. In Canada, an employer may not discharge or discriminate against such an employee if he or she lost or was denied union membership because he or she exercised rights under labor law, including the right to join or associate with another union.

The FLL requires employers to deduct from union members' pay and remit to the union ordinary union dues payments. Ordinary union dues are those which are paid at regular intervals to support the normal operating expenses of the union. A worker who is not a union member may not be required to pay union dues. There are no legal restrictions on a union's ability to allocate funds to otherwise lawful activities, whether collective bargaining related or political, except that unions may not engage in for-profit activity or intervene in religious affairs (see Union Self-Governance, section 2A.4, above).

In the United States, compulsory union dues or fee payment is left to the bargaining parties, except in 21 "right-to-work" states. These states have exercised an option under federal labor law to prohibit negotiation of a union security clause requiring either membership in a union or payment of an amount equal to union dues by those workers in a union's bargaining unit who choose not to become union members. In all U.S. states, unions are prevented from spending any portion of a nonmember's dues on political purposes if that nonmember objects to such expenditures. In Canada the majority of labor relations statutes require that, at the request of the union, the employer deduct the amount of regular union dues from the wages of each worker in a bargaining unit that it represents. All but one of the Canadian jurisdictions allow unions to decide whether and how to spend dues revenue, both from union members and nonmembers, for political purposes.

*7) Freedom of Association within Unions*

Article 371 of the FLL sets out a list of subjects which a union's bylaws must address, including such matters as the rights and obligations of members; the mode of payment and amount of union dues; and rules for the administration, acquisition and alienation of property constituting the assets of the union. A union member has a legal right to ensure that these bylaws are followed and may file a complaint with the relevant CAB to do so.

Article 371 does not mandate that any particular member rights be included in union bylaws, with two exceptions. First, it provides the following procedural protections for union members facing expulsion from the union:

(a) a meeting of the workers shall be called for the sole purpose of informing them of expulsion;

(b) in the case of trade unions subdivided into sections, the expulsion procedure shall be carried out at a meeting of the section concerned; the motion of expulsion shall be submitted to the workers of each one of the sections of the trade union for their decision;

(c) the worker concerned shall be entitled to make a statement in his or her defense in accordance with the bylaws;

(d) the meeting shall hear the evidence on which the motion of expulsion is based and the evidence submitted by the worker concerned;
(e) workers shall not be represented by proxy or vote by correspondence or in writing;
(f) expulsion shall be approved by a two-thirds majority of the total membership of the trade union; and
(g) expulsion may be decided only in those cases expressly stipulated in the bylaws, duly evidenced and exactly applicable to the case.

Article 371(VIII) also provides a mechanism whereby the members of a union can convoke, by petition of workers representing at least 33 percent of the total membership of the union, a general meeting of the union if the board of directors of the union fails to do so.

As noted above (see Union Membership and Dues, section 2A.6), the Mexican Constitution provides remedies to workers against dismissal pursuant to an exclusion clause for joining or supporting a union during the formation or registration of that union.

Article 373 of the FLL requires the board of directors of a union to provide a complete and detailed account of the administration of the union's assets to a general meeting of the union at least once every six months. Unions must report to the relevant CAB the makeup of their leadership, as well as registering new union members and any changes in leadership. The CABs treat union membership lists as confidential. Unions also must report any change in their constitution or bylaws and respond to inquiries from the authorities about any union-related actions.

> In the United States the *Labor Management Reporting and Disclosure Act* (LMRDA) includes a comprehensive union member's "bill of rights" regulating internal union democracy. The LMRDA protects free speech rights in union affairs; the right to vote on union dues; the right to run for union office; the right to obtain the union's charter, bylaws and a copy of the collective bargaining agreement; the right to obtain an accounting of union finances; and the right to union elections free of intimidation or fraud. Canada does not regulate internal union democratic processes as closely as the United States. Most Canadian jurisdictions require unions to provide their members with a copy of the

union's audited financial statements and prohibit unions from retaliating by seeking dismissal under union security clauses against bargaining unit members for exercising labor law rights. Most of the other rights provided to U.S. unionists under the LMRDA are left to the discretion of Canadian unions as to their inclusion in the union's constitution.

## B. Labor Principle 2 – The Right to Bargain Collectively

### *1) Legal Foundations*

The Constitution does not explicitly mention the right to bargain collectively. However, the introductory clause of Article 123 (A) of the Constitution, which promotes "social organization for labor" and empowers the federal Congress to "enact labor laws which shall apply… in a general way to all labor contracts," has been interpreted to provide a constitutional basis for the right to and regulation of collective bargaining.

The 1931 FLL incorporated the definition of the collective contract developed in earlier state legislation, defining it as "any agreement concluded between one or more trade unions of workers and one or several employers, for the purpose of establishing the conditions under which work will be performed in one or more companies or establishments." This remains the definition in Article 386 of the 1970 FLL. Articles 386 to 469 of the FLL set out the main provisions relevant to collective bargaining in Mexico.

### *2) Acquisition of Title to a Collective Contract*

The FLL definition of a collective contract establishes that only trade unions can enter into such an agreement. The union that signs a collective contract is considered to hold title to the agreement. Its counterpart may be a single employer, a multiemployer group, or a union of employers, depending on the type of union (see The Formation and Dissolution of Unions, in section 2A.2, above). A collective contract can be negotiated with a single facility or with a multifacility employer, or a

combination of the two, again depending on the type of registration the union holds.

A union that holds title to a collective agreement has the exclusive right to administer, enforce and renegotiate its terms. Moreover, the collective contract is considered a right of workers as a class and must be extended to cover all workers in the enterprise (except managers and certain confidential employees), whether or not they are members of the union that negotiates the collective contract. This rule does not apply to the collective contracts of craft unions.

> Unlike in Canada and the United States, where the scope of the group represented by the union is based on the relatively fluid criterion of bargaining unit appropriateness, in Mexico the coverage of a collective agreement to which a union holds title is prescribed by the FLL and depends primarily on the type of union.

In Mexico, a union may be formed and registered, may bargain collectively, and may obtain title to a collective agreement without an election or other evidence that it has the support of a majority of the workers that it seeks to represent. There may be more than one registered union in a given workplace (see, however, Union Membership and Dues, section 2A.6, above).

> In Canada and the United States a union requires the support of a majority of any group of workers that it seeks to represent before engaging in collective bargaining on their behalf. In Mexico, it is only when a union is faced with either a challenge by another union seeking title to the collective contract (see immediately below) or a challenge by an employer to its majority support for a strike (see Regulation of the Right to Strike, section 2C.3, below) that it may be legally required to demonstrate that it has the majority support of the workers it represents.

(i) Challenging the Title of Another Union

Any union of a type appropriate to the workers in question can at any time seek support from workers covered by a collective contract and file with the relevant CAB a challenge to the incumbent union's title to that contract. The CAB will then hold hearings into the challenge. If the in-

cumbent union does not prove its majority support during such proceedings, it will lose title to the collective contract, and thus lose the right to administer and negotiate revisions to it. The union that demonstrates majority support obtains or maintains title to the contract, as the case may be. In deciding such challenges, a CAB may supervise a vote by the workers, known as a *recuento*, in order to obtain evidence of which union enjoys majority support. A *recuento* will not necessarily be conducted if other evidence is sufficient to prove majority support. If a vote is held, it may be carried out by secret ballot or by public declaration of support. The decision to conduct a *recuento* by secret ballot or not is at the discretion of the CAB. The FLL does not specify a required voting procedure. In practice worker votes are most often recorded publicly.

> U.S. labor law provides that no union representation election may take place within one year of an earlier election in the same bargaining unit. Canadian labor law generally provides that, when a union's application for certification is unsuccessful, that union may be temporarily barred from making another application for certification for substantially the same bargaining unit. The length of the bar varies by jurisdiction but is most often less than one year.

If multiple-enterprise or industrial unions compete for representation in a single workplace, the collective contract must be concluded with the union having the greatest number of members among workers employed in the enterprise (FLL art. 388). If there are multiple craft unions, the employer may make a collective contract with a group of unions representing a majority of the craft workers, as long as the rest of the craft unions agree. If they do not, each craft union may negotiate a separate collective contract. If a craft union competes with an enterprise union, it may negotiate separately as long as it has more members than the number of workers of that craft who prefer the enterprise union; otherwise, the enterprise union will bargain for everyone.

### *3) The Collective Bargaining Process*

Collective contracts generally have an unlimited duration. Salary scales must be revisable on a yearly basis (FLL art. 399BIS). Either party may

request revision of the collective contract. A request for revision must be made at least 60 days before the expiry of a collective contract made for a special fixed period, if such period does not exceed two years; or at least 60 days before the conclusion of a contract's second year, in the case of a contract for a specified period of time longer than two years or an unspecified period of time, or for a specified or unspecified piece of work. Collective contract negotiations thus generally take place at two-year intervals. A request for revision of the salary scale must be made at least 30 days prior to the end of its one-year term. If neither party requests a modification, or if the union does not exercise its right to strike for its proposed changes, the collective contract is extended for a period equal to its previous term.

(i) Obligation to Bargain

When an employer is asked by a union to sign a collective contract and refuses to do so, the workers may exercise their right to strike (FLL art. 387 and art. 450). In practice, this generally compels the employer to engage in bargaining and to conclude a collective contract with the union. Unions must file a notice of strike with the relevant CAB prior to striking (see Strike Procedures, in section 2C.3, below). Unions often file a notice of strike with the relevant CAB at or soon after the beginning of negotiations.

> U.S. and Canadian labor laws establish a legal "duty to bargain in good faith" on the part of employers. Unlike Canadian and U.S. labor law, Mexican labor law does not create a legal duty to bargain. Mexican labor law enforcement thus does not deal with negotiating practices or refusals to bargain *per se*. Rather, legal enforcement deals with the results of an employer's refusal to sign the contract sought by the union, if the refusal results in a strike. The legal enforcement role of the CAB in these situations is to verify that the strike meets legal requirements and, if so, to enforce the right to strike by granting the workers the necessary guarantees and assistance to halt company operations (see Regulation of the Right to Strike, section 2C.3, and Prohibition of Striker Replacement, section 2C.5, below).

(ii) Disclosure of Information

There is no legal obligation upon parties to collective bargaining to disclose to each other information concerning subjects of negotiation. However, under Article 121 of the FLL, an employer is legally obligated to disclose its tax declaration to its workers within 10 days of filing that declaration with the Department of Finance and Public Credit. This obligation is imposed for the purpose of facilitating mandatory profit sharing under the FLL. Employees are not permitted to disclose information contained in these returns to any third party. Employees may, however, disclose such information to their union.

(iii) Changes to Working Conditions during Negotiations

The terms of the collective contract remain in effect until either (1) a strike begins, or (2) a new collective contract is reached, whether by agreement, CAB decision, or voluntary arbitration. Note that, as discussed below (see Binding Effect of Collective Contracts, in section 2B.4), collective labor relations may be suspended or terminated in cases of economic necessity, pursuant to articles 427 to 439 of the FLL.

> In the United States an employer may not unilaterally alter terms and conditions of employment from the time when either party gives notice to negotiate a collective bargaining agreement until the parties reach an impasse in negotiations. The employer may, however, refuse to deduct union dues or to participate in arbitration hearings once a collective bargaining agreement has expired. In Canada a freeze on terms and conditions of employment applies from the time that either party gives notice to bargain to the time at which the parties have completed the conciliation process and are in a legal strike or lockout position.

(iv) Scope of Bargaining and Contents of Agreement

Article 391 of the FLL provides that every collective contract shall state:

I. the names and addresses of the contracting parties;
II. the enterprises and establishments covered by it;

III. its duration or a statement to the effect that it is for an unspecified time or for a specified piece of work;
IV. the hours of work;
V. rest days and vacation leave;
VI. wage rates;
VII. the training to be provided to workers in the enterprises or establishments covered;
VIII. the initial training to be given to persons recruited for work in the enterprise or establishment;
IX. rules for the establishment and operation of the committees to be set up in accordance with the *Federal Labor Law*; and
X. any other stipulations agreed to by the parties.

If the agreement lacks a salary scale, the CAB nullifies it for failing to fulfill this legal requirement. If there are no terms regarding holidays and vacations or hours of work, the constitutional and statutory minimums are applied and the contract is approved as legal by the CAB (FLL art. 393). A first collective contract may not contain terms less favorable to workers than those contained in their individual employment contracts.

> Unlike the U.S. system of collective bargaining, there is no distinction in Mexican labor law between "mandatory" and "permissive" subjects of bargaining. Canadian labor law likewise does not make this distinction.

*Mandatory Joint Committees*

The FLL mandates the formation of worker-employer joint committees to carry out social and economic functions prescribed by the FLL or the collective contract. The most important committees are those that determine profit sharing (FLL art. 125 s. 1), those that create the general framework for seniority rules (art. 158), those that formulate company disciplinary policies (art. 424 s. 1) and joint health and safety committees (art. 509). Health and safety committees are empowered to propose preventive measures, to investigate the causes of accidents and occupational disease, and to supervise measures they adopt. The agreements of joint committees may add to but may not take away from the rights of workers contained in the FLL or in a collective contract.

### (v) Conciliation and Arbitration of Bargaining Disputes

A union and an employer may at any time voluntarily request conciliation by the labor authorities. The federal STPS has created a Conciliators Corps to assist parties in settling contract disputes. Once a union has filed a notice of strike with the relevant CAB, conciliation by the CAB becomes mandatory. At that point, the CAB will summon the employer in order to give it an opportunity to respond to the union's position and will hold a conciliation hearing prior to the commencement of any strike action. If no agreement is reached in conciliation, the union may strike on the date given in its notice.

Arbitration of bargaining disputes is not legally mandatory in Mexico, though the parties may agree to submit their disputes to such processes at any time. In addition, once a strike has begun, a union may submit the labor dispute to the relevant CAB for resolution. For a more detailed discussion of CAB conciliation and dispute resolution processes, see Regulation of the Right to Strike, section 2C.3, below.

In practice, when unions in Mexico declare their intention to strike, the parties often seek intervention of the labor authorities to mediate and conciliate the conflict. If the dispute arises in an important enterprise or industry, the federal or state secretary of labor often gets involved, either personally or through high-level aides. This is when genuine bargaining usually takes place, with mediation helping the parties to reach an agreement.

> In most Canadian jurisdictions, conciliation is a mandatory precondition to striking. Binding first-contract arbitration is available to prevent an employer from "stonewalling" a newly certified union. In the United States, unions may proceed to strike upon the expiration of a collective bargaining agreement without mandatory mediation or conciliation. The U.S. *National Labor Relations Act* generally limits government intervention to mediation at the request of both parties. The U.S. Federal Mediation and Conciliation Service (FMCS) may enter a dispute only when both parties request it. Only a genuine "national emergency" can provoke stronger government intervention. The *Railway Labor Act*, however, which covers the railroad and airline industries, requires mediation before any strike in those industries. It also provides for farther-reaching government intervention, even by the

President or the Congress of the United States, in those industries (see Appendix 4A, below).

### (vi) Law-Contracts: Extension of Contract Terms to an Entire Sector or Region

Unions representing at least two-thirds of unionized workers in a given industrial or geographic sector may petition the relevant federal or state Department of Labor and Social Welfare for a declaration bringing a law-contract into force throughout the sector. A law-contract (LC) is defined by Article 404 of the FLL as "the agreement made between one or more unions of workers and various employers, or one or more unions of employers, for the purpose of establishing conditions of work in a determined branch of industry where such conditions are declared obligatory in one or more federal states, in one or more economic zones within one or more states, or in the entire national territory." The LC thus extends negotiated contract terms to all employers and employees in the specific branch of industry.

Upon receiving a petition, the authorities may convene a meeting of interested unions and affected employers. Those attending the meeting may, by separate majority votes of unions representing and employers employing two-thirds of the unionized workers in the industry or sector in question, adopt a law-contract for the sector. Before such mandatory extension of contract terms, nonunionized workers and employers have an opportunity to state their objections.

The LC is administered by the majority union in each workplace, commonly through a labor-management committee overseen by a national commission. There are currently seven such law-contracts. They cover the following sectors: four textile sectors (cotton, wool, silk and hard fibers), with 30 unions and 34,507 workers in 1996; rubber (one union and 10,004 workers); sugar (nine unions and 27,942 workers); and radio and television (seven unions and 18,256 workers).[7]

The duration of an LC may not exceed two years (FLL art. 412). The LC can be modified by petition to the labor authorities by the represen-

[7] See Secretaría del Trabajo y Previsión Social (STPS), *Informe de Labores 1996-1997* (Mexico, D.F.: STPS , 1997), at p. 104, Cuadro 6.

tative trade unions and employers in the sector, under terms similar to those for modifying collective contracts. It can terminate through mutual consent of the parties or if a petition for revision does not end with an agreement and the unions have not subsequently exercised the right to strike.

> In Canada the province of Quebec has a similar institution, through which collective agreement terms are extended by legal decree to cover an entire sector or type of occupation. Such extension decrees cover 29 occupations or sectors. The mandatory extension of collective bargaining agreements to nonunionized employers and employees does not occur in the United States or in Canada outside of Quebec.

*4) Enforcement of Collective Contracts*

(i) Binding Effect of Collective Contracts

All collective contracts must be examined by the CAB for their legality and to ensure that they do not diminish workers' minimum rights under the FLL. Once this is done, the collective contract is treated as a judicial order of the CAB itself and is enforceable as such. The collective contract can be terminated by mutual consent of the employer and the union, due to completion of the project for which work has been contracted, or due to the permanent closure of the company or establishment.

In articles 427 through 439, the FLL provides a mechanism by which an employer may suspend or terminate collective labor relations in certain cases of economic necessity. Suspension of collective labor relations is somewhat analogous to a temporary layoff under Canadian or U.S. labor law, and a termination is analogous to a permanent layoff or plant closure. Articles 427 and 434 stipulate the legally recognized grounds for such measures.[8] Suspension or termination of collective labor relations is

[8] Article 427. Temporary suspension of labor relationships. The following shall be deemed to be grounds for the temporary suspension of the labor relationships in an enterprise or establishment:

subject to CAB approval. Except in cases falling under Article 427, Part I, or Article 434, Part I or V,[9] CAB authorization must be obtained prior to the suspension or termination. Suspension or reduction of the work hours of particular workers takes place in reverse seniority order. In approving a suspension, the CAB awards compensation to the workers in question of up to one month's salary. Workers whose employment is terminated are entitled to receive at least three months' pay plus a seniority allowance (see the description in The Individual Employment Relationship, section 1D, above). Suspended workers maintain rights to be recalled to their former positions. In the event that a terminated undertaking is started up again, the hiring preference clauses in the collective contract will apply.

> U.S. and Canadian labor relations statutes do not provide mechanisms through which collective bargaining agreement terms can be suspended or terminated in cases of employer economic hardship or necessity. Such mechanisms are left to the parties to negotiate and include in the agreement.

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I. "force majeure" or any unforeseen event not attributable to the employer, or the employer's physical incapacity or death, shall entail the suspension of work as an inevitable, immediate and direct consequence;

II. lack of raw materials not attributable to the employer;

III. over-production in relation to the enterprise's economic situation and the state of the market;

IV. the known and obvious inability, of a temporary nature, of the enterprise to pay its way;

V. lack of money and the impossibility of obtaining it for the normal continuance of work, on condition that these facts are adequately proved by the employer.

Article 434. Grounds for termination of labor relations. The following shall be grounds for terminating the labor relationship:

I. "Force majeure" or any unforeseen event not attributable to the employer, or the employer's physical incapacity or death, shall entail the suspension of work as an inevitable, immediate and direct consequence;

II. the known and obvious inability of the enterprise to pay its way;

III. the exhaustion of the substance being extracted by a mining enterprise;

IV. the cases referred to in Art. 38;

V. statutory declaration of insolvency proceedings or bankruptcy, if the competent authority or the creditors decide on the permanent closing down of the enterprise or the permanent retrenchment of production.

[9] *Ibid.*

(ii) Enforcement Procedures

The union has the right to file a complaint with the CAB claiming that the employer has violated the collective contract. Each individual worker has the same right. Such complaints are normally filed when a problem has not been resolved in direct discussions with the employer. In CAB proceedings, a worker may present his or her claim alone or with the union's assistance. The CAB will at the outset of the proceedings seek to conciliate the dispute between the parties. If a settlement is not reached it will conduct a hearing and issue an order in the case.

> The use of the Mexican government CABs to resolve grievance issues, including individual workers' grievances, contrasts with the systems of the United States and Canada. There private arbitration is generally the contract enforcement mechanism, rather than recourse to the NLRB (in the U.S.) or the federal or provincial labor boards (in Canada).

*5) Substitute Employers*

A change of employer, whether through the sale or transfer of an establishment or enterprise or other transaction, does not affect labor relationships in the establishment or enterprise. The collective contract continues unchanged, the substitute employer is bound by its terms, and title to the agreement is not affected.

> Canadian labor law also requires that the terms and conditions of a collective agreement carry over to an employer continuing the business of a previous employer. In the U.S., a "successor" employer has a duty to bargain with the union only if the successor employer hires a majority of the former company's union-represented workers. Otherwise there is no duty to bargain. The terms of the collective bargaining agreement are not binding on the successor employer.

*6) Obligations of Unions towards Represented Workers*

Article 375 of the FLL provides that a union shall represent its members in defending their individual rights unless the individual chooses to act directly and without the assistance of the union.

> U.S. and Canadian laws impose a duty of fair representation on unions. The duty requires them to represent all bargaining unit members without arbitrariness, bad faith or discrimination. It applies to the union's administration of rights under the collective bargaining agreement. In the U.S. and in most Canadian jurisdictions, it also applies to the negotiation of that agreement.

*7) Termination of Title to a Collective Contract*

Workers who wish to change collective bargaining representatives may at any time seek through a registered union to challenge the title of the current union to the collective contract (see Acquisition of Title to a Collective Contract, section 2B.2, above). Workers wishing to terminate their union representation completely rather than switch union representatives may seek to dissolve their union or to install as the contract title holder a union that they will later dissolve (see The Formation and Dissolution of Unions, section 2A.2, above). In practice workers seldom seek to deunionize.

> Canada's labor laws create periodic opportunities during which employees are allowed to change or remove their union representative. In the interests of labor relations stability, Canadian labor legislation typically gives unions a secure period of one year within which to negotiate a collective agreement. Where a collective agreement is in place, a union may in general be decertified only during specified "open periods," generally within two months of the expiry of the collective agreement. U.S. law provides similar opportunities for workers to change or remove their bargaining representative. There a union may not be decertified if an election was held in the bargaining unit within the previous year or during the first three years of a collective bargaining agreement.

