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Hot Topic "Future Worker
Management"

**STATEMENT OF THOMAS R. DONAHUE,
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BEFORE THE
COMMISSION ON THE FUTURE OF
WORKER-MANAGEMENT RELATIONS**

September 8, 1994

The focus of today's hearing is on the Commission's second charge, which is to submit recommendations for changes in the "present legal framework and practices of collective bargaining." It will not surprise you to know that the AFL-CIO has a number of proposals in this regard. But before addressing these specifics, we think it is essential to begin with the first principles that animate the national labor policy.

Almost sixty years ago, in enacting the National Labor Relations Act, Congress declared it to be the "policy of the United States" to "encourage the practice and procedure of collective bargaining" and to "protect the exercise by workers of full freedom of association ... for the purpose of negotiating the terms and conditions of their employment." That remains the point of the NLRA today.

Why encourage collective bargaining? Simply stated, because there is an overriding national interest in assuring fair and decent labor standards and the collective bargaining system is the surest means to that end that does not require further government regulation.

Left to its own devices, the invisible hand of the market treats working men and women as just one more factor of production -- "human capital" -- whose "return" depends on the laws of supply and demand. Those most desperate, and thus least demanding, effectively establish the labor standards for all. These "market" standards do not necessarily include decent wages and benefits, safe and healthful workplaces, or humane working conditions.

The collective bargaining system provides a means of tempering market competition with human values through private decision-making. By joining together in a group and by dealing with their employers on a collective basis, working men and women are able to realize a degree of market power that a single member of the employee group, acting individually, cannot realize. Through collective bargaining workers can take wages and working conditions out of competition and can establish labor standards responsive to basic human needs. And, through collective bargaining, working men and women can participate in shaping the terms and conditions of their employment rather than being forced to acquiesce in their employer's unilateral workplace decisions.

In all these ways, collective bargaining works to lift up the economy and to further the public interest. And, as Congress

intended, for many years the NLRA's protection of the bargaining system generated just that result.

Through collective bargaining, the "bad, low paying" jobs of a prior generation -- factory jobs, construction jobs, railroad jobs and the like -- became the "good, decent paying" jobs that enabled hard working Americans to buy a home, to raise a family, and or send their kids to college. Collective bargaining made health care affordable for most working Americans by establishing employer-paid health insurance as a standard employee benefit. Collective bargaining gave working men and women the chance to retire at a decent income by developing employer-provided pensions as another standard employee benefit. And through collective bargaining, a myriad of other labor standards were established that we take for granted today.

At its post World War II peak, the collective bargaining system directly established the terms and conditions of employment for 40% or more of the private sector workforce. In most industries, those terms became standards for all workers, regardless of whether they were represented by a union.

In the ensuing four decades, the number of private sector workers whose terms of employment are collectively negotiated has shrunk to just over 11% -- a smaller percentage than when Congress declared it to be the national policy to encourage collective bargaining. The force that collective bargaining agreements exert on national labor standards has diminished proportionately.

The consequence of this erosion is seen in what the

Commission's Fact Finding Report labels "changing labor market outcomes" -- outcomes which, as the Commission says, are inconsistent "with our past economic history of progress for virtually all our citizens" and that "fall short of meeting the needs of many Americans." The United States is becoming a two-tiered society with, to quote the Commission again, "an upper tier of high wage, skilled workers and an increasing 'underclass' of low paid labor." Our "earnings distribution ... is the most unequal among developed countries." And, the ability of younger workers "to form families and buy homes has been compromised by their labor market plight."

The consequences of a diminished collective bargaining system are seen, too, in what the Commission terms "an explosion in the breadth and depth of legal regulation of the American workplace" and a "dramatic surge in employment law disputes." Collective bargaining, and the grievance-arbitration procedure established through bargaining, provide a means to resolve workplace issues without resort to government regulation or to court litigation. To the extent working men and women are no longer able to protect themselves in this way, they inevitably demand, and they have secured, more and more in the way of government-mandated labor standards enforced through court litigation.

As the Commission warns, "a healthy society cannot long continue along the path the U.S. is moving."

The challenge facing this Commission -- and this country -- then, is, to breathe new life into the policy of the NLRA: to once

again encourage the practice of collective bargaining so that the collective bargaining system can again serve as a private means of advancing the national interest in establishing and enforcing labor standards in this country. No society at any time and in any place has ever succeeded in achieving widely-shared prosperity without an effective means of safeguarding the interests of working families. And no society has ever succeeded in establishing a stable political democracy without the nourishment provided by a vital labor movement.

If we fail to revitalize our collective bargaining system, we therefore face a future of continuing degradation of our standard of living and continuing polarization of our society. Without a vibrant system of worker representation, inevitably some future Commission will be called upon to devise a whole new means through which the government can establish and enforce the kind of labor standards that the national interest demands.

What, then, should be done to the "present legal framework" governing the collective bargaining system to enable that system to fulfill its mission?

The short answer is: a great deal. Mere tinkering with the NLRA's rules, procedures and remedies will not suffice. Experience shows that these rules and remedies no longer "encourage collective bargaining" and no longer "protect the exercise by workers of full freedom of association." Nothing less than a fundamental reworking of the NLRA will make representation accessible to all workers and nothing less will enable employees to participate on an equal basis

through collective bargaining in the decisions which critically affect their working lives. The task of this Commission, as we see it, is to detail the full agenda that is required to meet the needs of working men and women -- and of the nation.