## C. Labor Principle 3 – The Right to Strike

### *1) Legal Foundations*

The 1917 Mexican Constitution was the first in the world to protect the right to strike. Four sections of Article 123 speak directly to the right to strike:

Section XVII states that "the laws shall recognize the strike and the lockout[10] as a right of workers and of employers."

Section XVIII states that "strikes shall be lawful when they have as their purpose achieving balance between the different factors of production, harmonizing the rights of labor with those of capital… Strikes shall be considered unlawful only when the majority of the strikers engage in violent acts against persons or property."

Section XIX states that "lockout shall be lawful only when a production surplus makes it necessary to suspend work to maintain prices at a level with costs, and with prior approval of the Conciliation and Arbitration Board."

Section XXII states that "an employer who dismisses a worker without justifiable cause or because he has entered an association or union, or

[10] The English word "lockout" in this constitutional provision is the usual translation of the Spanish *paro*. However, it is not an accurate translation in terms of U.S. or Canadian labor discourse. "Lockout" has a precise meaning in Canadian or U.S. collective bargaining. The lockout is the weapon of economic strength available to an employer who "locks out" workers to compel them to accept the employer's bargaining proposal. In the United States and Canada, the lockout is the employer's counterpart to the workers' strike weapon. When it is used, the lockout usually accompanies employer demands for wage or benefit reductions. In both countries it is relatively rare. In Canada, extensive conciliation and mediation requirements usually preclude the lockout. In the United States, the employer's ability to unilaterally implement its final offer once the parties reach impasse in bargaining limits resort to the lockout, since implementation forces the union to strike or to work under the unilaterally imposed terms.

By contrast, *paro* in the Mexican constitutional sense has nothing to do with collective bargaining. The "lockout" concept does not exist in Mexican labor law. Employers are not permitted to lock out workers to force them to agree to wage or benefit reductions (although there have been instances of companies closing and reopening under other provisions of the law to achieve such a goal). In this constitutional provision, *paro* has a different meaning. It means a stoppage of work initiated by the employer because of economic necessity. Thus, it is best rendered by "layoff" or "furlough."

for having taken part in a lawful strike, shall be required, at the election of the worker, either to fulfill the contract or to indemnify him to the amount of three months' wages."

The first recorded strike in Mexico was one by singers and minstrels at the Metropolitan Cathedral of Mexico City in 1582 when the city reduced their salaries. The strike lasted one and a half months. Another early strike was one in 1766 by miners at the Real del Monte mine in Hidalgo. In notable 19th-century strikes, the weavers of Tlalpan in the Federal District went on strike for a shorter workday. Textile workers at the La Magdalena plant struck against the company store, and miners in Pachuca, Hidalgo, struck to improve working conditions. Early in this century, the best-known strikes were those by mineworkers in Cananea, Sonora, and by textile workers in Rio Blanco, Veracruz. Some authors find in these strikes the antecedents of the revolution of 1910.

The 1915 labor law of Yucatan was the first Mexican legislation dealing with strikes. It defined a strike as a stoppage by workers leaving their jobs or breaking their employment contract "with the purpose of compelling the employer to accede to their needs and demands."

For a decade and a half after passage of the 1917 Constitution, labor law jurisdiction rested exclusively with the states. Between 1917 and 1929, many states adopted labor laws dealing with strikes, among them the 1925 Tamaulipas Act, which established an important precedent for the federal law of 1931. The Tamaulipas law defined a strike as "the suspension of work as a consequence of a coalition of workers." This introduced the important concept of coalition, or concerted activity, by a group of workers for the defense of their common interests.

In Oaxaca, legislation defined a strike as the collective action of workers through a temporary suspension of their normal labor with the objective of balancing the different factors of production, harmonizing the rights of workers with those of employers. This formulation paved the way for the definition and norms that emerged in the FLL of 1931. The FLL brought labor law under federal jurisdiction, with enforcement shared between federal and state authorities. The 1931 FLL defined a strike as "the temporary suspension of work as a result of a coalition of workers."

The statutory regulation of the constitutional right to strike remained a controversial issue in Mexican labor law. Later reforms introduced the

concept of a "legal" strike, implying that workers needed prior approval of the authorities to undertake a strike. Adding to the constitutional definition of licit and illicit strikes, new statutory concepts of "legal" and "illegal" strikes, "existing" and "nonexisting strikes" and "justified" and "unjustified strikes" complicated this area of labor law in Mexico.

Article 440 of the current FLL of 1970 refined the definition of a strike, expressing it as "the temporary suspension of work carried out by a coalition of workers." This formulation effectively recognizes the right to strike without prior approval. Articles 440 to 469 and 920 to 938 of the FLL are the key provisions governing the right to strike.

*2) Protected Strike Activity*

Article 443 of the FLL limits the definition of a strike to "the mere act of suspending work." Thus the legal framework protecting the right to strike does not protect work slowdowns or other tactics that stop short of suspending work.

> Canadian labor laws employ a broad definition of the term strike, which typically includes most concerted refusals, cessations or slowdowns of work or other concerted activities designed to limit output. The U.S. *National Labor Relations Act* uses a narrower definition, excluding partial and intermittent strikes as well as work slowdowns from its definition of "protected concerted activities."

*3) Regulation of the Right to Strike*

Strikes are permitted during the term of a collective contract if the employer violates the contract, to seek new collective contract terms during an annual wage reopener, or during general collective contract negotiations. Strikes are also permitted to enforce the profit sharing provisions of the FLL. Solidarity strikes are expressly permitted under FLL Article 450, Section VI. A no-strike clause in a collective contract is unconstitutional under Mexican labor law.

> In Canada, all jurisdictions prohibit strikes during the term of a collective agreement, requiring arbitration to resolve any dispute relating to the interpretation, application or alleged violation of the agreement. In the United States, a no-strike clause is a matter for bargaining between the parties. The vast majority of union contracts contain a no-strike clause for the duration of the contract, with arbitration as the specified recourse for a claimed violation of the agreement. Neither Canada nor the United States permits secondary strike activity in support of workers involved in a primary labor dispute.

Mexican labor law regulates the right to strike in the following ways:

1) It specifies the permissible objectives of a strike.
2) It allows an employer, striking workers or an affected third party to require that a striking union show that the strike has the support of a majority of the workers at the enterprise(s) or establishment(s) affected by the strike.
3) It terminates the employment of workers involved in a strike in which the majority of the strikers perpetrate violence against persons or property, or in a strike during a time of war by workers employed in establishments or services under the government.
4) It requires certain workers providing key services to continue to work notwithstanding a strike.
5) It creates a set of mandatory strike procedures, which include a minimum period of notice of a strike (six days in the private sector) and conciliation conducted by the relevant CAB.
6) It provides a mechanism through which a union can submit the labor dispute to the relevant CAB for resolution and can seek redress where the cause of the strike is imputable to the employer.

Some of this regulation is achieved through a set of legal definitions. The key definitions are those of illicit, legally nonexistent, and justifiable strikes.

(i) Legal Definitions

*A *legally nonexistent strike* (FLL art. 459) is one that is not carried out by a majority of workers in the undertaking or establishment or is not carried out for any of the purposes enumerated in the law (FLL art. 450), or

fails to comply with procedural requirements set out in Article 920 (see Strike Procedures, below in this section).

FLL Article 450 defines the necessary objectives of a legally existing strike as follows:

I. to obtain a balance between the different factors of production, harmonizing the rights of labor with those of capital;
II. to achieve the employer's or employers'[11] acceptance of a collective contract and revisions of the contract at the end of its term;
III. to achieve the employers' acceptance of a law-contract and revisions of the contract at the end of its term;
IV. to secure compliance with the collective contract or law-contract when the employer violates the agreement;
V. to secure compliance with the legal requirements for profit sharing;
VI. to support a strike which has any of the foregoing objectives; and
VII. to obtain salary revisions on the anniversary date of the contract in accordance with articles 399 and 419. (Those articles require annual salary negotiations at the anniversary date of the collective contract, normally at the mid-point of a two-year contract.)

If a strike is declared legally nonexistent, workers must return to work within 24 hours or face dismissal.

* An *illicit strike* is one in which violence is perpetrated by a majority of the strikers against persons or property or, in time of war, one in which the striking workers are employed in establishments under the government. Workers involved in a strike determined to be illicit are considered to have terminated their employment.

* A *justifiable* strike is one whose cause is attributable to the employer (e.g., a strike precipitated by an employer's systematic violation of a collective contract). A CAB finding that a strike is justifiable can have significant economic consequences for an employer (see Strike Procedures, below in this section).

[11] Mexican labor law allows unions holding the appropriate type of registration to bargain with multiemployer groups. See Legal Status of Unions, section 2A.3, and Acquisition of Title to a Collective Contract, section 2B.2, above.

(ii) Services Maintained Notwithstanding a Strike

Article 466 requires certain workers on strike to continue to provide certain services. In particular, transportation workers must complete their travel to a final destination, and health care workers must ensure that patients are safely transferred to other facilities before they may join a strike.

On occasion, the President of the Republic has issued an executive order, referred to as a *requisa*, transferring control of a telecommunications or transportation enterprise facing a strike to a government-appointed administrator. *Requisas* are authorized only under specific legislation applying to the telecommunications and transportation industries. In general, the purpose of these laws is to ensure the continuity of such services to the public in order to avert harm to national interests. The legislation empowers the federal government to take control of transportation or telecommunication enterprises in specified situations, such as in times of war or in cases of "imminent danger to the national economy." The administrator who assumes control of the enterprise may be authorized to use other workers in order to keep it running notwithstanding the strike. Some unions have argued that the use of *requisas* in this manner breaches workers' constitutional right to strike.

> On occasion, Canadian governments have enacted *ad hoc* back-to-work legislation in order to bring an end to otherwise lawful strikes, generally in economically important enterprises. For example, the government of Canada passed back-to-work legislation in the federal jurisdiction 30 times between 1950 and 1999 in order to end railway, postal service, port operations, shipping and grain handling strikes. Under "national emergency" provisions of U.S. labor law, the President of the United States may direct the Attorney General to seek a court injunction against a strike or threatened strike. A court may issue an 80-day injunction if it finds that the strike or threatened strike will imperil the national health or safety. These "national emergency" provisions have been used in a number of industries, including steel, coal, atomic energy, maritime transport, and telecommunications.

(iii) Strike Procedures

Articles 920 to 938 set out the procedures governing strike action. Article 920 requires that a union give written notice of its bargaining demands to the employer, with a copy to the CAB, declaring the objectives of the strike and specifying a date and time when a strike will commence unless the demands are met. At least six days' advance notice is required before a strike may begin, except where the employer provides a public service, in which case 10 days' notice is required. Strike notice is referred to in Mexican labor discourse as *emplazamiento de huelga.*

Unions normally convey a strike notice in connection with every contract renewal or annual wage reopener, so labor law authorities record thousands of *emplazamientos* each year. The actual launching of a strike, the *estallamiento de huelga,* is much less frequent.

Under articles 448 and 902, a union's exercise of the right to strike (by giving a strike notice) suspends all legal proceedings between the parties before a CAB unless the union submits the dispute to the CAB for resolution. Under FLL Article 924, serving a strike notice also suspends the enforcement of all judgments against an employer's assets and prevents the sequestration of those assets, which must be preserved to protect the rights of workers, particularly with regard to pensions, severance pay, social security and housing fund payments. Workers' claims to these obligations have priority over all others except taxes.

Within 48 hours of receiving a strike notice, the employer must reply to the union's demands in writing. Unless Article 923 applies, the CAB then summons the parties to a conciliation hearing. Article 923 provides that a CAB may not act upon a notice of intention to strike if that notice is given by a union that is not a party to the relevant collective contract or law-contract or by an organization that seeks to conclude a collective contract, notwithstanding that one covering the workers in question has already been deposited with the CAB. As a result, if a collective contract or law-contract is in force, the CAB will not carry out the conciliation and adjudication procedures described below unless a strike notice is filed by the union that holds title to the collective contract or by the union administering the law-contract. Further, a CAB will not carry out such dispute resolution procedures if a union files a strike notice to seek a new collective contract, notwithstanding that a collective contract

which is not yet open for revision (see The Collective Bargaining Process, section 2B.3, above) has been deposited with the CAB.

If conciliation does not produce an agreement, the union may proceed to strike.

(iv) Suspension of Work and Preservation of Equipment and Raw Materials

If a strike occurs, the union sets up red and black flags at entrances to the workplace. Red and black flags are the universal strike symbol in Mexico. All union workers in the struck facility must halt work when the flags go up (see, however, Services Maintained Notwithstanding a Strike, above in this section). The company must cease operations except those necessary to protect equipment and raw materials. FLL Article 449 commands the CABs and corresponding civil authorities to enforce the right to strike and to grant workers the necessary guarantees and assistance to halt company operations. The union assumes legal responsibility for the preservation of equipment and raw materials and must cooperate by supplying workers for that purpose.

Before the strike begins, the CAB is required to set the number of workers who must remain at their posts to preserve equipment and raw materials, in order for the union to meet its obligation to preserve the employer's property during the work stoppage. The parties are entitled to be heard by the CAB on this matter. The union must submit to the CAB a list of members who can remain at their posts.

(v) Application for Determination that a Strike is Legally Nonexistent or Illegal

As noted above, FLL Article 451 provides that a strike that is not carried out by a majority of workers in the undertaking or establishment is legally nonexistent. Striking workers, the employer or an affected third party may apply within 72 hours of the suspension of work to the relevant CAB for an order declaring a strike legally nonexistent. The CAB will then open a proceeding that includes a hearing and the taking of evidence. It may also conduct a *recuento* or vote count to determine majority sentiment and to qualify the strike as existent or nonexistent. If a ma-

jority does not support the strike, the CAB declares it to be nonexistent and workers must return to their jobs within 24 hours or face dismissal. If the CAB is not petitioned to declare a strike nonexistent, it is deemed to exist for all legal purposes.

> In the United States strike votes are not mandatory, though as a matter of practice many unions hold them. Canadian labor relations statutes require a strike vote, usually by all workers in the bargaining unit, before a strike may occur.

An application for a declaration that a strike is illicit may be brought at any time after the strike has begun. Articles 928 to 933 set out detailed procedures for hearings of applications to have a strike declared illegal or nonexistent, including procedures for any strike vote that may be held to determine the legal existence of a strike.

(vi) Means of Ending a Legally Existent and Lawful Strike

FLL Article 469 defines the methods for ending a legally existent and lawful strike:

I. by agreement between the striking workers and the employer;
II. if the employer accepts the union's written demands and covers the salaries that the workers did not receive;
III. by arbitral order of an arbitrator or arbitral panel freely chosen by the parties; and
IV. by an order of the Conciliation and Arbitration Board if the striking workers have submitted the dispute for the CAB's decision.

Most strikes are settled by agreement between the union and the employer. Where a union does submit a bargaining dispute to the CAB for resolution, Article 937 provides that if the CAB declares in its award that the reasons for the strike are attributable to the employer, it must order the employer to meet the workers' claims, insofar as they are lawful, and pay them for the days that they were on strike. However, an employer may not be required under this section to pay such wages to workers engaged in a solidarity strike.

The union's option to submit a bargaining dispute for decision by the CAB contrasts with U.S. and Canadian law, where both parties normally must agree to have a strike resolved by a third party. An exception exists in the U.S. *Railway Labor Act*, which provides for binding government intervention (even of the Congress or the President) in some disputes, and in many Canadian jurisdictions where the board or labor minister can act to settle a first-contract dispute.

*4) Supportive Action*

As noted above, Article 450 of the FLL provides that workers may strike in support of a lawful strike by other workers. Workers may also demonstrate in support of their demands or those of other workers, consistent with their freedom of assembly and freedom of expression. While workers are free to do so, they seldom picket their employer in labor disputes. Employers are in any event required to cease production once a strike begins (see immediately below).

*5) Prohibition of Striker Replacement*

Article 4 of the FLL prohibits the use or attempted use of replacements for lawfully striking workers. The only exception to this prohibition arises if the union refuses to provide workers needed to preserve equipment and raw materials (see Regulation of the Right to Strike, section 2C.3, above). In such a case the employer may use temporary replacements under Article 936 of the FLL.

In the United States, employers may seek to continue operations during a strike. They may solicit workers represented by the union to remain at or return to work during the strike. They may hire replacement workers to maintain operations, and such replacements can permanently displace strikers unless the strike was provoked by the employer's unfair labor practices. Canadian labor relations statutes prevent the permanent replacement of striking workers. Employers may seek to continue operations using management personnel and, in most provinces, nonstriking workers and temporary replacement workers.

## D. Protections against Interference

### *1) Just Cause Protection*

Article 123, Section XXII of the constitution and various provisions of the FLL seek to ensure that employees who are dismissed for union or other lawful activities have access to reinstatement or severance pay, at their option.

Section XXII of Article 123 provides that an employer who dismisses a worker without justifiable cause or because he has entered an association or union, or for having taken part in a lawful strike, shall be required, at the election of the worker, either to fulfill the contract or to indemnify him to the amount of three months' wages. The law shall specify those cases in which the employer may be exempted from the obligation of fulfilling the contract by payment of an indemnity.

Article 47 of the FLL defines l5 "just causes" for discharge and makes unlawful a discharge that is not based on one or more of the permissible reasons spelled out in the law. Union activity, like any other lawful activity, is not among those reasons. Thus, a discharged Mexican worker does not have to show that antiunion motivation was a factor in the dismissal. The burden always rests with the employer to prove that the reason for the discharge falls within the statutory definition of just cause for discharge. Under general principles of Mexican labor law, any ambiguities in the evidence with respect to whether just cause existed must be resolved in favor of the worker. Article 48 of the FLL gives the worker who is discharged for union activity a choice between seeking a reinstatement order from the relevant CAB or accepting a payment of at least three months' salary (*indemnización*). In the majority of cases workers negotiate a severance payment with the assistance of an attorney, instead of seeking reinstatement. For further detail, see The Individual Employment Relationship, section 1D, above.

Box 3.3

Severance Pay in Mexican Labor Law

For U.S. and Canadian readers of this report, the importance of severance pay in the Mexican system cannot be overstated. All workers are entitled to severance pay when they lose their jobs, unless they are discharged for one of the 15 specified acts of misconduct in Article 47 of the FLL. There is no unemployment insurance system in Mexico, so the immediate provision of severance pay, in the highest possible amount, becomes of paramount interest to workers in both individual discharge cases and mass layoffs.

A great number of cases of alleged unjust discharge are processed each year in Mexico's federal and state CABs (in 1996 the Federal CAB in Mexico City processed 4,610 of these cases). For their part, the CABs normally press the parties to reach a private settlement for severance pay.

Throughout the country, workers can obtain free legal assistance in such cases from the Federal Office of the Labor Public Defender. Because it is a statutory benefit for all workers, there is a high demand for such legal assistance. Where workers engage private attorneys to represent them before the CAB, the attorney's fees are customarily a percentage of the total severance amount. This creates an incentive for them to reach a settlement at the highest possible amount.

The caseload of the Federal Office of the Labor Public Defender has increased dramatically in the past decade. In 1985, the labor public defender provided some 15,000 consultations, achieved about 3,000 settlements, and took 1,200 cases before the CABs. In the 1996-1997 fiscal year, more than 50,000 consultations, 7,075 settlements, and 9,803 CAB cases were initiated.[12]

*2) Limitations on the Use of Exclusion Clauses*

Article 123 of the Constitution provides workers with remedies against dismissal pursuant to an exclusion clause for joining another union during the registration of that union (see Union Membership and Dues, section 2A.6, above).

[12] See Secretaría del Trabajo y Previsión Social (STPS), *Informe de Labores 1996-1997* (Mexico, D.F.: STPS , 1997), at p. 82, Section 3.5.2, paragraph 3.

*3) Prohibitions against Coercion*

Article 133 of the FLL provides that employers shall not "compel an employee by coercion or any other means to join or withdraw from the union or association of which he or she is a member, or to vote for a specified candidate." It also prohibits employers from interfering in any manner in the internal activities of a union.

Mexican labor law does not specifically address other forms of employer interference with freedom of association, the right to organize or the right to strike, or such interference by trade unions. However, as noted above (see Legal Sources of Labor Rights, section 1C), ILO Convention 87 (Freedom of Association and Protection of the Right to Organize Convention, 1948) applies to labor relations in Mexico. The ILO's Committee of Experts on the Application of Conventions and Recommendations has stated that "the protection afforded to workers and trade union officials against acts of antiunion discrimination constitutes an essential aspect of freedom of association, since such acts may result in practice in denial of the guarantees laid down in Convention No. 87."[13]

*4) Civil Rights and Protection*

Without civil and political rights there can be no normal exercise of trade union rights. The Mexican Constitution provides fundamental civil and political rights to all Mexicans. Like other Mexican residents, unions and union members enjoy constitutional protection of their freedom of assembly, provided that the exercise of this freedom does not pose significant danger of substantial harm to property or physical safety. Unionists have the freedom to travel within and outside the country that is granted to all residents and have the right to attend national and international trade union meetings with full freedom and independence. Similarly, unions and employees have the constitutional right to express their views and opinions publicly and to impart information through

[13] See International Labour Organization, *Freedom of Association and Collective Bargaining* (Geneva: I.L.O., 1994), at p. 92, paragraph 202.

any media, like other Mexican residents. Note, however, that under Article 378 of the FLL, unions may not intervene in religious activities (see Unions Self-Governance, section 2A.4, above).

Unions and employees engaged in union activity, like all Mexican residents, have a constitutional right to be free from search and seizure of their property without a judicial warrant. Similarly, unionists enjoy constitutional freedom from arbitrary arrest or detention without a warrant and without charges being brought. Unions and their members are entitled to full protection of the criminal laws which prohibit physical assaults and damage to property and to the same police protection from such harms as other Mexican residents.

## 3. GOVERNMENT ENFORCEMENT

The public administration of key elements of Mexican labor law is carried out in a tripartite fashion, involving government, labor and management representatives. The federal and state CABs that regulate and enforce rights to organize, bargain collectively and strike are made up of government, labor and management representatives. National commissions and institutes on minimum wages, profit sharing, housing, and social security also have such tripartite composition.

Box 3.4

Union Involvement in Tripartite Labor Policy Bodies

Mexican unions are represented on tripartite bodies that serve as the mechanisms of national consultation and cooperation among business, labor and the government. In recent decades these have included the National Tripartite Commission of 1971, giving unions a voice in the drafting of proposed labor law amendments; the 1977 Alliance for Production; and successive agreements such as the 1983 Economic Solidarity Agreement, the 1989 Stability and Growth Agreement, and the 1995 Alliance for Economic Recovery. The 1983, 1989 and 1995 agreements (*pactos*) had as a key purpose controlling inflation through wage restraint.

Mexican labor legislation states that the "most representative national unions" are entitled to serve on such tripartite bodies. Under the *Social Security Law* (art. 248) and the law creating the National Workers' Housing Fund (art. 8), the STPS is empowered to designate these organizations (under a regulation that takes into account the number of union members as documented before the labor authorities) and to organize assemblies where unions and employers elect their representatives to these bodies.

The National Minimum Wage Commission is the body charged with setting minimum wages for various occupations in the country. This commission consists of a government chairperson and an equal number of labor and management representatives (art. 554).

The National Profit Sharing Commission is a tripartite body that sets the percentage of income of employers upon which profits must be shared with workers. Under Article 579, it is also made up of an equal number of labor and management representatives.

The governing body of the Mexican Social Security Institute (IMSS) is made up of 10 representatives each from the federal government, employer organizations and unionized workers (art. 246-247 of the 1945 *Social Security Law*). The Technical Council of the IMSS operates in a similar tripartite fashion, with four persons from each of these groups.

The National Workers' Housing Institute (INFONAVIT) is another tripartite national organization in which unionized workers participate through national trade unions. The ruling body is composed of 15 representatives of government, labor and management. This body administers the housing fund created through obligatory payroll taxes to provide a source of low-interest loans for workers to purchase or improve their homes.

## A. Government Labor Authorities

### *1) Federal*

The federal labor authorities are headed by the Department of Labor and Social Welfare (STPS), an executive agency that oversees compliance with labor laws, as well as collective bargaining, fair labor standards, labor defense, and job training. The STPS also oversees the Federal Conciliation and Arbitration Board (FCAB) and various other tripartite

organisms such as the National Minimum Wage Commission and the National Profit Sharing Commission. The STPS contains the General Directorate for Registration of Associations, which is charged with trade union registration in the federal jurisdiction. The STPS has approximately 50 offices called Federal Labor Delegations where most federal jurisdiction labor affairs are handled. These offices are found in state capitals and in other cities with a large labor presence.

*2) State and Federal District*

In each of the states and in the Federal District of Mexico (Distrito Federal, D.F.) there are departments of labor under the authority of the local executive branch (the state governor or the chief of the government of the D.F.). These local authorities carry out the same functions as the STPS, but within the local jurisdiction. They oversee the local CABs. The local labor departments also assist federal authorities in implementing job training programs and other programs in federal jurisdiction. Local CABs are responsible for trade union registration within state jurisdiction.

## B. Administrative Labor Tribunals

The CABs are judicial tribunals located in the executive branch of government. They are charged with interpreting and enforcing the labor laws to resolve disputes arising out of labor relationships between workers and employers or between workers only or employers only. This mandate covers disputes between workers and their unions and disputes between employers and their organizations. They are composed in tripartite fashion of representatives of the government, workers and employers. CABs have varying numbers of members depending on the volume of cases in their jurisdiction. CAB chairpersons are appointed by the STPS (in the federal administrative jurisdiction), by the relevant state governor (in state administrative jurisdiction), or by the chief of the government in the Federal District. They must be lawyers. Labor and management members of the CABs are elected in annual assemblies of their respective organizations.

The Federal CAB has its headquarters in Mexico City, but it also operates 21 Federal Special CABs in Mexico City and 43 Federal CABs throughout the country for various sectors of federal jurisdiction. In every state capital and in the Federal District, tripartite local CABs carry out equivalent functions within local jurisdiction. In total, over 100 CABs operate to enforce the *Federal Labor Law* within their respective jurisdictions.

The CABs administer all aspects of industrial relations issues in Mexico — union formation, union registration, disputes between unions for representation rights, collective bargaining, plant closings, the right to strike and so on — as well as individual discharges and other grievances between individual workers and employers outside the industrial relations context. They generally dispose of cases in a single proceeding, starting with an attempt to resolve the matter through conciliation. If conciliation fails, the parties will generally proceed directly to a hearing of their dispute. Decisions of the CAB are final. They may be appealed only under a proceeding for judicial review known as an action for *amparo.* Such actions may be based only on certain limited grounds, the most important of which are error of law, breach of due process, and exceeding legally authorized powers (see Appeals and Judicial Review, section 5B, below).

In the federal jurisdiction, Special Conciliation Boards have been established as part of the Federal CAB structure. The Special Conciliation Boards are empowered to arbitrate disputes involving amounts not exceeding three months' salary. They are also empowered to conciliate individual and collective labor disputes.

The impartiality of the CABs in matters of union registration and other actions has been the subject of extensive debate in Mexico. There are various currents of opinion, and some have been translated into proposals aimed at modifying the *Federal Labor Law.* For example, proposals have been advanced to substitute a single judge for the current tripartite boards.

> Mexico's tripartite CABs combine many of the functions carried out in the United States and Canada by labor boards, labor tribunals, mediation and conciliation services and private arbitrators. The U.S. NLRB is made up of public members appointed by the President. A majority

of Canadian jurisdictions provide for tripartite participation in labor boards.

The U.S. NLRB's enforcement procedures can involve several steps: the filing and investigation of a complaint, the issuance of charges or dismissal of the complaint, administrative law judge (ALJ) hearings, appeal of the ALJ's decision to the National Labor Relations Board, and court proceedings for enforcement of the NLRB's order or to appeal it. By contrast, like Mexico's CABs, Canada's federal and provincial labor boards (and in Quebec the Office of the Labour Commissioner and the Labour Court) are more integrated than the U.S. NLRB in their structure and operation. Most boards have labor relations officers or investigation officers who summarily investigate and attempt to settle cases prior to hearings. If settlement efforts are unsuccessful, the board holds a single set of hearings and issues a final decision. Most boards will reconsider such decisions only in unusual cases. The board's decision is generally not appealable to the courts. The decisions of Canada's federal and provincial labor boards are immediately enforceable as judicial orders upon filing of the decision in the appropriate superior court. Quebec's Labour Court is a judicial body whose orders are immediately enforceable.

## 4. RIGHTS OF PRIVATE ACTION

### A. Access to Administrative Tribunals

Any worker has the right to file a complaint with the relevant CAB to enforce individual employment rights under the FLL or under a collective contract, if the worker is covered by one. If the worker is covered by a collective contract, the union with title to it may represent the worker. However, workers can waive union representation and represent themselves, personally or through counsel, in disputes arising under the collective contract as well as the FLL. Upon such a waiver, the intervention of the union ceases. The individual worker is entitled to representation at no cost by an attorney from the Federal Office of the Labor Public Defender, a branch of the labor ministry in the federal jurisdiction, or by an attorney from the analogous local (state or D.F.) office.

In the United States, following a preliminary investigation of charges, a complaint may be issued; at that point the Office of the General Counsel of the NLRB prosecutes the case on behalf of the charging party (worker, union or employer) and the people of the United States. The board's attorney effectively serves as the charging party's counsel in proceedings before an administrative law judge and in any appeal to the full board or the courts. By contrast, in Canada individual workers, unions or employers may file complaints directly with the labor relations tribunal and present a case directly to the tribunal. The parties are responsible for their legal representation costs.

### B. Access to Courts

In general, the Constitution (art. 123) and the FLL give the relevant CAB exclusive jurisdiction over all employment law matters. A private party therefore may not take a labor law claim directly to court. However, a party may invoke a right of *amparo* to obtain judicial review in a constitutional court of a CAB action that is alleged to violate individual constitutional rights or due process protections (see Appeals and Judicial Review, section 5B, below).

## 5. PROCEDURAL GUARANTEES AND REMEDIES TO ENSURE ENFORCEMENT

### A. Due Process

Article 14 of the Constitution provides a general guarantee of due process of law in the legal system (see Appeals and Judicial Review, below). In addition, extensive provisions in articles 685 to 991 of the FLL apply due process guarantees in proceedings before the CABs. The *Federal Administrative Procedure Law* (FAPL) of 1995 provides procedural protections which apply to the administrative acts, proceedings and decisions of federal administrative agencies, including the STPS. These protections apply to the process of registering a union in the federal jurisdiction. They do not apply to the federal or local CABs.

*1) Procedural Protections*

Key elements of due process guarantees in CAB labor proceedings require that they be: (1) open to the public (with certain exceptions, such as not offending morals); (2) free, that is, there are no filing fees or other procedural costs; (3) immediate, in the sense that the members of the tribunal must be in personal contact with the parties; and (4) predominantly oral, short and simple.

Parties to CAB proceedings have the right to receive notice of hearings and to attend them in person. The hearing must generally take place upon 10 days' notice and within 15 days of the filing of the relevant complaint with the CAB. No specified form is required for tendering pleas or making statements. Parties have the right to be represented by an attorney during CAB proceedings.[14]

At the outset of proceedings, CABs seek to settle through conciliation the cases that come before them. If a settlement is not reached, the case moves to the hearing stage, where the CABs receive the evidence offered by employers and workers in relation to the matter in dispute and hear their arguments. Hearings must generally continue from day to day until they are completed. Parties may present evidence in support of their claims and, at the request of a party, the CAB will compel the appearance of witnesses, whom the parties may examine and cross-examine, provided that the evidence to be obtained through questioning such witnesses is relevant to the case. Parties have the right to respond to each other's pleadings, evidence and arguments.

The CAB evaluates the evidence and issues a decision called a *laudo*. The *laudo* must be issued in writing and contain a concise statement of the issue and the positions of the parties, an account of the evidence and the evaluation of the evidence by the CAB, the legal reasoning behind its decision, underlying jurisprudence and legal doctrine, and the points resolved.

[14] A worker may choose to be represented at the conciliation stage of CAB proceedings, notwithstanding Article 876 of the FLL. See the *jurisprudencia* established in Contradicción de Tesis 16/83, *Semanario Judicial de la Federación*, octava época, tomo IV, primera parte, julio-diciembre de 1989, p. 330, analyzing the relationship between articles 876 and 692 of the FLL.

Mexican labor law assumes that employers have inherent advantage over workers in the employment relationship and in the intricacies of legal proceedings. Therefore the labor law is expressly *tutelar*, that is, protective of workers' rights. For example, the burden of proof in CAB cases always rests with the employer, which must produce evidence to support its position in the case. If a worker's complaint does not cover all of the legal grounds for relief that could be raised on the basis of facts alleged by the worker, the CAB must correct the complaint petition by adding those grounds (FLL art. 685). CABs are also required to note any evident irregularities or matters in a worker's complaint which could lead to contradictory legal claims and provide the worker with three days to correct such matters (FLL art. 873).

> In most Canadian jurisdictions the burden of proof in an unfair labor practice case involving discrimination for union activity rests with the employer, who must prove that it had no antiunion animus in acting as it did. In the United States, the NLRB's general counsel has the burden of proof in unfair labor practice cases, including cases involving discrimination for union activity. However, the general counsel need only present *prima facie* proof of antiunion actions or motivations in order to shift the burden of proof to the employer, which must then show that the same personnel action would have occurred in the absence of union activity, or that prohibited motivations played no part in its decisions.

As noted above, the FAPL provides procedural protections which apply to the administrative acts, proceedings and decisions of federal administrative agencies, including the STPS, and these protections apply to the process of registering a union in the federal jurisdiction. Among other things, the FAPL provides that an agency may not set any requirements for an application additional to those stipulated in the law, must provide an applicant with information on the legal and technical requirements for the application, must admit evidence permitted by law and take it into account in reaching a decision on the application, must permit access to its files and archives within the time limits set out for the application, and must give an answer to all questions raised by an application within time limits for processing it. It gives to an applicant the right to know at any time the status of the application, the right to obtain at its own ex-

pense certified copies of the documents contained in the administrative file pertaining to the application, and the right to timely notice of decision on application.

*2) Independence and Impartiality of Decision Makers*

CAB members serve six-year renewable terms. The FLL sets the remuneration of Federal and Federal District CAB chairpersons at the amount received by judges of the Mexican Supreme Court and the President of the High Court of Justice respectively. Articles 643 to 645 of the FLL stipulate the grounds upon which a CAB chairperson may be dismissed and restricts those grounds to such matters as dereliction of duty, accepting gifts from a party, voting an evidently illegal or unjust decision, or failing to provide for timely enforcement of decisions. Article 646 vests the power to dismiss a chairperson with the authority that made the appointment (see Government Enforcement, section 3, above).

Article 707 of the FLL sets out the grounds upon which CAB members may be legally disqualified from conciliating or hearing a particular case. These grounds include: a direct personal interest in the case; a relationship of economic dependence on one of the parties; a family, debtor/creditor, heir or legatee or business partnership relationship with a party. A CAB member may not conciliate or hear a case in which he or she has acted as an attorney for a party, or upon which he or she has issued an opinion. There is some disagreement among Mexican jurists over whether a CAB member who is assigned to adjudicate a case and who is a member of a union, union confederation, or employers' organization that is a party to that case can be disqualified from adjudicating the case on that ground.

Articles 708 to 711 set out disqualification procedures. Article 708 requires any representative of the government, employers or workers to withdraw from a case upon finding himself or herself involved in one of the circumstances described in Article 707. Under Article 710 a party to a case who believes that a CAB member should be disqualified from hearing that case may file an application to have that member disqualified. In the case of worker or employer representatives, or in the case of the president of a Special Conciliation Board, the president of the relevant CAB

decides the application. Where the application seeks to disqualify the president of the CAB, it is brought to the STPS in the case of the Federal CAB, or to the governor of the state or chief of the government of the Federal District, as the case may be, where a local CAB is concerned. If a CAB member is disqualified, a substitute is appointed. For a CAB president the substitute is a CAB officer stipulated in Article 710, generally the secretary of the CAB. Workers' or employers' representatives are replaced by their respective alternates on the CAB. CABs are required to make their awards in good faith, on the basis of well-informed truth and an appraisal of the facts made in good conscience (art. 841).

The FAPL prevents any federal public official from intervening in a federal jurisdiction union registration proceeding when that official has a direct or indirect interest in the outcome of the matter, has a family relationship with a party to it, objectively demonstrates the existence of manifest friendship or enmity towards a party through clear acts or evident attitudes, has previously intervened in the matter as an expert witness, or has a relationship of service with a party directly interested in the matter.

## B. Appeals and Judicial Review

Decisions of the CABs are self-enforcing. This means that they do not require any other act of authority in order to become effective. They normally are not reviewable, and CABs cannot reverse their own decisions (FLL art. 848). However, without changing the essence of its ruling, the CAB may clarify it at the request of a party to correct mistakes of fact or to make a point more precise (art. 847). Parties may also seek review by the CAB of actions taken by the chairperson to enforce CAB awards (see Sanctions and Remedies, section 5C, below.)

> Canada's labor laws also make labor board rulings self-enforcing upon filing with the appropriate court. Judicial review is limited to constitutional, jurisdictional and due process issues. In contrast, rulings of the U.S. NLRB are not self-enforcing. Employers may ignore NLRB rulings, forcing the board to seek enforcement of its orders in the courts.

*1) Amparo*

The action for *amparo* (translated literally, "shelter" or "protection") is an institution which originated in Mexico and now forms part of the legal system of many Latin American countries. *Amparo* permits any person to obtain judicial review of a law or act or decision by a public authority which allegedly violates his or her constitutionally guaranteed individual rights. Articles 2 to 28 of the Mexican Constitution provide a set of civil rights including freedom of speech, press and assembly, rights in civil and criminal proceedings, property rights, and social rights. These form the primary bases for *amparo* actions.

Articles 14 and 16 of the Constitution are of particular importance. These articles ensure that legal decisions and actions affecting the rights of persons (including legal or artificial persons such as corporate employers or unions) are taken both in accordance with procedural due process and in accordance with the law. In particular, Article 14 requires that the essential elements of procedural due process be observed in any proceedings through which a person's rights are removed. Due process requires that the parties be properly notified, represented and heard by a tribunal and that the proceedings of the tribunal be fair, unbiased and unaffected by coercion, intimidation or fraud. Article 14 also requires that in civil suits (including labor law matters) final judgments be made according to the letter of the juridical interpretation of the law or, in its absence, be based on the general principles of law. Article 16 requires that acts or decisions of public authorities which directly affect individual persons or their property be specifically authorized by law and be permitted by law.

The federal courts have exclusive jurisdiction over actions for *amparo*. An action for *amparo* must be filed with the court within 15 days of the act or decision being challenged.

Actions for review of a final decision are referred to as "direct" *amparo* actions. A direct *amparo* action is filed with the CAB, requesting that it temporarily suspend the application of the decision in question and that the case file be sent to the Collegiate Circuit Tribunal for review. Where the action challenges the constitutionality of a law or regulation, the Collegiate Circuit Tribunal will send the file to the Mexican Supreme Court

for hearing and decision. In general, decisions of the Collegiate Circuit Tribunal in direct *amparo* cases are final and may not be appealed.

A party may also seek *amparo* review of an interlocutory decision or procedural ruling where the party alleges that the decision or ruling will cause him or her irreparable harm. Such actions are referred to as "indirect" *amparo* actions. Indirect *amparo* actions are normally filed with the relevant federal district court. A party dissatisfied with a decision by the federal district court to deny *amparo* may petition the Collegiate Circuit Tribunal for review. The tribunal will hear the request for review, unless it challenges the constitutionality of a law or regulation, in which case the request for review will be heard by the Mexican Supreme Court.

Under the federal *Amparo* Law (*Ley de Amparo*, hereinafter LA) courts are required in labor law matters to correct deficiencies in an *amparo* complaint for the benefit of the worker. The LA also provides that in labor law matters an employer must post a bond prior to a CAB's suspending the application of a decision or action with respect to which the employer seeks *amparo* review. The chairperson of the CAB may then give to the worker the amount of the bond in the event that the worker suffers serious hardship while awaiting completion of the *amparo* proceeding.

A final decision granting *amparo* overturns an act or decision that was the subject of the *amparo* proceeding. In cases where the constitutionality of a law or regulation is successfully challenged, a decision granting *amparo* suspends the application of that law or regulation to the petitioning party. An *amparo* decision generally affects only the parties to the *amparo* action, creating no binding precedent (see Legal Sources of Labor Rights, section 1C, above).

Where a CAB decision is overturned, the court will identify the legal errors committed, indicate the legal interpretations that should govern, and direct that the CAB reopen or resume its proceedings so that a decision may be reached in accordance with those interpretations.

## C. Sanctions and Remedies

The final decisions of the CABs are called *laudos*. *Laudos* are judicial orders and immediately enforceable as such. A CAB may directly invoke police powers to enforce a *laudo*. There is no need to file a *laudo* with a

court prior to its enforcement. Noncompliance with a CAB order subjects the violating party to fines or seizure of assets to satisfy the judgment.

The CABs have general powers to award remedies to provide redress for violations of the FLL. A *laudo* may require, among other things, the reinstatement of or severance payment to a worker unjustifiably discharged or may order the employer otherwise to comply with the law or with the collective contract. The chairperson of the CAB is empowered to take necessary measures to ensure prompt and expeditious enforcement of *laudos* (FLL art. 940).

If an employer refuses to submit a dispute with an employee to arbitration or to accept a CAB award in such a dispute, the CAB must: (1) declare the labor relationship to be terminated; and (2) order that the employer pay the worker three months' wages plus compensation set out in articles 50 and 162 of the FLL (generally 20 days' pay per year of service plus a seniority allowance of 12 days' pay per year of service), plus back pay from the date of termination of employment (art. 947). However, this rule does *not* apply in cases where an employer has dismissed a worker without justifiable cause or for joining a union or association or participating in a lawful strike.

CABs may issue fines against employers who fail to fulfill contract terms regarding wages, the workday and days off. Such fines can amount to 15 to 315 times the general daily minimum wage, and fines can accumulate for prolonged violations, with a 25 percent additional penalty. Each day of an ongoing violation of the law can be treated as a separate offence, subject to an additional fine. Under Article 994 of the FLL, a CAB may also fine an employer between 15 and 155 times the daily minimum wage for violating Article 133's prohibition against coercing or compelling a worker's choice of representative.

The federal *Criminal Code* and criminal codes of the states create a special category of labor-related crimes, including salary fraud or the fraudulent use of joint funds created under collective contracts. If a CAB decides upon a review of the evidence in a case that there may be grounds for prosecution, it will direct the relevant file to the public prosecutor, who may then pursue criminal sanctions.

## 6. PUBLICATION MEASURES

### A. Publication of Laws, Regulations, Procedures and Administrative Rulings

By law, Mexico's laws and regulations must be published in the *Diario Oficial de la Federación* (DOF), which appears daily Monday through Friday. A section devoted to the STPS contains all matters related to labor laws and regulations. Copies are distributed throughout the country at low cost and are generally available in any library.

Judicial decisions are published in the *Judicial Weekly*, with Supreme Court decisions also published in the *Annual Report of the Chief Justice of the Court*. The Supreme Court also issues a compact disc on general jurisprudence every year. The National Autonomous University of Mexico (UNAM), the Institute of Juridical Research (IIJ), and the STPS jointly issue a compilation of labor law jurisprudence, labor laws and regulations, and a specialized bibliography. This compilation, entitled *Sistema de Información Juridico Laboral*, is published in CD-ROM format. Commercial services such as the Mayo collection also publish court decisions and related matters. Similarly, laws and regulations are published in the Andrade collection, produced by another commercial publishing house.

The Federal CAB publishes the *Gazette of the Federal Board*, which contains materials on new developments in labor law and jurisprudence, as well as analytical studies. CAB decisions can be found in the archives of the relevant boards.

The archives of the General Registry of Associations are not open to the public. With regard to trade union registrations, only parties with a legal interest may consult the archives. Collective contracts filed with the CABs are generally not publicly available.

### B. Notice and Opportunity for Comment

Proposed laws and legislative amendments may be introduced by deputies or senators in the legislative branch or by the President of the

Republic. The two houses of the legislature normally function through specialized committees that consider the legislation. A committee may organize public activities and forums to receive the views of persons, organizations and institutions. The mass media, especially the press, diffuse proposals for new law, giving rise to a process of analysis and public commentary.

## 7. PUBLIC INFORMATION AND AWARENESS

### A. Availability of Public Information

To disseminate knowledge of labor law, the STPS publishes 30,000 copies of the FLL each year for free distribution to the public in general and to workers in particular. The STPS also publishes numerous booklets on workers' rights.

The STPS publishes an annual report which contains an overview of its programs, activities and expenditures, including information specific to the workings of the Federal CABs and the Federal Office of the Labor Public Defender. Statistical tables include information on the number of individual and collective disputes, the number of collective agreements, and the number of strike notices filed with the CAB. The report also contains statistics on the number of strikes that occurred, the number of collective dispute conciliations undertaken by the CAB, and the number of cases in which the Federal Office of the Labor Public Defender was consulted by or represented workers in legal proceedings.

The STPS publishes the *Mexican Labor Review*, containing studies on labor law themes. It also publishes the thrice-yearly *Labor Notes*, the bimonthly *General Conditions in Matters of Safety and Health*, and semiannual reports of labor statistics. The statistical reports include data on the number and type of collective and individual labor disputes within the federal jurisdiction and whether those disputes were resolved through conciliation or adjudication. The state CABs also produce annual reports.

## B. Public Education

The STPS and state labor departments maintain public affairs officers to deal with inquiries from the public and the press and to publicize the activities of the departments. Labor department and CAB offices are open to the public with staff responsible for responding to requests for assistance. The office of the Federal Office of the Labor Public Defender provides advice as well as legal representation to workers who believe their rights have been violated.

The STPS, state labor agencies and CABs sponsor and participate in conferences, workshops, forums and other events to disseminate knowledge of labor law.

## C. Private Information Sources

Several private publishers market low-cost editions of the *Federal Labor Law* for sale in bookstores and newsstands.

Among management groups, the Employers Confederation of the Mexican Republic (COPARMEX) publishes a monthly review and a weekly bulletin. The National Confederation of Chambers of Industry (CONCAMIN) publishes a monthly review.

In the trade union sector, the major federations and confederations publish newsletters and reports. These include the Confederation of Workers of Mexico (CTM), the Revolutionary Laborer-Farmworker Confederation (CROC), the National Union of Workers (UNT), the Regional Workers Confederation (COR), and the Authentic Labor Front (FAT). Other labor groups also publish newspapers, journals and special reports.

The Institute of Juridical Research of the Universidad Autónoma de Mexico (UNAM) publishes the *Mexican Comparative Law Bulletin* and the *Juridical Annual* with labor themes. Similarly, the Law School of UNAM and other faculties and schools of law publish law reviews including labor matters.

There are also private labor-related organizations such as the Mexican Academy of Labor Law and Social Security and the Mexican chapter of the Iberoamerican Academy of Labor Law, which sponsor labor educa-

tion events. A commercial publication called *Laboral* contains extensive labor law information.

## D. NAALC Cooperative Activities

The Mexican National Administrative Office (NAO), in collaboration with the NAOs of Canada and the United States, has undertaken an extensive program of cooperative activities on industrial relations principles of the NAALC. Members and staff of various Mexican federal and provincial labor agencies as well as many unions and employers' organizations have participated in these activities. Information on such programs can be obtained from the NAO of Mexico.

## Appendix 3A

# PROVISIONS OF THE FEDERAL LABOR LAW RELATING TO SPECIAL TYPES OF WORK

Title VI of the FLL (art. 181-353) contains provisions governing certain specific types of work. These provisions serve mainly to create special terms for individual employment relationships, the details of which are beyond the scope of this volume. However, some of Title VI's provisions relate directly to freedom of association and the rights to organize, to bargain collectively and to strike. The most important of those provisions are the following:

### Exclusion of Certain Airline Workers from Collective Bargaining

Operational managers, flight superintendents, persons in charge of training, chief pilots, pilot instructors or examiners, and any other officials who perform similar duties are deemed to be representatives of the employer (art. 219). Such workers therefore cannot be represented by a union in their dealings with their employer.

### Collective Bargaining in Universities and Legally Autonomous Higher Education Institutions

Unions of university workers must be composed only of: (1) academic personnel (defined as individuals who render teaching or research services to the university or institution); or (2) administrative personnel (defined as individuals who render nonacademic services to the university or institution); or (3) both academic and administrative personnel. A union of either group is treated as an occupational union, while a union of both groups is treated as an enterprise union. Unions of university workers may exist only at an enterprise level: the boards of directors and membership of such unions may be drawn only from workers who ren-

der their services at a particular university or institution. Collective contracts may not contain clauses requiring that only members of the union be admitted to employment or that the employment of those who are not members of the union be terminated. (These are known as "exclusion clauses" and would otherwise be permitted by art. 395.) Notice of any strike must be given at least 10 days in advance of the strike date. Workers required to remain on duty during a strike include those workers who are necessary to prevent irreparable prejudice to an investigation or experiment which is under way (see art. 353J – 353U).

### Special Grounds for Legally Justifiable Dismissal

Certain classes of worker may be dismissed for just cause for reasons not enumerated in Article 47 of the FLL. Such grounds are enumerated in specific articles contained in Title VI of the FLL. (See art. 185, 208, 244, 255, 264, 291, 303, 341, and 353G). These exceptions relate mainly to various transportation workers, to confidential employees, and to "commercial agents" (salesmen, publicity and sales promoters and the like).

The employment of a confidential worker may be terminated if there are "reasonable grounds for loss of confidence" by the employer, even if these do not coincide with the justified grounds for termination set out in Article 47.

The employment of seafarers may be terminated for, among other things: failing to report for work, drunkenness, use of stupefying drugs, insubordination or breach of laws with respect to import or export of merchandise.

The employment of members of flight crews may be terminated for, among other things: loss of passport or visas required by national or foreign laws; being under the influence of alcohol, a narcotic or a stimulant (not prescribed by a specialist in aviation medicine) at any time in the 24 hours preceding the start of the flight; violation of laws with respect to import or export of merchandise; refusal without good cause to carry out mercy or search and rescue flights; refusal to commence or continue assigned flying duties; refusal to undergo training courses organized by the employer; a deliberate act or omission or negligence likely to endanger

his or her own safety or that of others or to damage or endanger property of the employer or any third party.

The employment of railway workers may be terminated for: allowing goods or passengers to be taken aboard at places other than those specified by the enterprise for such purposes; or refusal to make a scheduled run as contracted for, or unjustified interruption of the run.

The employment of road transport workers may be terminated for: refusal to make a trip as contracted for, or interruption of the same for insufficient reason; or for "considerable and repeated falloff in the volume of income, unless there are circumstances justifying the same."

The employment of commercial agents may be terminated for "any considerable and reiterated falloff in the volume of trade, unless there are extenuating circumstances."

# UNITED STATES

## 1. GENERAL INTRODUCTION

### A. Basic Labor Policy

Section 1 and Section 7 of the *National Labor Relations Act* set forth the central precepts of U.S. labor law.

Section 1 states: "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

Section 7 provides that: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

The *Labor Management Relations Act* of 1947 added to Section 7 the clause "and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agree-

ment requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3)."

Because U.S. labor law protects "concerted activities" and "mutual aid or protection," employees do not have to be involved in trade union activity to be protected by the law. Indeed, intent to unionize is not required as long as employees act in concert.

The central mechanism under in U.S. law for protecting workers' rights to organize, to bargain collectively and to strike is found in sections 8(a) and (b) of the *National Labor Relations Act*, which define unfair labor practices (ULPs). An unfair labor practice violates the law and is subject to the remedies provided by the Act.

## B. Labor Law Jurisdiction

United States labor laws dealing with private sector employees fall almost entirely within federal jurisdiction. Under the "Commerce Clause" in Article I, Section 8 of the *United States Constitution*, federal law prevails over state laws on matters of interstate commerce — an extremely broad jurisdiction in the complex modern U.S. economy.

U.S. labor laws dealing with private sector employees are enforced by federal government authorities and by federal courts. Occasional state efforts to pass legislation on labor relations matters are most often struck down by the courts as preempted by federal law. The states are permitted a limited legislative or law enforcement role where predominantly local interests are at stake, such as preventing picket line violence. In addition, fields not covered by federal legislation can be the subject of state legislation. Agricultural workers are an example; they are often covered by state law.

> In Canada, the federal role is limited and labor law is primarily a provincial responsibility. Mexico has a single *Federal Labor Law* (FLL) which was enacted under authority granted to the federal government by the states of the Mexican Federation. Enforcement of the FLL is divided between federal and state authorities, generally on the basis of the type of industry or service in question. In both nations, the law designates certain commercial or industrial sectors of national scope that fall under federal jurisdiction.

## C. Legal Sources of Labor Rights

Common law traditions influenced the development of the legal system in the United States.

The common law tradition did not develop doctrines recognizing the right to organize, to bargain collectively and to strike, and constitutional recognition of those rights is limited (see below). As a result, most U.S. labor law is based on statutes. Statutes also establish administrative agencies and tribunals to ensure the enforcement of labor rights.

Once a statute takes effect, U.S. administrative law provides two methods of applying it. One is called "rulemaking" — enacting regulations based on the language of the statute before adjudication of any cases. The purpose of rulemaking is to advise parties how the law has been interpreted and will be applied. The second method, "adjudication," proceeds by deciding individual cases by applying the statute to the facts of the case.

U.S. labor relations statutes set out few detailed standards on freedom of association, protection of the right to organize and the right to strike. Instead, labor law has generally developed through *case law*, as administrative tribunals and courts interpret constitutional and statutory law as they apply to specific cases that come before them. Through adjudication, courts and tribunals play a central role in the development of U.S. labor law.

Case law establishes precedents that guide parties, tribunals and courts. Decisions of higher courts are considered binding by lower courts within the same jurisdiction. Case decisions may also carry persuasive weight outside of the particular jurisdiction. A decision of the U.S. Supreme Court is considered as a definitive interpretation of the law both by lower courts and administrative tribunals. Of course, every new case contains unique facts and circumstances, creating a constant shifting of nuance and interpretation of the law. Tribunals may also undertake a basic shift in policy, reversing the precedent of earlier cases. Similarly, courts may adopt a different interpretation of the law and reverse earlier decisions.

> Except in Quebec, the Canadian legal system also developed out of the English common law tradition. The legal systems of Quebec and Mex-

ico arose from a civil law tradition, which places more emphasis on statutory codes than on judicial or administrative tribunal precedents.

### *1) Constitutional Sources*

The U.S. Constitution makes no specific mention of the right to organize, to bargain collectively or to strike. The First Amendment of the U.S. Constitution (1789), however, protects freedom of assembly, free speech and the right to petition the government for redress of grievances. Laws or regulations that violate these rights may be struck down as unconstitutional by the Supreme Court of the United States. The 14th Amendment (1866) and its mandate for "equal protection of the law" applies the *Bill of Rights* (the first 10 amendments to the Constitution) to the individual states. Moreover, each state has its own constitution and bill of rights providing equivalent guarantees. The U.S. Supreme Court has specifically interpreted the First Amendment to protect labor organizing, workers' political and legislative action, peaceful picketing, and other lawful trade union activity.[1]

In practice, constitutional guarantees are not absolute. Courts have upheld limitations on assembly, speech and other aspects of the right of association in the labor organizing context on such grounds as protecting public safety or the property rights of employers. Moreover, U.S. constitutional rights generally do not offer direct protection against the actions of private parties. Rather, they protect only against interference by government action. Constitutional rights do not directly govern relations between private parties and cannot be enforced against private parties.

Canada's *Charter of Rights and Freedoms* is silent on specific labor rights. Constitutional protection for labor rights can be found only in their recognition as aspects of the more general rights of freedom of association, assembly and expression which are found in the Charter. Like the U.S. Constitution, the Canadian Charter does not offer protection against the actions of private parties. In contrast, Mexico's Constitution contains guarantees of the right to organize and the right to

[1] *See Hague v. C.I.O.*, 307 U.S. 496 (1939); *Thornhill v. Alabama*, 310 U.S. 88 (1940).

strike, as well as extensive constitutional norms on wages, hours and working conditions which are intended to protect workers. These constitutional rights and norms are directly binding upon public and private employers.

*2) Statutory Sources*

Landmark federal legislation in the 20th century set the framework for protection of workers' rights to organize, to bargain and to strike. The key statutes are listed below in chronological order. (Note that American laws often carry the name of their congressional sponsors and are often referred to by those names.)

The *Railway Labor Act* of 1926 (RLA) established the right of workers in the railroad industry to organize and bargain collectively through representatives of their own choosing. The Act covered only railway labor because of the central importance of rail transportation to the national economy. The RLA was extended to workers and employers in the air transportation sector in 1936. Today, nearly one million U.S. workers are covered by the RLA. Appendix 4A provides an overview of the key features of the regime created by the RLA.

The *Norris-LaGuardia Act* of 1932 outlawed employment contracts requiring that workers promise never to join a union. Such "yellow-dog" contracts, as they were called, were a common device used by employers to prevent union organizing. The Norris-LaGuardia Act also sharply constrained the ability of employers to obtain injunctions as a strike-breaking measure. In addition it relieved union leaders of criminal and civil liability for the acts of union members unless the leaders participated in or ratified the acts.

The *National Labor Relations Act* of 1935 (NLRA or Wagner Act) extended to most private sector employees "the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or

protection." The NLRA created a new concept in U.S. law: the unfair labor practice. The Act defined and made unlawful five unfair labor practices by employers. The NLRA also established the National Labor Relations Board (NLRB) to administer the Act.

The *Labor Management Relations Act* of 1947 (LMRA or Taft-Hartley Act) amended the NLRA, retaining the key rights and responsibilities of the Wagner Act but introducing important limitations on the rights to organize, to bargain collectively and to strike. The amended NLRA retained the five employer unfair labor practices and included a new category of union unfair labor practices. It permitted "employer free speech" to campaign against union organization.

The Taft-Hartley amendments also allowed individual states to enact "right-to-work" laws prohibiting union security agreements (by which a union and an employer agree to require payment of union dues by all represented employees). Finally, the amendments prohibited "secondary boycotts," by which workers involved in a "primary" labor dispute apply pressure against "secondary employers" and seek solidarity action by workers at a supplier or customer of their own employer.

The *Labor Management Reporting and Disclosure Act* of 1959 (LMRDA or Landrum-Griffin Act) established a "bill of rights" for individual union members in internal union affairs, including a right to democratic elections of union officers. The Act also set forth detailed financial reporting and disclosure requirements for unions.

Today, the *National Labor Relations Act*, as amended by the *Labor Management Relations Act*, and the *Labor Management Reporting and Disclosure Act* comprise the most important federal labor laws governing private sector labor-management relations. Other laws, such as the *Fair Labor Standards Act*, the *Occupational Safety and Health Act* and the *Equal Pay Act*, address minimum wage, hours of work, child labor, workplace safety, nondiscrimination in employment, and other labor standards.

> The Canadian federal jurisdiction and the 10 provinces each have a comprehensive labor relations statute governing workers' rights to organize, to bargain collectively and to strike. These 11 jurisdictions also have separate legislation on labor standards. Mexico's single *Federal*

*LaborLaw* covers industrial relations matters as well as labor standards and most other aspects of employment.

### *3) Rulemaking*

In general, the National Labor Relations Board does not engage in rulemaking. Therefore, there is no common practice of communicating proposed changes in rules and regulations in advance for public comment. The Board decides particular cases brought before it through charges by private parties. In some exceptional instances, the NLRB undertakes rulemaking by publishing proposed rules for advance notice and public comment.

## D. The Individual Employment Relationship

Common law principles of "master-servant" relations, where the "master" held both authority over and responsibility for the "servant," governed the employment relationship in the United States from the earliest colonial periods. Until the early 19th century, individual workers could be bound by an employment contract for years without an opportunity to seek new employment under better terms. The courts gradually overturned this form of employment because it did not suit a growing market economy. By the 1830s, the shift in judicial opinions created the "employment-at-will" doctrine of freely contracted individual employment. Under this doctrine, employment is a voluntary relationship unregulated by the government. The employee agrees to work under the direction and control of the employer, and the employer agrees to provide compensation for work performed. For most workers, there is no written contract of employment. The employment-at-will relationship still predominates in the United States for the majority of workers not covered by collective bargaining agreements.

In its classic formulation, the at-will doctrine permits either a worker or an employer to terminate an employment relationship at any time for "a good reason, a bad reason or no reason at all." No severance pay or other form of indemnification is required under U.S. law.

There are three basic exceptions to the at-will rule. First, a written contract of employment can contain conditions for terminating the relationship. Professionals and executives often have such individual contracts of employment, as do the approximately 16 percent of the American workforce (12 percent in the private sector) covered by collective bargaining agreements. Most collective bargaining agreements contain a "just cause" standard for discharge, which provides a recourse to neutral, binding arbitration in disputed cases.

Second, the employment-at-will doctrine is superseded by statutes that prohibit certain forms of discrimination in employment or require advance notice of workplace closures. For example, U.S. laws prohibit discrimination based on concerted activity (including union organizing), race, color, sex, age, national origin, religion and disability. Protection against discrimination generally covers all employees in both the private and public sectors. Federal antidiscrimination statutes provide exemptions for small enterprises, but such firms are usually covered by state and local antidiscrimination measures. Requirements for advance notice of plant closings or mass layoffs apply only to employees of large firms.

Third, exceptions can be created by courts applying state laws or directly by state statute. Courts in some jurisdictions have established a "public policy" exception to the at-will rule. For example, an employee fired for refusing to perform an illegal act may be reinstated. Some courts have also found an implied contract of employment requiring just cause for discharge. In employee handbooks an implied "covenant of good faith and fair dealing" under common law principles may also provide a basis for the reinstatement of workers who were unfairly discharged.

Court-fashioned exceptions to the at-will rule remain limited. Individual employees must bring private lawsuits to challenge a discharge. The costs and risks of litigation make such challenges rare. In several states, however, statutes have been enacted that codify public policy exceptions and other variations from the at-will doctrine. For example, in several states employers are prohibited from discharging an employee for reporting illegal activity to public authorities. These prohibitions are commonly referred to as "whistle-blower protections." Among the 50 United States, only Montana — a lightly populated, rural state with lit-

tle industrial employment — has enacted a statute creating a just cause standard for discharge covering all private sector employees in the state, with a right of action in state courts.

Labor and employment law specialists generally agree that the traditional at-will employment relationship is gradually being eroded by the effects of broadened antidiscrimination laws and the accumulation of court decisions and state laws which carve out exceptions to the at-will rule. Nonetheless, the employment-at-will doctrine remains the prevailing basis of the individual employment relationship in the United States.

> The at-will employment doctrine does not apply to employment relationships in Mexico or Canada. Mexican law establishes a set of limited and specific just causes for terminating any individual's employment, whether or not the individual is covered by a collective bargaining agreement. Any worker may bring a claim of unjustified discharge before a labor tribunal. Canadian employees covered by collective agreements (approximately 35 percent of the labor force) can generally have their employment terminated only for "just cause." Statutory notice of termination requirements are applicable to all employees, as are antidiscrimination laws and a common law judicial requirement of reasonable notice (or pay in lieu of notice) for any termination of an employment contract which is for an indefinite term.

## E. Exclusions from Coverage

Under the *National Labor Relations Act*, legal protection for the right to organize, to bargain collectively and to strike is afforded to those falling within the definition of an "employee." The definition excludes agricultural workers, domestic workers, managers, supervisors, confidential employees, independent contractors, and employees covered by the *Railway Labor Act.*

> Most Canadian jurisdictions are more expansive than the United States in their labor law coverage, including front-line supervisors and contractors in a position of economic dependence (often referred to as "dependent contractors") within the definition of "employee" under the law. Mexican labor law covers any person who personally performs

subordinate work for another individual or legal person in return for remuneration, except family members employed in a family enterprise.

## 2. LEVELS OF PROTECTION – SUBSTANTIVE LABOR LAWS

### A. Labor Principle 1 – Freedom of Association and the Right to Organize

#### *1) Legal Foundations*

Although the U.S. Constitution does not contain specific guarantees of labor rights, the U.S. and state constitutions do provide protection for freedom of association by protecting rights of assembly, free speech and petitioning the government for redress of grievances. Moreover, the constitutions of some states specifically guarantee the right of state employees to organize. Because U.S. constitutional guarantees apply only to government action, constitutional protections do *not* apply to the actions of private parties. Affirmative legislation is required to protect freedom of association and the right to organize in the private employment context. The key statutes protecting freedom of association and the right to organize in the private sector are outlined in section 1C, above, and are discussed in more detail below.

#### *2) The Formation and Dissolution of Unions*

U.S. federal law protects the right of two or more employees to form a union. This right belongs solely to workers. Neither recognition by the employer nor prior authorization, registration or other official act by the government is required to form a union.

Only two workers are necessary to form a union — whether they are the only employees of the employer or part of a larger workforce. Union members can elect officers, collect dues, establish a union constitution, obtain property, engage employees, hold meetings, assist workers in legal proceedings outside the workplace, or otherwise act to defend their interests.

Members of a union determine whether and when it should be dissolved.

The legal existence of a union is not by itself sufficient to require an employer to bargain or to conclude a collective bargaining agreement. Rather a union must obtain bargaining rights, which are normally obtained through union representation elections conducted by the National Labor Relations Board (see Acquisition of Bargaining Rights, section 2B.2, below). The election process is a method of determining whether a majority of employees in an "appropriate bargaining unit" (see section 2A.2, below) desire representation for purposes of collective bargaining. If so, the law will compel the employer to bargain. Even if a majority of workers do not vote in favor of a union in such an election, or if an election never takes place, workers retain the right to form a union and engage in protected concerted activity. The right to organize exists independently of any such election. In practice, certification by the NLRB as a result of an election is by far the most common means by which workers organize a union, since their objective is to achieve a collective bargaining agreement.

*3) Legal Status of Unions*

Section 301 of the LMRA creates a private right of action for unions to sue or be sued for the enforcement of contracts. In addition, the U.S. Supreme Court has held that unions may sue or be sued as legal entities in the federal courts in any action involving the application of federal law to a union.

*4) Union Self-Governance*

Unions are governed by the terms of their own constitutions. Union members have the power to create and amend their union's constitution. Unions are free to determine their own course of legal, political and strategic action, provided that they comply with their constitutions, as well as with laws regarding internal union democracy (see Freedom of Association within Unions, section 2A.7, and Protections against Interference, section 2D, below), laws restricting the purposes for which

union dues may be spent (see Union Membership and Dues, section 2A.6, below) and general laws governing economic and political activity.

*5) Union Political and Legislative Activity*

Trade union political action is a vital aspect of freedom of association. Workers and unions in the United States have a constitutional right (regulated by statutes) to engage in electoral and legislative activities.

U.S. unions often endorse candidates for public office and work to have favored candidates elected by distributing handbills to their members and local communities, organizing volunteer "phone banks" to telephone voters urging a favorable vote, and providing financial support to candidates. Most unions do not endorse political parties. The law places certain restrictions on the use of union dues for political expenditures (see Union Membership and Dues, below). Resources from union dues may be used, however, for nonpartisan legislative and voter education campaigns.

Unions participate in the legislative process by persuading legislators to introduce prolabor bills, meeting with legislators to persuade them to support prolabor bills ("lobbying") and testifying at legislative committees in support of prolabor bills. Many unions also develop "grass roots" campaigns to undertake similar activities at the local level. Finally, unions often mobilize their members to participate in demonstrations, marches, rallies and other forms of peaceful assembly and free expression protected under the First Amendment of the Constitution.

*6) Union Membership and Dues*

An individual employee cannot be compelled to become a union member under U.S. principles of freedom of association. However, a union and an employer may generally negotiate an "agency shop" or "union security" clause requiring nonmembers of the union to pay, as a condition of employment, equivalent fees for representation. Such employees are often referred to as "agency fee payers." An employee cannot be terminated from employment for refusing to join the union as long as he or she tenders agency fee payments.

In a majority of states, trade unions may negotiate union security clauses. However, the LMRA amended the NLRA to permit states to prohibit such contract clauses under state statutes, commonly referred to as "right-to-work" laws. Twenty-one states, most in the southern region of the United States, have enacted right-to-work laws. These laws generally provide that an employee may not be required to pay agency fees as a condition of employment. Unions are nonetheless legally obligated to represent each employee in the bargaining unit, regardless of the employee's union membership status and regardless of whether the employee pays any agency fees to support such representation. While unions represent more than 20 percent of employees in states where union security agreements are permitted, unions represent fewer than 10 percent of employees in right-to-work states.

In 1988, the U.S. Supreme Court decided that an agency fee payer may not be compelled to pay dues which go to expenses other than those "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive bargaining representative," which the court found to be limited to collective bargaining, administering collective bargaining agreements, and union administration.[2] Where a nonmember objects to the expenditure of his or her dues money on activities other than those, such as expenditures on political and legislative activities or on some types of union organizing activities, the union must reduce his or her dues by the portion devoted to such purposes. Courts have been faced with the task of deciding on a case-by-case basis which expenses are necessary to a union's duties as exclusive bargaining representative.

> In both Canada and Mexico, unions may negotiate agreements with employers requiring employees to be union members as a condition of employment. In Mexico the *Federal Labor Law* requires employers to deduct from union members' pay and remit to the union ordinary union dues payments. Most Canadian jurisdictions require that collective agreements contain "Rand Formula" clauses if the union opts for one. Rand Formula clauses do not require union membership but do require that all bargaining unit members pay regular union dues. All but one Canadian jurisdiction allow unions to decide whether and how to spend dues revenue from both union members and nonmembers for

[2] *Communications Workers v. Beck*, 487 U.S. 108 (1988).

political purposes. As long as unions do not interfere in religious matters, unions in Mexico enjoy autonomy in making spending decisions.

*7) Freedom of Association within Unions*

The *Labor Management Reporting and Disclosure Act* (LMRDA) establishes rules for internal union democracy. The Act provides union members with the following rights:

- free speech rights in union affairs;
- the right to vote on union dues;
- the right to run for union office;
- the right to obtain the union's charter and bylaws;
- the right to receive a copy of the collective bargaining agreement;
- the right to obtain an accounting of union finances; and
- the right to union elections free of intimidation or fraud and other procedural guarantees.

The Act also requires labor organizations to file with the Labor Department annual financial reports detailing salaries, expenses, sources of income, use of contractors, etc. These records are available to the public.

Canada does not regulate internal union democratic processes as closely as the United States. Most Canadian jurisdictions require unions to provide their members with a copy of the union's audited financial statements and prohibit unions from retaliating against bargaining unit members for exercising labor law rights by seeking their dismissal under union security clauses. Most of the other rights provided to U.S. unionists under the LMRDA are left to be voluntarily included in the constitutions of Canadian unions. In Mexico a union member may be lawfully expelled from a union only by a two-thirds majority vote of the union's membership, following procedures set out in the FLL and any procedures established by the union's constitution. The Mexican Constitution protects workers against dismissal for joining or attempting to form a union. Workers dismissed pursuant to a closed shop union security clause (known as an "exclusion clause" in Mexican labor law discourse) for joining or supporting another union, during the formation or registration of that union, may seek reinstatement or severance pay

by filing a claim with the relevant CAB. In addition, Mexican labor law provides a mechanism by which the membership can convoke a general meeting of the union if the board of directors fails to do so and requires that the board of directors provide members every six months with accounts of the administration of the union's assets.

## B. Labor Principle 2 – The Right to Bargain Collectively

### *1) Legal Foundations*

The U.S. Constitution does not specifically address the right to bargain collectively. During the 19th century and into the early 20th century, efforts by workers and unions to engage in collective bargaining were often treated as criminal conspiracies or restraints of trade. During and after the First World War, however, governmental hostility to collective bargaining began to yield to the reality of industrial conflict, especially in the railroad industry. American workers' mass organizing and political movements of the 1930s succeeded in normalizing collective bargaining as a method of industrial relations.

The *Railway Labor Act* of 1926 (RLA) gives railroad industry employees the right to bargain collectively through representatives of their own choosing and establishes the duty of industry employers to "make and maintain agreements concerning rates of pay, rules and working conditions." Since 1936, the RLA has also applied to airline industry labor relations. An overview of the RLA is provided in Appendix 4A.

The *National Labor Relations Act* of 1935 (NLRA) grants employees the right "to bargain collectively through representatives of their own choosing" and "to engage in other concerted activities for the purpose of collective bargaining." Section 1 of the NLRA declares the policy of the United States as "encouraging the practice and procedure of collective bargaining" and "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." The NLRA makes it an unfair labor practice (ULP) for an employer to interfere with

those rights or "to refuse to bargain collectively with the representatives of his employees."

The *Labor Management Relations Act* of 1947 (LMRA or Taft-Hartley Act) created a new group of union ULPs analogous to employer ULPs, such as a union's refusal to bargain. The LMRA also created the Federal Mediation and Conciliation Service (FMCS) to assist unions and employers in the collective bargaining process.

The principal features of U.S. law on collective bargaining are:

- the right of workers to bargain;
- the duty of employers to bargain;
- the requirement of proof of union majority representative status before bargaining rights and duties attach to the union and the employer;
- certification of majority status by the National Labor Relations Board, which affords protection to the union as bargaining representative;
- exclusive representation by the certified union (i.e., the union has the exclusive right to bargain on behalf of the employees that it represents and to conclude an agreement on their behalf); and
- minimal government intervention in bargaining, limited to mediation (except in national emergencies).

Canadian collective bargaining laws are similar to U.S. laws. In Canada, however, a majority of jurisdictions give unions the right to certification by "card-check" (verifying that a majority of workers have voluntarily signed cards designating a union to represent them) rather than by an election. Canadian law creates a system in which the governments intervene more directly in the bargaining process than in the United States. Canadian law also specifies certain clauses that must be contained in a collective bargaining agreement.

Mexican labor law contains the principles of majority status and exclusive representation, but it does not create a duty to bargain collectively. Instead, it creates a context to stimulate bargaining by guaranteeing the right to organize and the right to strike. Voting to determine majority status may take place if one union challenges another for title to a collective contract. In deciding such challenges, a CAB may supervise a vote of the workers, known as a *recuento*, in order to obtain evidence of union majority support. A *recuento* will not necessarily be conducted if other evidence is sufficient to prove majority support.

Mexican law establishes requirements for the content of a collective contract agreement and makes conciliation mandatory once a union has delivered notice of its intention to strike.

*2) Acquisition of Bargaining Rights*

A union cannot compel an employer to bargain collectively except in the following circumstances: (1) the employer voluntarily recognizes a union's evidence that it has the support of a majority of bargaining unit employees; (2) the union's majority support is certified as the result of an NLRB election in which a majority of those casting ballots vote to be represented by the union; or (3) the Board issues a bargaining order in response to employer unfair labor practices (see The Gissel Doctrine, below). In practice, a certification election is the usual means by which workers seek to achieve a collective bargaining agreement. Once a union has acquired bargaining rights, the employer is required to bargain in good faith for the purpose of concluding a collective bargaining agreement.

(i) Petitioning for an Election

The NLRA speaks only of representatives "designated or selected" by workers for the purpose of collective bargaining. The Act does not specify the method for designating representatives. Strictly speaking, an election is not necessary to determine a union's majority status and the employer's obligation to bargain. Cards signed by a majority of workers without coercion, or any other objective measure of employees' will, are sufficient in principle to establish majority status.

In practice, however, U.S. employers generally dispute a union's claim of majority status and its demand to bargain by asserting a "good-faith doubt" about the union's majority status. The National Labor Relations Board does not require an employer to recognize a union's majority support based only on signed membership cards, and there is no inquiry into the good faith of the employer's doubt. The employer may petition the NLRB for an election to determine majority status or the employer may do nothing and refuse to deal with the union. The union may seek to pressure the employer for recognition through appeals for public support or collective

action. A union striking for recognition must petition the NLRB for an election within 30 days of the start of the strike.

A union may petition the NLRB to conduct an election when it has obtained cards from 30 percent of the employees that it seeks to represent designating the union as their collective bargaining representative. American unions generally seek the support of a substantial majority of employees before seeking certification. They do this for two reasons. First, unions commonly receive a lower percentage of votes in an election than the percentage of signed cards obtained. Second, the NLRB may obligate the employer to bargain in good faith without an election (see The Gissel Doctrine, below) if the union can demonstrate it at one time had the support of a majority of the employees it seeks to represent.

In recent years, some U.S. unions have negotiated agreements with some employers which require the employer to recognize the union as the employees' bargaining agent at unorganized sites on the basis of more expeditious processes than NLRB elections, such as proof of membership cards signed by a majority of the employees that they seek to represent at the site in question. Such agreements may be achieved through collective bargaining, where the union already represents a substantial portion of the employer's workers, or by seeking public support or otherwise pressing employers to agree to such terms.

> In a majority of Canadian jurisdictions, signed cards may serve as the basis for certification without need for an election. In Mexico a union requires a minimum of 20 members in order to obtain registration. "Registration" in Mexico is not the same as "certification" in the United States and Canada. Registration gives a union the legal capacity to enter into contracts and act as a party to legal proceedings. It is obtained through an administrative procedure which does not require proof that the union represents a majority of any group of workers. Once registered, a union can demand a collective contract from an employer and give a strike notice to induce bargaining and/or conciliation or arbitration by government authorities.

### (ii) Appropriate Bargaining Unit

When a union petitions for an election, it must specify which group of employees it seeks to represent. This group is referred to as a "bargaining

unit." Upon receipt of an election petition, the NLRB is empowered by Section 9(b) of the NLRA to determine whether the unit sought by the union is appropriate. The employer may challenge the union's proposed bargaining unit with its own proposed unit. The NLRB regional office will then conduct a hearing and decide which employees make up an appropriate bargaining unit and are entitled to vote in the election. If the employer and union reach an agreement on the scope of the proposed bargaining unit and the agreement is approved by the regional director, a hearing is unnecessary. Unions may decide to compromise on some aspects of scope in order to expedite the election process.

In general, a "community of interest" of workers and common management control of labor relations policy covering those workers within the enterprise are required for a bargaining unit to be found "appropriate." The practice within an industry will typically be taken into account. Within these guidelines, an appropriate unit might, in certain circumstances, be a narrow one, such as workers in one department or one occupation at a single facility. On the other hand, an appropriate unit in another case might cover all departments and all nonsupervisory occupations in more than one facility or even nationwide. Bargaining units are generally confined to a single employer. The Board may approve a multiemployer bargaining unit in which a group of employers agrees to be bound in collective bargaining by group actions and a union representing a majority of the workers of each of such employers agrees to bargain collectively with that group.

Supervisory employees are excluded from coverage under the NLRA. There are often disputes between employers and unions as to whether certain employees are really "work leaders," who share a community of interest with other employees, rather than supervisors, whose community of interest lies with management.

> Canadian law defines an appropriate bargaining unit in a similar fashion. Low-level supervisors are normally included in a unit. In Mexico, the type of workers that a union may represent depends on the type of union (craft, enterprise, industrial, etc.). Confidential employees such as managers, supervisors, and workers in a position of trust may not be represented by the same union as other employees.

(iii) The Representation Election Campaign

Once the bargaining unit is determined, a date for an election is set. The NLRB normally seeks to arrange an election within 42 days of the filing of the petition. The union is provided with a list of employee addresses during an NLRA election so that the union may contact employees at home.

The period preceding the election is generally one of intensive campaigning by the union and employer. Some employer conduct during an election campaign (such as discharging a leader of the prounion campaign for union activities or making threats of reprisal if the union wins the election) might rise to the level of an unfair labor practice. A meritorious ULP charge (see NLRB Enforcement Procedures, section 3B, below) will delay the election until it is settled or litigated, unless the charging party consents to go forward with the election and resolve the ULP case later.

(iv) Secret Ballot Elections

NLRB agents conduct a secret ballot election at the workplace (although dispersed workers might instead have a mail ballot). The employer and the union are entitled to have election observers present at the polling places and at the tabulation of ballots. The observers can challenge the votes of those they believe are not eligible to vote. Challenged votes are segregated for a later determination whether they would affect the final results.

The average number of elections has decreased from more than 7,000 per year in the 1960s and 1970s to approximately 3,800 in the 1990s. Unions currently win approximately one-half of NLRB elections.

(v) Election Objections

Depending on the results, the union or the employer may file objections to the election. NLRB case law requires "laboratory conditions" at elections, meaning "conditions as nearly as ideal as possible, to determine uninhibited desires of employees"[3] with respect to union representation (see Protections against Interference, section 2D, below). Campaign conduct that might not amount to an unfair labor practice can still de-

[3] *General Shoe Corp.*, 77 NLRB 124 (1948).

stroy the laboratory conditions for an election. The NLRB may order a new election if it finds merit in such objections to the election. In practice, NLRB election campaigns are normally as hard-fought and passionate as any political campaign, with charges of unfair tactics, misleading propaganda and other misconduct commonly raised by both the union and management.

(vi) The Gissel Doctrine

The NLRB and the courts have fashioned an important legal doctrine affecting the right to organize and the right to bargain, known as the Gissel doctrine.[4] When an uncoerced majority of workers has designated the union as their bargaining representative and the employer commits unfair labor practices that tend to undermine the union's majority and make a fair election impossible, the NLRB may issue a bargaining order without an election. This order requires the employer to bargain in good faith with the union as if the union had won an election.

> Most Canadian jurisdictions have enacted legislative provisions empowering the labor board to order automatic certification without majority support in cases where ULPs by the employer have rendered the board unable to ascertain the true wishes of the employees. Bargaining orders are not an issue in Mexico. There, workers may register a union regardless of whether the union represents a majority of any group. Once registered, a union may seek to negotiate a collective contract. When an employer is asked by a union to sign a collective contract and refuses to do so, the workers may exercise their right to strike, subject to mandatory conciliation and other legal requirements. In practice, this generally compels the employer to engage in bargaining and conclude a collective contract with the union.

(vii) NLRB Rulings Not Self-Enforcing

Although the NLRB is the labor law enforcement agency that decides whether an employer or a union has violated the law, the Board cannot enforce its own decisions. If parties refuse to comply with a Board order,

[4] *See NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

enforcement must occur through the judicial system. By way of example, a union organizing effort sometimes follows this course:

1) the union wins the NLRB election;
2) the employer files objections to the election accusing the union of improper tactics in the election process;
3) the NLRB rules against the employer and issues a bargaining order;
4) the employer refuses to bargain;
5) the union files a ULP charge alleging refusal to bargain;
6) the regional director issues a ULP complaint.

The ULP procedure then begins (see section 3, Government Enforcement, below), with the general counsel prosecuting the case through a trial before an administrative law judge, an appeal to the NLRB, and appeals from the Board to the federal courts, which may or may not enforce the Board's order. Only a final ruling by a court is enforceable. In practice, the availability of numerous appeals can mean that a union election victory is followed by extended litigation before the employer is finally compelled to bargain. The cycle of litigation can begin all over again with new ULP charges of refusal to bargain in good faith. In recent years, the NLRB's general counsel has sought to reduce litigation delays by bringing a motion for summary judgment in response to appeals of ALJ decisions to the NLRB.

(viii) The One-Year Rule

Regardless of the outcome, no new election may be held within one year of an earlier election in any given bargaining unit. If the union wins and is certified as the exclusive representative of employees, it has a one-year period in which its representation rights cannot be disturbed. The employer is obligated to bargain in good faith during this period.

> Canadian labor law generally provides that where a union's application for certification is unsuccessful, the union may be temporarily barred from making another application for certification in respect of substantially the same bargaining unit. The length of the bar varies by jurisdiction but is most often less than one year. Canadian labor legisla-

tion typically gives a newly certified union a secure period of one year during which to negotiate a first collective agreement. In Mexico, a registered union can at any time seek support from members of the union that holds title to an existing collective contract and make an application to the relevant Conciliation and Arbitration Board to obtain title to the collective contract.

### *3) The Collective Bargaining Process*

Collective bargaining can be initiated by the union or by the employer to conclude a first collective agreement or to modify, terminate or replace an existing one. Collective bargaining is normally initiated by one party delivering a "notice to bargain." Notice to bargain can be delivered at any time following certification of a union as a new bargaining agent. Notice to bargain modifications to, or the termination or renewal of, an existing contract must generally be delivered 60 days prior to the expiration date of the agreement. In the event that the agreement contains no expiration date, notice must be delivered 60 days prior to the proposed date to alter or terminate the agreement. The party giving notice must also give advance written notice to the Federal Mediation and Conciliation Service.

#### (i) Obligation to Bargain

*"Good Faith Bargaining" Requirement and the "Refusal to Bargain" ULP*

Section 8(d) of the *National Labor Relations Act* defines collective bargaining as the obligation to bargain "in good faith" with respect to wages, hours and other terms and conditions of employment and to execute a written contract to incorporate any agreement reached. The Act specifies that "such obligation does not compel either party to agree to a proposal or require the making of a concession." Section 8(a)(5) of the Act makes it a ULP for an employer "to refuse to bargain collectively with the representatives of his employees." Section 8(b)(3) of the Act makes a union's refusal to bargain a ULP.

The duty to bargain does not compel the parties to reach a collective agreement. They are simply required to meet at reasonable times, without unreasonable delays, and to negotiate in good faith. Dilatory tactics

such as refusing to meet and confer at reasonable times and intervals, sending a representative with inadequate authority to bargain, or imposing numerous or unreasonable conditions upon initiating negotiations or the final execution of a contract have been found to breach the good faith bargaining obligation. Similarly, the employer may not negotiate with any other union, bypass the union to deal directly with employees, or deal individually with employees, since Section 9(a) of the *National Labor Relations Act* makes the union chosen by a majority of workers the exclusive representative of the employees for collective bargaining purposes. The union has the duty and the right to represent all employees in the bargaining unit. Within these largely procedural obligations, however, the parties remain free to bargain hard and to disagree.

The duty to bargain continues during the term of the collective bargaining agreement unless it has been discharged or waived. Matters which were neither discussed nor embodied in any of the terms and conditions of a collective bargaining agreement remain subject to the duty to bargain. In practice, the parties often negotiate a clause (commonly referred to as a "zipper clause") waiving the right to bargain about terms and conditions of employment during the term of a collective bargaining agreement.

*Surface Bargaining*

Surface bargaining is the term applied to a practice by an employer of going through the motions of bargaining without intending to reach an agreement.

Surface bargaining can occur in any labor negotiation, but usually arises in the context of a newly certified bargaining unit where management resisted the organizing effort. Surface bargaining is an unfair labor practice because it is a refusal to bargain in good faith. Since surface bargaining involves subjective motivation rather than obvious external conduct, such cases are among the most difficult to prosecute.

> Canadian labor laws also contain a "good faith bargaining" obligation with an equivalent unfair labor practice of breach of the duty to bargain. In contrast, Mexican law does not contain the unfair labor practice concept. It does not impose a duty to bargain. Instead, by protecting workers' right to strike, the law seeks to induce bargaining by giving workers the right to strike if the employer refuses to conclude a collective contract with their union.

Canadian and Mexican labor laws also uphold the principle of exclusive representation by a single union for the relevant bargaining unit. As in the United States, there may be two or more unions that bargain with the employer, but not for the same categories of workers in a given workplace.

(ii) Disclosure of Information

Under U.S. law, the duty to bargain in good faith includes the duty to provide relevant information to the other party for collective bargaining. The duty applies to requests for information relevant to any mandatory subject of bargaining (see Scope of Bargaining and Contents of Collective Bargaining Agreement, below).

In practice, most unions send detailed information requests to employers prior to bargaining, covering all major aspects of employment conditions. As long as the information sought is relevant, employers must respond. The NLRB and the courts have given a broad interpretation to the relevance requirement, providing unions with a valuable bank of information for bargaining purposes.

Disputes over information requests are sometimes grounds for a ULP charge by a union that the employer has refused to bargain in good faith. Such disputes over information requests may also serve as grounds for a ULP strike by workers (see Unfair Labor Practice Strikes and Economic Strikes, in section 2C.5, below).

(iii) Changes to Working Conditions during Negotiations

An important feature of U.S. collective bargaining law is that the employer is not permitted to change any terms or conditions of employment without first engaging in good faith bargaining with the union. A unilateral change prior to a genuine impasse having been reached constitutes a ULP of refusal to bargain. A genuine bargaining impasse exists only when each party has fully bargained over and complied with information requests with respect to all mandatory issues (see Scope of Bargaining and Contents of Collective Bargaining Agreement, below), but the parties are still apart and unwilling to make further substantive concessions. This rule against unilateral changes by the employer continues

to apply even when a collective bargaining agreement has expired, except that an employer may at that point refuse to honor obligations that were created by the collective bargaining agreement, such as deduction of union dues and participation in the arbitration of grievances.

After a true impasse has been reached, the employer may unilaterally implement all or part of its final proposal to the union. At that point, the union must either take strike action or work under the terms unilaterally imposed by the employer. In practice, the workers will sometimes work under the imposed terms while carrying out informational picketing or other actions to press the employer to return to negotiations.

> In all Canadian jurisdictions, an employer may not alter terms and conditions of employment from the time at which either party gives notice to bargain a collective agreement until the parties have completed the conciliation process and are in a legal strike or lockout position. At that point, the employer may impose unilateral changes in terms and conditions of employment, provided that those changes do not constitute an attempt to undermine or interfere with the union.
>
> Under Mexican law an employer may not unilaterally change the terms of a collective contract or an individual employment contract. Once filed with the relevant CAB, a collective contract that meets basic legal requirements for minimum contents is treated as a judicial order of the CAB itself and is enforceable as such. Collective contracts generally have an unlimited duration. A union may strike in response to unilateral changes to a collective contract. In cases of economic necessity a collective contract may be suspended or terminated, subject to CAB approval, if the employer can prove the existence of one of the legally recognized grounds for such measures.

### (iv) Scope of Bargaining and Contents of Collective Bargaining Agreement

*Freedom of Contract*

Under U.S. labor law, no clause of a collective bargaining agreement is required by law, and neither the NLRB nor the courts can impose any clause of an agreement on either the union or the employer. Parties may voluntarily submit contract negotiation disputes to binding arbitration, but this mechanism is rarely used in U.S. labor relations. The negotiat-

ing parties normally go to the brink of a strike or lockout, then ultimately compromise in a settlement.

> Canadian laws specify several clauses that must be contained in every collective agreement. Mexican law stipulates a number of subjects that a collective contract must address, such as wage rates, hours of work, rest days and vacation leave.

*Mandatory Subjects of Bargaining*

In the United States, the obligation to bargain extends only to "mandatory subjects of bargaining." The NLRB and the courts have developed this concept to a high degree of nuance, but the controlling factor is the subject's relevance to wages, hours and working conditions. Parties are required to bargain over mandatory subjects, but may refuse to bargain over other "permissive" subjects.

An important distinction between mandatory and permissive subjects relates to decisions by employers to close or transfer all or part of their operations. The Supreme Court has defined matters that lie at "the core of entrepreneurial control" as nonmandatory subjects that are left to employer discretion, as long as they are unrelated to labor costs. Although the "effects" of such decisions are a mandatory bargaining subject, the decision itself is not subject to negotiation. On the other hand, a decision that turns on labor costs or other issues related to wages, hours and working conditions could fall within the mandatory subject scope.[5]

> Neither Canadian nor Mexican law has an equivalent to the U.S. doctrine of mandatory and permissive subjects of bargaining.

(v) Conciliation, Mediation and Arbitration of Bargaining Disputes

*Federal Mediation and Conciliation Service (FMCS)*

The FMCS was created by the Taft-Hartley Act of 1947 "to assist parties to labor disputes … to settle such disputes through conciliation

[5] See *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964); *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

and mediation." The FMCS may undertake mediation and conciliation only if both parties request its involvement in the bargaining dispute. A union or an employer seeking to modify or terminate a collective bargaining agreement must notify the other party and the FMCS and any state mediation body of such intention. An FMCS mediator normally calls both parties as the contract nears its expiration to check on the status of negotiations and to offer mediation services if the parties jointly agree to request mediation.

The FMCS has no enforcement power. It can serve only as a mediator and conciliator, attempting to persuade the parties in a collective bargaining dispute to compromise their differences and reach an agreement. The FMCS can make recommendations to the parties but cannot arbitrate the dispute.

The FMCS employs a staff of mediators at its headquarters in Washington, D.C., and in regional offices around the country. Mediators are usually experienced labor negotiators with a background in union or management activity. Mediators normally use a "shuttle diplomacy" method of bridging communication between the employer and the union when bargaining has broken down or a strike has erupted. Most state governments also have a mediation and conciliation office which provides similar services for private sector parties located in the state, even when the parties are within federal labor law jurisdiction. Federal and state mediators generally coordinate their activities to avoid duplication of effort.

U.S. labor law does not provide for mandatory arbitration of collective bargaining disputes although parties may voluntarily agree to arbitration.

> A majority of Canadian provinces and the federal jurisdiction provide for a mandatory conciliation process and access to binding arbitration of a first-contract dispute where a newly formed union is unable to achieve a negotiated agreement with the employer. In Mexico, conciliation by the relevant CAB is mandatory once a union delivers notice of its intention to strike. In addition, once a union has filed a strike notice with the CAB, it has the choice of submitting the dispute to the CAB for settlement or going forward with the strike.

(vi) Extension of Agreement Coverage

There is no provision in U.S. labor law for extension by law of collective bargaining agreement terms to workers outside the bargaining unit.

> In Canada, only Quebec provides for extension of collective agreement coverage. On the other hand, law-contracts which extend negotiated terms of employment to cover an entire sector or region are an important feature of Mexican labor law.

*4) Enforcement of Collective Bargaining Agreements*

(i) Binding Effect of Collective Bargaining Agreements

A collective bargaining agreement is legally enforceable by either party (the union or the employer). Its terms govern relations between the parties unless they are waived or amended by mutual agreement.

(ii) Enforcement Procedures

Collective bargaining agreement obligations can be enforced through three different mechanisms: (1) grievance and arbitration under the terms of an arbitration clause contained in the collective agreement; (2) filing of a complaint with the NLRB; or (3) court action.

*Arbitration*

Private arbitration under the terms of a collective bargaining agreement is the most common recourse available to private parties in the U.S. labor relations framework. Most collective bargaining agreements contain a "no-strike" clause forbidding a work stoppage while the contract is in effect and providing for arbitration of disputes that concern the rights and obligations contained in the agreement. Disputes arising under the contract are normally first subject to a grievance procedure, in which union and employer representatives attempt to resolve differences. Most grievances are resolved in this manner.

Unresolved grievances are generally submitted to a neutral arbitrator. Labor arbitration is an entire system of private jurisprudence in U.S. industrial relations. Arbitrators are private citizens, not government officials. The method of selection of an arbitrator and the powers of the arbitrator are usually established by the contract's arbitration clause, not by laws or regulations.

If necessary, an arbitrator's award can be enforced by obtaining a court order. Courts will generally enforce such awards. Indeed, case law has established that arbitrators' awards must be enforced even if the arbitrator's interpretation of the collective bargaining agreement is ambiguous or would differ from the court's decision on the merits of the dispute. Courts will overturn an arbitrator's decision only if it violates the law or an overarching public policy, if it exceeds the authority granted by the parties in their arbitration clause, or if it is inconsistent with the essence of the contract. Such cases are rare.

**Box 4.1**

**Arbitration — "Private Jurisprudence" in U.S. Labor Relations**

Arbitral decisions over the past 50 years of U.S. labor relations constitute a body of private law that guides current decision making. Although each case presents new facts and there is no application of precedent as at common law, there is a *de facto* pattern of deciding similar cases in a similar manner.

Two principal arbitration services serve as a source of arbitrators in labor-management matters. The American Arbitration Association (AAA) is the primary private organization of arbitrators. Arbitrators must meet standards established by the AAA to be included on the AAA roster of arbitrators. The second organization is the Federal Mediation and Conciliation Service (FMCS), which maintains a list of private arbitrators (not FMCS mediators, who are government employees) from which parties to a collective bargaining agreement may select an arbitrator. FMCS arbitrators must meet FMCS standards. Many arbitrators are on both the AAA and the FMCS lists.

Some companies and unions agree in their labor contract to forego AAA or FMCS procedures for selecting an arbitrator and instead agree on a permanent arbitrator or panel of arbitrators to handle all their arbitra-

tions. Most such permanent panelists are experienced arbitrators who are also on the AAA and FMCS lists. Arbitrators conduct thousands of labor arbitrations each year in the United States.

*National Labor Relations Board (NLRB)*

A refusal by an employer to deal with an alleged violation of the collective bargaining agreement through contractual grievance and arbitration provisions can be the subject of a refusal-to-bargain charge. The courts have held that collective bargaining is a continuing process, which includes day-to-day adjustments in working rules, resolution of problems not covered by existing agreements, and the protection of employee rights already secured by the terms of an agreement. However, charges relating to collective bargaining agreement violations are often subject to the NLRB's deferral doctrine, described below.

*NLRB Deferral Doctrine*

Compared with ULP cases taken to the NLRB or lawsuits in federal district courts, arbitration is generally faster and less expensive. Most grievances (complaints that the opposite party to a collective bargaining agreement has breached that agreement) submitted to arbitration are resolved in three to six months, compared with possibly years of litigation before the NLRB or the courts. The NLRB has developed a "deferral" doctrine by which the Office of the General Counsel will defer ULP cases alleging violation of the collective bargaining agreement pending completion of the grievance-arbitration procedure, by which such cases are susceptible to private arbitration under a collective bargaining agreement.

*Courts*

Section 301 of the LMRA creates a private right of action in federal district court for an alleged violation of a collective bargaining agreement. This means that either party may sue for breach of a collective bargaining agreement and seek any remedy available under statutory and common law rules. A Section 301 suit is often preferable to a ULP charge because the remedies of a federal district court order — including financial damages — are self-enforcing. However, because of the costs and time involved in such suits, they are in practice undertaken only in cases involving very large amounts of money or important but intractable issues.

*5) Successor Employers*

When a business with a collective bargaining obligation is sold, U.S. labor law requires the new owner to bargain in good faith with the union for a new collective bargaining agreement, as long as a majority of the former company's union-represented workers are employed by the new owner. There is no obligation, however, to extend the terms and conditions of the former contract, unless the new employer is really an "alter ego" of the old one, meaning that the new employer has substantially identical management, business purpose, operation, equipment, customers and supervision, as well as ownership. A new employer is not required to hire the employees of its predecessor. However, it is an unfair labor practice for a successor employer to refuse to hire its predecessor's employees because of their union membership or activities or to avoid recognition of and bargaining with the union.

> Canadian and Mexican laws require terms and conditions of collective agreements and collective contracts, respectively, to carry over to an employer continuing the business of a previous employer. The new employer assumes all rights and obligations created by the contract with the union.

*6) Obligations of Unions towards Represented Workers*

U.S. labor law imposes a "duty of fair representation" on the union, requiring it to represent bargaining unit members in contract negotiations and in the administration of a collective agreement without hostile discrimination, fairly, impartially, and in good faith. A violation of the duty of fair representation can give rise to an unfair labor practice charge against the union. In practice, the NLRB and the courts have created a high threshold for proving a violation of the duty of fair representation, leaving wide discretion to the union in managing its negotiations and contract administration.

Canadian law provides for a similar duty of fair representation. In Mexico, Article 375 of the *Federal Labor Law* requires unions to represent their members in defending their individual rights unless the individual chooses to act directly and without the assistance of the union.

### *7) Termination of Bargaining Rights*

A union may lose its certification under certain circumstances. It may be decertified by a majority vote of bargaining unit members. U.S. law permits workers to change their collective bargaining representative or to decertify their bargaining representative and revert to nonunion status. The NLRB will conduct a decertification election if it receives a petition voluntarily signed by at least 30 percent of the employees in the bargaining unit. However, there are certain restrictions on the holding of such elections. First, no election may be held if a certification or decertification election has been held in that bargaining unit within the preceding year. Second, to enhance stability in bargaining relationships, the NLRB has devised a "contract bar" rule. This rule precludes any election for a new union to replace an incumbent union or for the decertification of an existing union for the first three years of a collective bargaining agreement. A representation petition for a new union or a decertification petition must be filed 60 to 90 days before the expiration of the existing contract. An employer, supervisor or other agent of the employer may not file a petition for a decertification election.

Canada's labor laws provide for similar methods of decertifying or changing the bargaining representative. Under Mexican labor law any duly registered union may challenge another union's title to a collective contract at any time by filing a claim to that title with the relevant CAB. If an incumbent union does not prove its majority support during such a proceeding, it will lose title to the collective contract and thus lose the right to administer and negotiate revisions to it.

## C. Labor Principle 3 – The Right to Strike

### *1) Legal Foundations*

The United States Constitution does not explicitly address the right to strike. Instead, legislation has established rules for strike activity.

#### (i) The Labor Injunction in U.S. Labor History

Throughout the 19th century and the early 20th century, many U.S. legislatures and courts treated strikes as a criminal conspiracy or restraint of trade. One phenomenon peculiar to Anglo-American labor law history, critical in understanding U.S. treatment of the right to strike, is the so-called "labor injunction."

Labor injunctions were widely used in the 19th century and early 20th century at the behest of employers to break strikes. Injunction proceedings often took place *ex parte*, without an opportunity for workers or unions to be heard. Many judges also held union leaders personally liable, both criminally and civilly, for the acts of union members. The judicial repression of strikes deeply affected organized labor's views and later gave way to legislation on the right to strike.

In the 1920s and 1930s, sustained political efforts by workers and their allies achieved greater protection of the right to strike, culminating in the Norris-LaGuardia Act of 1932 and the *National Labor Relations Act* of 1935. In later legislation, Congress demonstrated greater interest in protecting employers' interests and those of "neutral" third parties by enacting legislation governing workers' right to strike.

#### (ii) Norris–LaGuardia Act and *National Labor Relations Act* Policy

In the collective bargaining context, where workers seek better terms and conditions of employment in a first contract or in a new contract, workers' right to strike is relatively unfettered. Workers' right to engage in "concerted activities" for "mutual aid or protection," including collectively withholding their labor, is protected by the basic provisions of the Norris-LaGuardia Act and the *National Labor Relations Act.* In general, U.S. law provides that workers cannot be discriminated against for exer-

cising this right, nor can employers obtain labor injunctions from judges to halt a strike. Section 7 of the *National Labor Relations Act* declares the right of workers to engage in "concerted activities" for "mutual aid or protection" and underscores this point in Section 13: "nothing in this Act shall be construed so as either to interfere with or impede or diminish in any way the right to strike."

(iii) Federal Preemption

U.S. federal law on the right to strike is paramount and preemptive in its scope and enforcement. For example, when in 1992 the state of Wisconsin enacted a state law prohibiting the permanent replacement of strikers within the state, federal courts ruled that the state act was preempted by federal law and voided the state statute.

States, counties and municipalities do have a critical ancillary role affecting the right to strike because they enforce public safety provisions governing the conduct of strikes. State courts can issue civil injunctions to stop violence, trespassing or other public safety disturbances in the course of an otherwise legal strike. Local police and, much less commonly, the National Guard (which is under control of the governor of a state) may be deployed to guarantee access to and from work sites for managers, nonstriking employees, replacement workers, suppliers and others crossing the picket lines of striking workers. State and local police and prosecutors also have jurisdiction over picket line violence and other unlawful activity.

*2) Protected Strike Activity*

As noted above, Section 7 of the *National Labor Relations Act* protects the right of employees to engage in concerted activities, including the right to strike. The National Labor Relations Board and U.S. courts have ruled that certain types of strike activity are not protected by that section. In particular, partial strikes (such as concerted refusals to perform overtime work), concerted production slowdowns, intermittent work stoppages, and minority strikes conducted without the authorization of a certified or voluntarily recognized majority bargaining representative are treated as unprotected. As a result, an employer is free to take disciplinary action against employees involved in such strikes.

Canadian labor law protects a wider range of strike activity, including partial and intermittent strikes. Canadian unions may lawfully strike, however, only to conclude a collective agreement and only once statutory conciliation, mediation and notice requirements have been met. Mexican labor law limits the definition of a strike to "the mere act of suspending work" and thus does not protect work slowdowns.

*3) Regulation of the Right to Strike*

U.S. workers and unions are relatively free to engage in peaceful strike action without interference by the employer or intervention by the state. No law mandates requirements or conditions for workers to begin, sustain or end a strike. However, the law makes certain types of strike unlawful, mandates that unions provide certain types of notice, allows for no-strike clauses to be included in collective agreements, and allows for injunctions against strikes in "national emergencies." The *Railway Labor Act* establishes somewhat different procedures and regulations for strikes in the airline and railway industries (see Appendix 4A).

(i) Unlawful Strikes

The Taft-Hartley Act (the *Labor Management Relations Act* of 1947) amended the *National Labor Relations Act* to make it unlawful to strike to achieve certain purposes.

The most important of these restrictions are contained in Section 8(b)(4) of the NLRA, which basically prohibits union actions against neutrals in a labor dispute. Section 8(b)(4) prohibits workers and unions from inducing or engaging in work stoppages or refusing to handle products for such purposes as: (1) forcing any employer or self-employed person to join any labor or employer organization; (2) requiring a neutral third party to cease doing business with an employer with whom the union has a labor dispute; (3) forcing an employer to recognize a union when another union has already been certified as the representative of its employees; or (4) forcing an employer to assign particular work to employees in a particular union (unless the employer is failing to comply with a certification or order of the NLRB determining

the bargaining representative of employees performing such work). A strike to force an employer to designate a multiemployer organization as its bargaining representative violates other subsections of Section 8(b), as does a strike seeking to force an employer to pay for services which are not performed or are not to be performed.

(ii) Notice Requirements

A union must give 60 days' advance notice to the employer of its intention to modify or terminate an existing collective bargaining agreement. It must also provide notice of the existence of a bargaining dispute to the Federal Mediation and Conciliation Service within 30 days after providing such notice. Section 8(d)(4) of the NLRA bars strikes by a union that has failed to provide the required notice to the FMCS until 60 days after that notice is eventually filed. If any strike action is taken within a required notice period, striking workers lose their status as employees for the purpose of protection against unfair labor practices and the right to vote in representation elections until such time as they are reemployed by the employer.

In addition to those general notice requirements, amendments to the NLRA in 1974 covering the health care sector established special advance notice requirements for strikes in the private sector health care industry, including 10 days' advance notice by health care unions of an intent to strike.

(iii) No-Strike Clauses

In the United States, the vast majority of collective bargaining agreements contain a no-strike clause barring work stoppages while the contract is in effect. The normal *quid pro quo* for the no-strike clause is an arbitration clause, in which the employer agrees to submit disputes that arise during the contract term to binding arbitration before a private arbitrator under terms of reference established by the contract. Most strikes occur after the expiration of a contract when the employer and the union cannot reach agreement on a new contract.

No-strike clauses and the arbitration *quid pro quo* in American labor contracts are products of agreement between the parties. In contrast, Canadian labor laws require no-strike and compulsory arbitration clauses in every collective bargaining agreement. Statutes will apply the requirement if it is not contained in the agreement. Mexican law does not restrict the right to strike but requires that formal advance notice of strikes be given and that, once such notice is given, the union and the employer attend CAB conciliation hearings. It also permits a union that has given a strike notice to submit the dispute giving rise to the notice to the CAB for resolution.

(iv) National Emergencies

Sections 206 to 210 of the LMRA create an exception to the Norris-La-Guardia Act, permitting labor injunctions where a strike creates a "national emergency." Under these provisions, if the President believes that an actual or threatened strike or lockout will imperil "the national health or safety," he or she may appoint a board of inquiry to investigate the issues in dispute and report publicly on them. Upon receiving this report, the President may direct the Attorney General to seek a court injunction against the strike or lockout. Section 208 of the LMRA gives the court jurisdiction to issue an injunction if it finds that the threatened or actual strike or lockout: (1) affects all or a substantial part of an industry engaged in interstate or international commerce or engaged in the production of goods for commerce; and (2) will "imperil the national health or safety." If an injunction is issued, the parties must resume bargaining with the aid of the Federal Conciliation and Mediation Service. Sixty days after the issuing of the injunction the board of inquiry must submit a further report on the current status of the bargaining dispute and on the employer's last offer of settlement. Within 15 days of that report the NLRB must conduct a vote of the affected employees on that offer. Subsequent to the election the injunction must be dissolved. The national emergency provisions of the LMRA have been used in a number of industries, including steel, coal, atomic energy, maritime transport, and telecommunications.

(v) Airline and Railroad Industries

The *Railway Labor Act* establishes different requirements and regulations of the right to strike in the airline and railway industries. A summary of these conditions is included in Appendix 4A.

(vi) Strike Votes

No U.S. law requires a strike vote or a vote by workers on an employer's last contract offer before strike action is taken or after a strike has begun. As a matter of democratic practice, however, most unions' constitutions and bylaws require a strike vote, some requiring a two-thirds majority to launch a strike. The government plays no role in overseeing such votes.

> In Mexico, once a strike has started, employers, workers, or interested third parties may request that the CAB certify the legal "existence" of the strike. This requires the CAB to determine, among other things, whether a majority of workers support the strike, for which purpose a strike vote of workers (called a *recuento*) may be held in order to determine whether the strike enjoys majority support. If the strike does not enjoy majority support it will be declared "nonexistent," and work must be resumed. In Canada, federal law and most provincial laws require mandatory strike votes.

*4) Picketing and Other Supportive Action*

Peaceful picketing, handbilling and other concerted activities are generally protected under the *National Labor Relations Act.* Many such activities also benefit from constitutional protection against state interference with freedom of expression. However, the NLRA restricts some union actions, such as "secondary boycotts."

(i) Secondary Boycotts

U.S. law on secondary boycotts is a significant limitation on the scope and impact of the right to strike. Section 8(b)(4) of the *National Labor Relations Act* makes unlawful any form of "secondary boycott" by a U.S.

union. Secondary boycotts are a type of action by workers or their union which seeks to influence an employer by bringing economic or social pressure to bear on those who deal with that employer.

On the other hand, the Supreme Court has held that the NLRA does *not* prohibit peaceful handbilling, unaccompanied by picketing, that urges customers and consumers not to patronize a neutral employer. The Court has also held that a union can, in most situations, lawfully picket a secondary employer for the limited purpose of persuading customers or consumers not to buy the products of the primary employer.

Unions can be subject to lawsuits for financial damages and to ULP charges for secondary boycott activity. Many strike-related ULP charges are filed by employers against unions and union members for secondary boycotts. The general counsel is required by Section 10(l) of the NLRA to immediately seek an injunction in federal court against any secondary boycott by a union.

**Box 4.2**

**Secondary Boycotts by Farmworkers**

Although farmworkers' unions in the United States are generally disadvantaged by their exclusion from federal labor relations laws (they can organize only under state laws, where such laws exist), they have an advantage in this area since they are free to seek secondary boycotts both by unions and consumers. Some farmworkers' unions were able to gain a foothold in the agricultural sector because they were able to organize consumer boycotts of large grocery store chains in major U.S. cities.

*5) Striker Replacement*

The Supreme Court enunciated an important rule which affects the right to strike in the 1938 Mackay Radio case, when it held that an employer may permanently replace striking workers engaged in an economic strike.[6] It is fairly common today for U.S. employers to threaten to employ permanent replacements in the event of a strike.

[6] *See NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

An exception to the rules permitting permanent replacement of strikers applies where a strike is undertaken to protest an employer's unfair labor practices. In such cases, strikers cannot be permanently replaced (see Unfair Labor Practice Strikes and Economic Strikes, below).

Striking workers who are permanently replaced under the Mackay doctrine are not terminated from employment. Rather, they remain on a recall list and must be offered employment if a position becomes available.

U.S. trade unionists and their allies argue that the right to strike necessarily implies that all striking workers should have the right not to be permanently replaced in response to strike action and that this right should not be limited to strikes provoked by an employer's ULPs. Employers counter that their right to permanently replace economic strikers maintains balance in the test of economic force between the parties. Proposals to amend U.S. labor law to overturn the Mackay decision and bar the permanent replacement of striking workers have been strongly debated in the U.S. Senate twice during the 1990s. In both attempts, the efforts were filibustered, and supporters of reform were unable to muster the 60 percent vote needed to cut off the filibuster and proceed to a vote.

> Canadian labor laws do not permit the permanent replacement of strikers. British Columbia and Quebec prohibit most forms of temporary replacement of strikers as well. Mexican law requires a company to cease operations during a strike, except as necessary to maintain equipment and preserve raw materials. The law requires the members of the union on strike to perform these tasks and makes the union responsible for the installations of the company during the strike.

### (i) Unfair Labor Practice Strikes and Economic Strikes

U.S. labor law makes a critical distinction between strikes provoked by an employer's unfair labor practice and strikes motivated by workers' economic interests in improved wages, benefits or working conditions. A ULP strike has greater protection under the law, since workers engaged in a ULP strike cannot be permanently replaced under the Mackay doctrine. They may be temporarily replaced, but they must be reinstated, displacing any temporary replacement workers, when they decide to end their strike and return to work.

In practice, many unions file ULP charges when they begin a strike. The union hopes to prevail on the ULP charge to protect strikers against permanent replacement. A final decision by the NLRB or by the courts on the ULP case may not be forthcoming for a period of months or years, and so striking workers cannot be certain that their action is protected. However, an equivalent risk exists for the employer: if it replaces strikers, and years later a final ruling of the NLRB or a court of appeals finds that they are ULP strikers, the employer must rehire the strikers and pay back wages and other expenses for the period of the strike.

## D. Protections against Interference

### *1) Prohibition of Employer Unfair Labor Practices*

The central instrument for protecting the rights to organize, to bargain collectively and to strike under U.S. law is the prohibition of five unfair labor practices in Section 8(a) of the *National Labor Relations Act*. A ULP violates the law and is subject to the remedies provided by the Act.

> Canadian labor law also rests on the prohibition of defined unfair labor practices. Mexican labor law does not define unfair labor practices as such. While some prohibitions are stated, Mexican law relies on detailed affirmative declarations of what employers, employees and unions must do rather than what they must not do, establishing sanctions and remedies for noncompliance.

Section 8(a)(1) of the *National Labor Relations Act* makes it a ULP to "interfere with, restrain or coerce" employees engaged in concerted activity, including union activity. For example, prohibiting employees from distributing prounion literature on their own time and in nonwork areas may be unlawful interference with workers' organizing rights. Examples of employer behavior found to be coercive include the following: (1) polling or interrogating individual employees about their voting intentions in a potential representation election; (2) threatening to withdraw economic benefits during a representation election campaign; (3) attempting to influence the election of union officials; and (4) placing employees or union organizers engaged in union activity under surveillance.

Threatening to close a workplace if the workers form a union is also an example of unlawful coercion. However, courts have allowed employers to make predictions as to the effects that they believe unionization will have.[7]

> Canadian law treats most employer statements which link the job security of employees to their choice to unionize as unfair labor practices.

Section 8(a)(2) seeks to guarantee the independence of trade unions by making it an unfair labor practice to dominate or interfere with the formation or administration of a labor organization or to contribute financial or other support to it. Section 8(a)(2) of the Act bars the creation of "company unions" controlled by management and used to prevent genuine trade union organizing. Section 8(a)(2) also prevents an employer from assisting one union among rival unions seeking to represent its employees. An employer who has been notified of a valid petition for a representation election must refrain from recognizing and bargaining with any rival unions until the outcome of the election has been determined.

While some employers claim that Section 8(a)(2) and its continued enforcement by the NLRB impede the formation of labor-management cooperation committees, unionists insist that the clause is necessary to prevent a resurgence of company unions. Proposals to reform Section 8(a)(2) have been sharply debated in the U.S. Congress in recent years.

Section 8(a)(3) of the Act protects workers' right to organize and carry on concerted activities by prohibiting discrimination against workers who engage in lawful union activities. The Act provides for reinstatement and back pay (or other "make-whole" remedies) for workers who are discharged or otherwise discriminated against for such activity. An employer will be found to have discriminated if antiunion reasons were a substantial or motivating factor in its decision. Where an employer closes a part of its operations with the motive of chilling unionism in the remainder of its operations or transfers some or all of its operations to avoid collective bargaining obligations under the Act, the employer commits an unfair labor practice under Section 8(a)(3).

[7] For a fuller treatment of this issue, see Commission for Labor Cooperation, *Plant Closings and Labor Rights* (Dallas: Secretariat of the Commission for Labor Cooperation, 1997).

Discharging workers for attempting to organize a union is one of the most common ULPs in the United States and has increased sharply in recent decades. For example, during the 1950s, reinstatement offers to remedy discharges of workers in violation of Section 8(a)(3) were found in less than 5 percent of union elections. By the 1980s, that figure had risen to 28 percent.[8] Moreover, reinstatement offers do not reflect all ULP discharges, since many workers are offered and accept back pay or some other compensation without being offered reinstatement, and some ULP discharges are not reported to the NLRB.

> In most Canadian jurisdictions any presence of an antiunion motive will render a discharge unlawful, and the worker will be reinstated with back pay. In Mexico, workers can be discharged only for limited and specific causes, which do not include union activity.

Section 8(a)(4) makes it unlawful to retaliate against a worker for giving testimony or otherwise availing himself or herself of the protection of the NLRA.

Section 8(a)(5) makes it unlawful for an employer to refuse to bargain with a majority collective bargaining representative of its employees. In addition, the duty to bargain prevents an employer from unilaterally altering terms and conditions of employment prior to an impasse in collective bargaining. The Act includes prohibitions against other actions by employers which interfere with the ability of a union to represent its bargaining unit members (see Obligation to Bargain, in section 2B.3, above).

### *2) Prohibition of Union Unfair Labor Practices*

Section 8(b) of the Act protects workers against certain actions by unions. Section 8(b)(1) of the Act makes it a ULP for a union to "restrain or coerce" employees in the exercise of rights guaranteed by Section 7 of the Act. This protects certain worker rights to refrain from

[8] Annualized averages for each decade. See Commission on the Future of Worker Management Relations, *Fact Finding Report* (Washington DC: U.S. Department of Labor and U.S. Department of Commerce, 1994), at page 84.

union membership and concerted activity or to change union allegiance. For example, a union may not fine or otherwise penalize a member for seeking to resign from the union during a strike or for opposing incumbent union officials in intraunion politics. Similarly, a union which makes threats of violence against those supporting a rival union commits an unfair labor practice. Section 8(b)(2) makes it a ULP in some circumstances for a union to cause an employer to discriminate against an employee in violation of Section 8(a)(3). Section 8(b)(4) makes it unlawful for a union to require employees covered by a union shop to pay an "excessive or discriminatory" membership fee.

*3) The "Laboratory Conditions" Requirement*

In addition to prohibitions on unfair labor practices, the National Labor Relations Board enforces a requirement of "laboratory conditions" during union representation elections. This requirement has been defined as "conditions as nearly as ideal as possible, to determine uninhibited desires of employees"[9] during union representation elections. The Board will set aside and rerun elections where laboratory conditions are not met. In practice, the laboratory conditions doctrine prohibits only the most aggressive forms of campaigning, leaving a wide scope for misleading and derogatory campaign propaganda. The Board will intervene if a party uses forged documents to render voters unable to recognize propaganda. It has also intervened when a party engaged in electioneering at a polling place once the polls had opened, when a party exacerbated racial tensions through inflammatory racial statements, and when a party made threats of violence.

*4) Civil Rights and Protection*

Without civil and political rights there can be no normal exercise of trade union rights. The U.S. Constitution provides fundamental civil

[9] *General Shoe Corp.*, 77 NLRB 124 (1948).

and political rights to U.S. residents. Like other U.S. residents, unions and union members have full freedom of assembly, provided that the exercise of this freedom does not pose a real and present danger of substantial harm to property or physical safety. Unionists have the freedom to travel within and outside the country that is granted to all residents and have the right to attend national and international trade union meetings with full freedom and independence. Similarly, unions and employees have the constitutional right to express their views and opinions publicly and to receive or impart information through any media, like other U.S. residents.

Unions and employees engaged in union activity, like all U.S. residents, enjoy freedom from search and seizure of their property without a judicial warrant issued following a determination that reasonable and probable cause exists to believe that evidence for criminal proceedings will be found on the premises. Similarly, unionists enjoy constitutional freedom from arbitrary arrest or detention without a warrant and without charges being brought. Unions and their members are entitled to police protection from assault, injury, and damage to property and to full protection of the criminal laws which prohibit inflicting such harms.

## 3. GOVERNMENT ENFORCEMENT

### A. The National Labor Relations Board (NLRB) – Structure

The principal U.S. government agency that enforces private sector labor relations laws is the National Labor Relations Board (NLRB), often just called "the Board" in U.S. labor discourse. The NLRB structure actually contains three independent entities: (1) the five-member Board itself; (2) the Office of the General Counsel; and (3) the Division of Administrative Law Judges (ALJs).

The Board employs some 2,000 attorneys, field examiners, and support staff at its headquarters in Washington, D.C., and 33 regional offices around the country. A regional director heads each regional office and makes critical decisions in matters that come before the office. Re-

gional directors and their staff handle representation issues on behalf of the five-member Board. Regional directors also deal with ULP cases under the supervision of the independent general counsel.

*1) The Board*

The President of the United States appoints five members to the NLRB. Each appointment must be confirmed by the U.S. Senate. As a matter of custom, no more than three members of the Board belong to the same political party. The Board has two distinct functions: hearing appeals of decisions by administrative law judges (ALJs), and supervising representation elections to certify a union's majority status.

> Mexico's CABs and several Canadian provincial labor boards are tripartite in their composition, with representatives of government, labor and management.

(i) Supervision of Certification Elections in Representation Cases

Through its regional offices, the NLRB oversees secret ballot elections in workplaces where workers seek to prove majority support for collective bargaining. Under the authority of the Board, NLRB elections are conducted by regional directors and regional office staff. The Board establishes the rules for conducting such elections and reviews objections to the election. Such complaints of unfair campaign and election tactics are distinct from ULP proceedings (see The "Laboratory Conditions" Requirement, section 2D.3, above.)

(ii) Appeals from ALJ Decisions in ULP Cases

The NLRB sits as an appeals panel that reviews the decisions of administrative law judges in ULP cases. In this role, the Board is a tribunal reviewing the written record of the trial and the written decision of the ALJ. Decisions of the NLRB are themselves appealable to federal appeals courts and may eventually be appealed from there to the U.S. Supreme Court.

### *2) Office of the General Counsel*

The independent Office of the General Counsel is the main enforcement agency for the right to organize, to bargain collectively and to strike. The general counsel is appointed by the President of the United States for a four-year term and must be confirmed by the Senate.

The NLRB's general counsel is generally considered the most powerful single post in the agency structure. The general counsel enforces the ULP provisions of the law, receiving and investigating all ULP charges through the regional office staffs. Such charges may be filed by workers, unions or employers at any of the NLRB's regional offices. If the general counsel finds merit in the charge, a complaint will be issued against the charged party. If the general counsel does not find merit, the charge is dismissed. The refusal to issue a complaint after receiving an unfair labor practice charge is not reviewable by the Board or by the courts.

In effect, the NLRB Office of the General Counsel is the gatekeeper for enforcement of federal labor law on industrial relations. If the general counsel issues a complaint, the resources of the agency (and thereby the power of the federal government) are then applied to prosecution of the case before an administrative law judge, before the Board, and in the courts. The general counsel enforces the Act on behalf of the people of the United States, not just on behalf of the charging party.

### *3) Division of Administrative Law Judges*

The third branch of the NLRB is the Division of Administrative Law Judges. ALJs are independent of the five-member Board and of the Office of the General Counsel. Although they are appointed by the Board, they receive lifetime appointments and may be removed only for gross misconduct. They serve as trial judges in ULP cases, presiding over hearings where documentary evidence and testimony of witnesses are presented by counsel for the Office of the General Counsel and by counsel for the charging party and the respondent. After a hearing, the ALJ issues findings of fact and rulings of law based on the evidence. The ALJs' decision is commonly appealed to the Board by the losing party.

## B. NLRB Enforcement Procedures - Unfair Labor Practice Proceedings

### *1) Investigation*

ULP processes are initiated by a party's filing a charge with the Board. Acting under the authority of the general counsel, the regional director first conducts an investigation of the alleged violations set out in the ULP charge. The investigation includes taking sworn statements. It also allows extensive opportunity for union or employer counsel to submit position papers and to argue orally on their client's behalf for the issuance of a complaint or for the dismissal of the charge.

### *2) Complaint or Dismissal*

Based on the investigation, the regional director then decides whether it is reasonable to believe that a ULP may have been committed. The regional office issues a complaint if it finds that the charge is "meritorious" — if the findings of a preliminary investigation support the facts as alleged in the charge and if the facts as alleged would constitute a ULP. If not, the regional director will recommend that the charging party withdraw the charge. Charges may be withdrawn without prejudice to the right of the charging party to refile charges relating to the same matters, possibly on the basis of new or additional evidence or allegations. If the charging party refuses to withdraw an unmeritorious charge, the regional director will dismiss it. Dismissals can be appealed only to the general counsel. The regional director often convinces the charging party to withdraw the charge prior to dismissal. About one-third of all ULP charges are found to be meritorious after a preliminary investigation. (In several regional offices of the Board, a large volume of charges involve individual employee grievances, often by Postal Service employees who are within NLRB jurisdiction. These charges are generally deferred to arbitration by the regional office and are not listed as meritorious. Thus, the true rate of meritorious charges is higher than one-third.)

*3) Settlement Efforts*

While the Act does not specifically mandate a mediation or conciliation role for the NLRB in connection with ULPs, regional offices are encouraged by the general counsel to seek voluntary compliance through settlement between the regional director and the charging and charged parties. There is no provision in the law for arbitration of such matters.

More than 90 percent of all meritorious ULP charges are disposed of through settlement rather than by litigation. Parties' reasons for settling cases are diverse. Their decision to settle is often based on an assessment of the strength of their case. Settlements might also be driven by the potential costs of litigation, the length of time required to litigate a case, the economic circumstances of the employees concerned, and the reasonableness of a settlement offer.

*4) ALJ Hearing*

If the parties do not settle a complaint, the case goes forward to a trial of the facts before an administrative law judge. The ALJ hears the examination and cross-examination of witnesses. Three attorneys usually participate in ALJ hearings: counsel for the Office of the General Counsel, counsel for the employee or the union, and counsel for the employer.

The ALJs evaluate witnesses' credibility, examine documents and other exhibits for their probative weight, make findings of fact, and draw conclusions of law. They issue a written decision in the case, deciding whether the charged party has committed an unfair labor practice. If so, the ALJ orders a remedy.

*5) Appeal to the NLRB*

ALJ decisions may be appealed to the Board for a review of the record in the case. The Board can affirm or reverse, in whole or in part, the ALJ's decision. In complex or novel cases, the Board might hear oral arguments by parties to the case.

*6) Non-Self-Enforcement of NLRB Decisions*

Decisions of the NLRB are not self-enforcing. A party may choose not to appeal a Board ruling and, at the same time, not comply with the ruling. The Board must then initiate proceedings for enforcement in a federal appeals court. The court will then review the Board's decision based on the record in the case.

Testing the NLRB's decision through deliberate noncompliance with an order is a common practice under U.S. labor law. Many employers believe that the courts are more sympathetic to property rights and other employer interests than the Board. Some judicial circuits are considered more likely than others to reverse the NLRB. An employer upset with a decision of the NLRB who does business in one of these judicial circuits will often seek to file an appeal there. Decisions by U.S. circuit courts of appeal may conflict with each other, resulting in variations in labor law enforcement in the different judicial circuits until the issue is resolved by the Supreme Court.

> The decisions of Canada's federal and provincial labor boards are immediately enforceable as judicial orders upon filing of the decision in the appropriate superior court. Quebec's Labour Court is a judicial body whose orders are immediately enforceable. The orders of Mexico's CABs are judicial orders and immediately enforceable as such.

*7) Section 10(j) Injunctions*

Section 10(j) of the NLRA permits the general counsel, upon issuing an unfair labor practice complaint, to seek an injunction from a federal district court judge in order to obtain an interim remedy for the complaining party. An injunction is a special court order based on principles of equity at common law granting immediate remedial action while a case proceeds through the normal litigation process. In practice, injunctions have been sought only in extraordinary cases, where the general counsel believes that irreparable harm might result from the normal delays of litigation. A 1979 memorandum by the general counsel sets out various

fact situations, divided into 14 categories, in which injunctive relief will be sought.[10]

> Canada's federal and provincial labor boards (in Quebec, the Office of the Labour Commissioner and the Labour Court) are generally more integrated than the U.S. NLRB in their structure and functioning. Most boards have labor relations officers or investigation officers who summarily investigate and attempt to settle cases prior to hearings. If settlement efforts are unsuccessful, the board holds a single set of hearings and issues a final decision. Most boards will reconsider such decisions only in unusual cases. The board's decision is generally not appealable to the courts. Mexico's Conciliation and Arbitration Boards are also structured to process cases in a single administrative proceeding, in contrast to the NLRB's multiplicity of divisions and stages of treatment.

## C. Department of Labor (DOL)

The NLRB enforces laws regarding labor-management relations and unfair labor practices in that context. The U.S. Department of Labor enforces the *Labor Management Reporting and Disclosure Act*'s provisions regarding rights of individual union members and internal union democracy, as well as financial reporting and disclosure requirements for unions.

### *1) Complaint Proceedings*

Complaints involving alleged violations of union members' rights under the LMRDA and unlawful tactics in union elections may be filed at certain regional DOL offices and are investigated by regional DOL agents. If a complaint is found to have merit following an investigation of the alleged violation, there is not a further administrative proceeding, as with the NLRB. Instead, the Department of Labor files a lawsuit in federal district court to seek appropriate sanctions or remedies.

[10] NLRB GEN. *Counsel Memo* No. 79-77.

*2) Monitoring of Compliance*

While enforcement of the LMRDA generally takes place in response to complaints, DOL regional offices also monitor unions' compliance with financial requirements of the law through audits of labor organizations' financial books and records.

*3) Settlement Efforts*

As is the case with most labor law enforcement efforts, the Department of Labor seeks voluntary compliance with LMRDA requirements. There is no provision for arbitration of such matters. Unresolved complaints go forward to litigation in federal district courts.

## 4. RIGHTS OF PRIVATE ACTION

Three avenues for private action are available to workers and unions to secure statutory rights to organize, to associate freely, to bargain collectively and to strike: the NLRB, the U.S. Department of Labor, and the federal district courts.

### A. Access to Administrative Tribunals

*1) The National Labor Relations Board (NLRB)*

The NLRB is available to private parties (workers, unions, employers) under two lines of statutory authority. First, private parties may petition the NLRB under Section 9 of the NLRA for an election to determine whether a majority of the workers in a bargaining unit desire representation for the purpose of collective bargaining (thus determining whether the employer's duty to bargain arises). Second, private parties may allege unfair labor practices, thus setting in motion the NLRB mechanisms for determining ULPs under Section 8 of the NLRA.

An individual employee who files a charge on his or her own behalf, without any involvement by a union, typically does not hire a lawyer. If a complaint is issued on the charge, an attorney representing the Office of the General Counsel works with the employee in presenting the complaint. When a union is involved, a union attorney often joins the case, with full rights to subpoena witnesses and documents and to engage in examination and cross-examination of witnesses. As the charged party the employer has the full rights of a litigant party, including representation by counsel and rights of appeal to the Board and to the courts. (For more detail on NLRB processes, see section 3, above.)

> Labor relations laws in Canada and Mexico are also complaint-driven. Government agencies do not conduct inspections or otherwise monitor compliance with laws on organizing, collective bargaining and striking. Rather, they receive and respond to charges and complaints filed by private actors in labor affairs.

*2) Department of Labor (DOL)*

Unions and individual union members have access to certain regional offices of the Department of Labor, where they may file complaints alleging violation of the *Labor Management Reporting and Disclosure Act*. Generally, only the DOL is empowered to file a lawsuit regarding internal union election procedures. (For more information on DOL processes, see section 3, above.)

## B. Access to Courts

As a general proposition, private parties do not have access to courts to directly enforce rights to organize, bargain collectively or strike. Instead, the NLRB is empowered to bring action in courts to vindicate private rights when administrative proceedings have not resolved the matter.

A specific exception to this rule is found in Section 301 of the *Labor Management Relations Act*. Section 301 of the LMRA creates a private right of action in federal district court for an alleged violation of a col-

lective bargaining agreement. A Section 301 suit can be preferable to a ULP charge because the remedies of a federal district court order — including financial damages — are self-enforcing.

An individual represented by a union may also sue his or her union in federal court for breach of the duty of fair representation.

## 5. PROCEDURAL GUARANTEES AND REMEDIES TO ENSURE ENFORCEMENT

### A. Due Process

#### *1) Procedural Protections*

Regional directors of the NLRB are required to carefully investigate any objective evidence that is offered by a charging party in support of unfair labor practice charges. If the regional director decides to dismiss the charges, the NLRB will send a dismissal letter to the parties. The letter will include a summary report setting forth the reasons for dismissing the charges, unless the charging party requests that the report be excluded.

If an unfair labor practice complaint or a dispute concerning representation under the NLRA is not settled by agreement of the parties, a hearing is held. Constitutional and statutory rules of due process apply to hearings under the NLRA.

Parties have the right to present evidence and make submissions relevant to their case and to know and respond to the case of other parties. Hearings are open to the public. Parties may be represented by counsel, obtain compulsory process for production of witnesses and documents, examine and cross-examine witnesses under oath, and rely on rules of evidence. Section 8(a)(4) of the *National Labor Relations Act* makes it an unfair labor practice for an employer to discriminate against an employee because he or she has filed charges or given testimony in an NLRB proceeding.

In a ULP case, notice of ULP charges must be given to the charged party, and the general counsel has the burden of proving an unfair labor practice.

An order may be issued only on the basis of the record of evidence adduced at the hearing. Transcripts of proceedings and other records in the case are publicly available. The decision must include findings and conclusions along with the reasons or bases for them on all material issues of fact or law presented in the record.

> In most Canadian jurisdictions, the burden of proof in an unfair labor practice case involving discrimination for union activity generally rests with the employer, who must prove that it had no antiunion animus in acting as it did. In Mexico, the law is similarly protective. The burden of proof always falls on the employer. The employer must prove that its motive for discharging a worker falls within the statutory definitions of just cause. Under the FLL, any ambiguity must be resolved in favor of the worker.

*2) Independence and Impartiality of Decision Makers*

Members of the NLRB are appointed by the President of the United States on the advice and consent of the U.S. Senate for renewable five-year terms. The five-year term endures even if the presidency changes. Board members may be removed by the President only upon notice and following a hearing, and only for neglect of duty or malfeasance in office. ALJs are appointed by the Board and receive lifetime appointments. ALJs may be removed only for gross misconduct and may be subject to discipline or reduction in pay by the NLRB only for just cause after the opportunity for a hearing before a tribunal independent of the Board. The general counsel is appointed by the President on the advice and consent of the Senate for a term of four years.

Board members and ALJs must be free of bias. They must not hold any personal interest by which they would stand to gain or lose by a decision and must not prejudge the facts of a case nor show personal bias or clear favoritism towards a party. Detailed regulations prohibit and require disclosure of real or apparent conflicts of interest on the part of Board members, the general counsel, and Board employees.[11] A party

[11] 49 C.F.R. Sec. 29.

may, at any time following the designation of an ALJ to hear a case and before the filing of the ALJ's decision, request that the ALJ withdraw on grounds of personal bias. If the ALJ does not disqualify himself or herself and withdraw from the proceeding, the ALJ must state this ruling and the grounds for it on the record. A court may later overturn any NLRB order based upon ALJ findings made in a hearing rendered unfair by the ALJ's bias.

Adjudicators and NLRB employees may not receive any *ex parte* communications from any person or entity outside of the NLRB or from the general counsel concerning the merits of any pending representation or ULP case. *Ex parte* communications are oral or written communications not on the public record with respect to which reasonable prior notice to all parties is not given.

## B. Appeals and Judicial Review

The five-member NLRB acts as an appeals tribunal in ULP cases (see section 3, Government Enforcement, above). Parties may appeal the ALJ's decision to the Board, which reviews the record and may affirm or reverse, in whole or in part, the ALJ's ruling. Decisions of the NLRB are appealable to federal appeals courts and may be appealed from there to the U.S. Supreme Court by a writ for *certiorari*.

Decisions by a regional director refusing to issue a complaint or to settle a case with the charged party may be appealed only to the general counsel. The general counsel's refusal to issue a complaint or to overturn a settlement is not reviewable, either by the NLRB or by the courts.

> Decisions by Canada's labor boards are generally final and may not be appealed to the courts. However, they may be subject to judicial review on constitutional or administrative law grounds. These grounds are quite restricted, and the courts have often stated that they should exercise restraint when asked to review the decisions of labor relations boards. Decisions of Mexico's CABs are usually final and are subject to judicial review only on an action for *amparo*. Such action may be based only upon certain limited grounds, the most important of which are error of law, breach of due process, and exceeding legally authorized power.

## C. Sanctions and Remedies

U.S. labor law is remedial, not punitive. It does not provide for civil or criminal sanctions or penalties in ULP cases. An employer or union that commits an unfair labor practice is generally ordered to "cease and desist" from unlawful conduct and post for 60 days a notice in the workplace or the union office promising not to repeat the conduct. Steps must also be taken to restore the *status quo ante*, such as reinstatement and back pay for workers discharged for organizing or a return to the bargaining table in refusal-to-bargain cases. In back pay awards for workers, the amount of any interim earnings obtained by the worker is deducted from the back pay paid by the employer.

The NLRB has fashioned other remedies specific to particular types of legal violation. For example, in cases of flagrant employer violations during union organizing campaigns, the Board has ordered employers to grant the union access to company bulletin boards, to give the nonemployee union organizers reasonable access to employees in nonworking areas on nonworking time, or to give the union equal time and facilities to respond to company messages to employees concerning union representation (see also The Gissel Doctrine, in section 2B.2, above).

With respect to internal union affairs, the *Labor Management Reporting and Disclosure Act* is remedial, like the NLRA, not punitive. In cases of improper election procedures, generally a court will order a new internal union election to be supervised by the Department of Labor.

After all appeals are exhausted, any "final order" under the NLRA as amended or the LMRDA is enforceable under the police power of the United States government. Failure to comply with the order amounts to contempt of court. Responsible individuals could then be incarcerated until compliance is fulfilled, or their assets may be seized to satisfy a monetary order, such as back pay to workers.

## 6. PUBLICATION MEASURES

### A. Publication of Laws, Regulations, Procedures and Administrative Rulings

Labor laws, administrative regulations and internal agency rules and procedures of the NLRB and the Department of Labor are published and available to the public at government offices, public libraries and law libraries. Similarly, decisions by administrative law judges, the NLRB and the courts are all promptly published and available to the public. Statutes, regulations, rules, procedures and decisions are also generally available through online electronic sources. Several private publishing firms also produce these materials for sale and subscription.

### B. Notice and Opportunity for Comment

Proposed changes in labor laws are published in advance and are available to the public upon request. Legislative committees of the U.S. House and Senate hold public hearings on proposed legislation to hear the views of interested parties. Most trade unions and management organizations maintain legislative offices to monitor proposed changes in the law, to meet with legislators on such bills, and to arrange for oral or written testimony at public hearings on the legislation.

## 7. PUBLIC INFORMATION AND AWARENESS

### A. Availability of Public Information

The NLRB ensures that public information is available concerning the right to organize, to bargain collectively and to strike. The Board publishes and makes available free publications, usually nontechnical brochures and other descriptive information, at all regional offices or upon written or telephoned request from any person.

In addition, the NLRB publishes a comprehensive annual report. The report provides an overview of the enforcement activities of the Board during the year, including summaries and analysis, organized by topic, of key Board or court decisions under the NLRA. It also provides detailed statistical data on the number and types of cases handled by the Board, the ways in which cases were concluded, and the median time which elapsed at each stage of the Board's proceedings. The report also places much of this data in historical perspective.

In the field, each NLRB regional office assigns attorneys or agents to act as "officer of the day" to handle telephone calls and to personally interview workers seeking advice about their rights under the Act.

### B. Public Education

Like all U.S. federal agencies, the NLRB maintains a public affairs office to respond to inquiries from the public and to provide detailed information to the press, trade unions, businesses, universities, and non-governmental organizations. The NLRB sponsors or participates in dozens of seminars, conferences, workshops, training sessions, and other events throughout the United States each year to share information with the public and with interested parties. The Department of Labor maintains similar functions through its various agencies.

### C. Private Information Sources

Information is also available from private publishing enterprises that specialize in reporting on government legal and regulatory affairs, including industrial relations issues. The Bureau of National Affairs, Inc., Commerce Clearing House, Inc., West Publishing Co., and other private publishers provide extensive materials that are subscribed to by labor law practitioners. These materials are also available in law libraries and many general public libraries.

The AFL-CIO and its affiliates, as well as independent unions, publish newspapers and reports with information on matters of organizing, bargaining and strikes from a trade union perspective. The U.S. Cham-

ber of Commerce, the National Association of Manufacturers, the Labor Policy Association, and other employer organizations similarly produce publications on these issues.

## D. NAALC Cooperative Activities

The U.S. National Administrative Office, in collaboration with the NAOs of Mexico and Canada, has undertaken an extensive program of cooperative activities on industrial relations principles of the NAALC. Members and staff of the NLRB and DOL have participated in a number of these activities. Information on such programs can be obtained from the U.S. NAO.

# Appendix 4A

## AN OVERVIEW OF THE *RAILWAY LABOR ACT*

### Basic Labor Policy

The *Railway Labor Act* (RLA) is the key statute which governs labor relations in the railroad and airline industries in the United States, enacted in 1926. The central purpose of the RLA is to settle labor disputes so that they do not result in work stoppages which impair railroad and airline transportation. The RLA was to a significant extent the product of negotiated compromise and agreement between labor and management in the railway industry.

### Coverage of Act

The RLA applies to rail and air common carriers and any entity owned or controlled by or under common control with such a carrier which performs transportation-related activities. Employees at the level of "subordinate official" and below are covered. Included within the scope of the term "subordinate official" are employees whose level of supervisory authority would render them "supervisors" under the NLRA and thus exclude them from the definition of covered employee under that statute. There are approximately 590,000 covered employees in the airline industry and 230,000 in the railroad industry. Approximately 65 to 70 percent of the airline employees covered by the RLA and 80 to 85 percent of those in the railroad industry are unionized.

### Acquisition of Bargaining Rights

Like the NLRA, the RLA enables unions to acquire collective bargaining rights either through voluntary recognition or through certification by a government agency as the majority representative of a group of employ-

ees. Under the RLA the National Mediation Board (NMB) makes certification determinations.

The certification process is invoked by requesting the investigation of a representation dispute by the NMB. The NMB has the duty and exclusive power to investigate such disputes. Only a labor organization or an employee may raise a representation dispute with the NMB. The RLA, unlike the NLRA, does not give employers standing in representation disputes.

Under the RLA the group or unit of employees represented by a union in collective bargaining is referred to as a "craft or class." A craft or class must be system wide, that is, it must include all members of that group working for the carrier at all locations. The showing of interest necessary to raise a representation dispute is calculated on the basis of the number of employees in the craft or class. An application for certification must be accompanied by authorization cards signed by at least 35 percent of the employees in an unrepresented craft or class or a majority of a craft or class that is already represented by another union. (By contrast, under the NLRA a bargaining unit need only be appropriate for representation. It can take many forms and more often than not is confined to a single location, even if the employer is national in scope. Generally, the total showing of interest necessary to raise a representation dispute under the NLRA is smaller, only 30 percent of the initiating group.)

When the showing of interest requirement has been satisfied, the NMB generally holds elections to determine the outcome of representation disputes. Unlike elections under the NLRA, the vast majority of elections under the RLA are conducted by mail ballot. In standard NMB elections, a majority of the eligible voters must cast valid ballots in favor of union representation in order for the NMB to issue a certification, in contrast to NLRB elections, in which only a majority of those actually voting is required for the union to win.

There are other differences between the two Acts in their handling of representation elections. Under the NLRA, a party is barred from raising a question concerning representation during the first three years a collective bargaining agreement is in effect. The NMB utilizes a two-year certification bar and a one-year dismissal bar. Also, while unions are provided with a list of employee addresses during an NLRA election, unions generally are not entitled to such a list during an initial election under the RLA.

During an RLA election the NMB requires that "laboratory conditions" be maintained to allow a free choice by employees without employer interference. Employer conduct that might be allowed in an NLRB election will sometimes be deemed to violate the RLA.

## Union Membership and Dues

The subject of union security is treated differently than under the NLRA. Section 14(b) of the NLRA permits the application of state laws barring union security agreements (the so-called "right-to-work" laws). However, Section 2, Eleventh of the RLA preempts the application of all such laws and authorizes carriers and labor organizations to include in their collective bargaining agreements union security arrangements obligating employees to pay uniformly required dues and fees as a condition of continued employment. As under the NLRA, actual union membership is not required. Section 2, Eleventh also authorizes carriers and unions to agree that the employer can deduct union dues from the pay of each member of the craft or class represented by the union, provided that the member has authorized this deduction in writing.

As under the NLRA, employees who are part of a union-represented craft or class, but who are not members of the union, are not obligated to pay that part of dues assessments which goes to expenses other than collective bargaining and grievance handling activity.

## Collective Bargaining

### *Duty to Bargain*

Section 2, First of the RLA imposes a duty upon a carrier to deal with the representative of its employees with respect to rates of pay, rules and working conditions. That section also imposes upon both carriers and labor organizations the duty to exert every reasonable effort to make and maintain agreements. Both duties are judicially enforceable. Unlike the NLRB, the NMB has no direct role in such enforcement.

Collective bargaining is initiated under RLA by one party serving a

notice upon the other proposing changes to existing rates of pay, rules and working conditions. The notice may be to establish an initial collective bargaining agreement or to amend an existing agreement.

Collective bargaining agreements in the railroad industry generally do not expire but instead continue indefinitely, unlike most agreements made under the NLRA. However, as a device to prevent the overly frequent reopening of agreements, the parties in the railroad industry often include moratorium clauses in their agreements, insulating them from negotiations for a specified period. The same result is accomplished in the airline industry by use of duration clauses, which specify the date upon which all or part of the collective agreement may be amended.

### *Disclosure*

Unlike the NLRA, as a general rule the RLA does not impose an obligation upon a carrier to disclose information to a union representing its employees in collective bargaining.

### Status Quo *Obligations*

During the process of collective bargaining under the RLA there is a duty to maintain the terms and conditions of employment without change. Carriers may not change wages, hours or working conditions, and labor organizations may not strike or use other economic self-help. Some courts have ruled that carriers may alter wages, hours and working conditions during bargaining for an initial agreement. The *status quo* obligation is judicially enforceable through injunctive relief and, where appropriate, through make-whole remedies. Unlike the NLRB, the NMB has no role in enforcing this obligation.

### *Contents of Agreements*

The RLA contains no specific requirements as to the particular content of collective bargaining agreements, except that an arbitral tribunal must

be established in airline agreements (see Enforcement of Collective Bargaining Agreements, below). However, such agreements generally must address rates of pay, rules and working conditions in order to satisfy the parties' obligation under the RLA to make and maintain agreements pertaining to such matters.

*Scope of Bargaining*

The Supreme Court has stated that the duty to bargain over "rates of pay, rules and working conditions" in Section 2, First of the RLA should be interpreted broadly. Some courts have ruled that the distinction between "mandatory" and "permissive" subjects of bargaining, which applies under the NLRA, also applies under the RLA. However, there is little case law on what might constitute permissive subjects under the RLA. The Supreme Court has decided that management is under no obligation to bargain over an employer's basic decision to go out of business, since this decision is a "management prerogative."

*Mediation and Arbitration*

Under the RLA, mediation functions are performed by the National Mediation Board. Either party can request mediation, and there is no minimum period of negotiation required before a request may be made. However, the NMB will encourage the parties to continue with direct negotiations if it believes that the request for mediation was premature.

If the parties are unable to agree and terminate bargaining, a 10-day waiting period begins, during which time either party may request mediation, or the NMB may directly proffer and initiate mediation. If neither happens within the 10-day waiting period, the parties become free to engage in economic self-help, including strike or lockout action.

The NMB has a wide discretion over when it may proffer interest arbitration and thus release the parties from mediation. Mediation generally continues longer than it does when conducted by the Federal Mediation and Conciliation Service in a dispute under the NLRA.

If interest arbitration is accepted by both parties, it is conducted pur-

suant to sections 7, 8 and 9 of the RLA. If either party rejects the proffer of arbitration, a 30-day cooling-off period begins during which the NMB continues mediation in the public interest.

The parties remain under an obligation to maintain the *status quo* until the cooling-off period expires. During this period the President of the United States may create an Emergency Board under Section 10 of the RLA, if the NMB believes that the dispute threatens substantially to interrupt interstate commerce to such a degree as to deprive any section of the country of essential transportation service. If this is done, terms and conditions of employment must remain unchanged and there may be no strike or lockout until 30 days after the Emergency Board has rendered its report to the President. Thereafter, the *status quo* is lifted. In some cases Congress has enacted special legislation to dispose of the dispute.

*Enforcement of Collective Bargaining Agreements*

The RLA distinguishes between what have become known as "major" and "minor" disputes. A minor dispute is one arising out of grievances or the interpretation or application of existing collective bargaining agreements. A major dispute is one over the making or amending of a collective bargaining agreement concerning rates of pay, rules or working conditions. Major disputes are subject to the notice, negotiation and mediation processes previously discussed in this appendix. Minor disputes are subject to compulsory arbitration under the RLA. As a general rule, self-help such as strike or lockout action is prohibited with respect to minor disputes.

The RLA establishes or provides for the establishment of tribunals, generally known as "adjustment boards" in the railroad industry, which are charged with the task of adjudicating minor disputes. Section 3, First establishes the National Railroad Adjustment Board, which is divided into four divisions defined by type of railroad work and consisting of equal numbers of employer and union representatives. Section 3, Second empowers carriers and unions to agree to establish system, group or regional boards of adjustment. In practice these boards are most often established by contract between an individual carrier and a single union and they usually consist of a carrier representative, a union representative and a neutral chair.

The National Railroad Adjustment Board has no jurisdiction over the airline industry. However, the RLA requires air carriers and unions representing their employees to create system, group or regional boards of adjustment having the same jurisdiction and power as such boards, under Section 3, Second.

Individual employees have no standing to invoke the creation of adjustment boards or, with the exception of the National Railroad Adjustment Board, to bring disputes before established boards except through labor organizations representing them. The decision of an adjustment board is essentially final and binding on the parties. It may be enforced by court action. Courts will generally set adjustment board orders aside only for failure of the board to comply with the RLA or to conform or confine itself to matters within its jurisdiction, for fraud or corruption by a member of the board or, in some court circuits, for failure of due process. Arbitration decisions by system boards in the airline industry are equally final and binding.

The powers of the courts may be invoked to ensure the disputants' compliance with the RLA's machinery for the settlement of both major and minor disputes.

### *Obligations towards Represented Workers*

Unions have a duty to fairly represent the workers in a craft or class for which they have bargaining rights, that is, without arbitrariness, discrimination or bad faith. The duty is the same under the RLA as it is under the NLRA. In fact, the duty was first articulated by the courts under the RLA.[12]

## Right to Strike

There are significant differences between the NLRA and the RLA as to how strikes are treated.

[12] The seminal case was Steele v. Louisville and Nashville Railway Co. 323 U.S. 192 (1944).

### *Regulation of the Right to Strike*

As noted above, under the RLA the mandatory mediation process preceding a strike is lengthy. It is intended to prevent or lessen the likelihood of a strike. However, once those processes are exhausted, the law imposes no special restrictions and does not require strike votes. Partial or intermittent or selective strikes are not prohibited under the RLA as they are under the NLRA. Of course, strikes must be conducted in a peaceful and otherwise lawful manner.

### *Picketing and Other Supportive Action*

A union may publicize its dispute with a carrier prior to exhausting the mediation process, provided that in doing so it does not disrupt the carrier's operations. Once mediation has been completed and the subsequent cooling-off period has elapsed, unions may exert a range of secondary pressures generally not available to their counterparts under the NLRA. Unions may picket or boycott another carrier in an effort to put pressure on the primary carrier with which they have a dispute.

### *Striker Replacements*

As under the NLRA, the RLA permits a carrier to replace economic strikers permanently before the strike ends, and there is no obligation to terminate permanent replacements after the strike ends. A temporary replacement may be displaced before the end of a strike by an economic striker who offers to return to work unconditionally. Whether a replacement is permanent or temporary has been the subject of some litigation and turns upon the facts of each case.

## PROTECTIONS AGAINST INTERFERENCE

Like the NLRA, the RLA prohibits certain employer actions which interfere with the right of employees to organize, bargain collectively and

strike. Section 2 of the RLA prohibits carriers from influencing, interfering with or coercing employees in the choice of their representatives; denying or questioning in any way the right of its employees to join, organize or assist in organizing the labor union of their choice; interfering with the organization of its employees; using its funds in maintaining or assisting or contributing to any labor organization; influencing or coercing employees in an effort to induce them to join or not to join or remain members of any labor organization; or requiring any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization.

These prohibitions are incorporated into the employment contract of every employee covered by the RLA and may be enforced by court action brought by an employee or a union.

The jurisprudence under these prohibitions covers a range of employer actions similar to that covered by the NLRB's unfair labor practice jurisprudence. However, the courts are divided on the question of whether disciplining an employee will be unlawful under the RLA if the employer has any antiunion motivation or, as under the NLRA, only if that motivation was a substantial or motivating factor behind the employer's action. Courts have ordered reinstatement, back pay, restored benefits, and similar compensatory measures to remedy employer violations of the law. The lower courts are divided on the question of whether punitive damages can be awarded in such cases.

The National Mediation Board regulates conduct during representation investigations by requiring that "laboratory conditions" be maintained. The NMB has remedied violations of laboratory conditions primarily by ordering that elections be rerun and that employers post NMB notices stating the basic grounds for rerunning the elections. In serious cases the NMB may order that the rerun election be decided on the basis of the majority of ballots cast rather than by majority of the entire craft or class. The board has also reserved the power to order certification on the basis of union authorization cards in egregious cases. The prohibition on violating laboratory conditions applies both to employers and to unions, although the NMB has never set aside an election because a union acting alone tainted laboratory conditions.

As under the NLRA, the duty to bargain established by the RLA contains an implied prohibition on seeking to bypass a union which has ac-

quired bargaining rights by dealing directly either with individual employees or with another organization. Unlike the NLRA, the RLA does not expressly protect concerted activities, and thus protection for union activity must be found under one of the prohibitions or doctrines described above.

## Successor Employers

The NMB's certification of a union as representative extends to the carrier's "successors and assigns." However, where a carrier is purchased by, merged into, consolidated with, or has its assets acquired by another carrier, the status of a union certified as majority collective bargaining representative for a craft or class may still come into question. In the event of a dispute over such matters, an affected union or employee may petition the NMB to resolve the dispute. If the NMB decides that the parties to the corporate transaction have created a new "single carrier," it will take different actions depending on the sizes of the merging crafts or classes. If the merger involves a large class merging with a much smaller class, it will extend the certification of the larger class's union to the smaller, while extinguishing the smaller group's certification. In cases where the merging crafts are of comparable size, the NMB will order an election. The NMB makes "single carrier" determinations on the basis of such factors as whether the previously separate carrier systems are held out to the public as a single carrier, whether management and labor relations operations have been combined, and whether there is a combined workforce. Union certifications may be extinguished only by order of the NMB following an investigation.

The NMB has issued merger procedures for both airlines and railroads under which it will decide whether a single carrier exists, whether unions' certifications will survive or be extinguished, and what the craft or class will be in the new single carrier. The effect of carrier restructuring upon existing collective bargaining agreements will depend upon the terms of those agreements and is not a matter over which the NMB will exercise jurisdiction directly. Such jurisdiction lies primarily with the courts and arbitration tribunals.

### Freedom of Association within Unions

The internal union democracy and accountability requirements of the *Labor Management Reporting and Disclosure Act* apply equally to unions under the RLA and NLRA.

### Termination of Bargaining Rights

The question of how and under what circumstances bargaining rights may be terminated is treated differently under the RLA than it is under the NLRA. Under the RLA, there are no formal decertification procedures as such. In order to accomplish decertification, an individual or labor organization must file a petition for certification as the representative of the craft or class of employees in question. The NMB requires that an application for a represented craft or class be supported by authorization cards from a majority of the craft or class before holding a representation vote. If a majority of eligible employees fails to cast valid ballots in the election, a previously issued certification covering the craft or class effectively will be cancelled by the NMB. If the individual seeking decertification is successful in the election, he or she may renounce bargaining rights after one year, in which event the craft or class is effectively decertified.

### Administrative Agencies and Rights Enforcement

The *Railway Labor Act* empowers the National Mediation Board to investigate and issue orders with respect to disputes over union representation. Like NLRB orders, NMB orders are not self-enforcing and must be enforced by court order. However, NMB actions are not subject to appeal and may be reviewed by courts only on very narrow grounds.

Rights under the RLA which are not subject to NMB representation dispute investigation or adjustment board adjudication are enforced directly by court action.