During the past year, since the announcement of the creation of this Commission, the AFL-CIO, through its Committee on the Evolution of Work, has engaged its affiliates in formulating recommendations for reforms of the NLRA and related laws in order to achieve these ends; the Industrial Union Department of the AFL-CIO began a similar process even earlier. We are today submitting to the Commission a complete proposal for change which reflects the results of this extensive work. We also are submitting the IUD's comprehensive white paper, Workplace Rights, which elaborates on the need for reform and on many of the reforms that are needed. Together, these documents represent the best thinking of the labor movement on the question at hand.

Our recommendations, it should be emphasized, address both the rules governing access to representation and the rules governing the collective bargaining process. That dual focus reflects our understanding of the breadth of this Commission's mission and of the scope of the needed changes. As AFL-CIO President Lane Kirkland stated in his testimony to the Commission, the current law is an "abject failure" in its treatment of both freedom of association and of collective bargaining.

Both aspects of the law must be reformed if the NLRA is to deliver on its promise. It will not do to address only the

deficiencies in the representation process. Even the most perfect protection of the right to organize from coercive employer interference would be of little practical consequence so long as the organizations that workers have the right to form can engage only in what President Kirkland aptly termed "collective begging." Rather, what is required is a comprehensive overhaul of the NLRA in all its aspects. That is what the proposals we are submitting seek to accomplish.

There is not time today to review with this Commission each item which is included in our proposal. And, given the attention this Commission has devoted to the problems of the representation process, I wish to concentrate the balance of my remarks on our recommendations in that area as well.

If the principal failure of the NLRA's representation system lay in the large number of employers who flout the law, the task facing the Commission would be rather straight-forward. There is no mystery as to why so many employers violate the Act with such frequency: under this law, crime pays.

As authoritatively construed by the Supreme Court, the NLRA -- unlike virtually every other contemporary employment law -- permits only "make whole" remedies rather than remedies designed to deter unlawful conduct. For unlawful discharges this means that the ordinary remedy, at least in theory, is reinstatement with back pay. But in practice, reinstatement can be secured only through protracted litigation by which time the employee will have found a new job. Thus, as the Commission observes, "most illegally fired

workers do not take advantage of the right to reinstatement." As a result, the only penalty is a back pay award which, on average, amounts to only \$2,479 per discharge. And, for employer conduct which otherwise interferes with, restrains, or coerces the exercise of the right to organize -- conduct such as illegal threats to, or illegal surveillance of, union supporters -- the remedies are weaker still: the NLRB ordinarily does nothing more than order the offending employer to post a notice foreswearing future illegal conduct.

The Labor Board, in our view, could do more within the confines of current law to strengthen its remedies if the Board were to focus its remedial authority on the affirmative steps required to undo the effects on the employee group of illegal conduct. But the basic problem here lies in the statute itself which leaves no room for remedies with a sufficient bite to deter employers from committing unfair labor practices in the first place.

Nor is there any mystery as to the type of statutory change needed to prevent employers from freely taking the law into their own hands: the NLRA should be brought in line with more recent employment laws by including sanctions to deter illegal conduct along with expeditious procedures to assure prompt relief. Stronger legal penalties are required for illegal discharges -- where the victim is both an individual, identifiable victim and the employee group's right to organize -- and are also required for other illegal acts in which the "only victim" is the employee group

as a whole. While in the short term such measures might, as some have argued, increase the number of charges that are filed and reduce the number that are settled, in the long term stiffer penalties will reduce the volume of litigation by deterring the unlawful conduct that gives rise to such litigation.

Similarly, if the problem of the Act's representation system lay in the length of time it takes to hold representation elections, the path to reform would be short and well marked. By more carefully managing the pre-election process, the NLRB could itself reduce the length of time it takes to schedule elections and most especially reduce the inordinate delay that can result when an employer refuses to stipulate to an election,¹ and that is a particular problem in elections involving larger bargaining units.² Fred Feinstein, the current General Counsel of the NLRB has announced that this will be a priority for his administration.

¹We have analyzed data supplied to the AFL-CIO by the NLRB, pursuant to the Freedom of Information Act, concerning all representation elections held from 1984-1992. Our analysis indicates that 85% of all stipulated elections -- but only 17% of elections in which the employer refuses to stipulate -- are completed within 60 days of the election petition. At the other end of the spectrum, only 2% of stipulated elections -- but 20% of non-stipulate elections -- take more than 120 days to conduct.

Because of how long it can take to hold a non-stipulated election, employers have undue leverage in negotiations over the date of the election, the composition of the bargaining unit, and the other issues that go into a stipulated election.

² The NLRB data for 1984-92 indicates that in units of less than 50 employees, 77.5% of the elections are concluded within sixty days and only 6.4% take over 90 days. In units of more than 250 employees, only 52.3% are concluded within sixty days whereas 17.8% take over 90 days. This undoubtedly is partially explained by the fact that employers refuse to stipulate to elections in 25.5% of the larger units but only 15.9% of the smaller units.

The General Counsel and the Board are handicapped in this regard, however, by the statutory provision requiring a pre-election hearing in all cases. Amending the statute to eliminate this requirement where the Board believes there are no factual questions requiring a pre-election hearing and to establish absolute deadlines for holding elections is merely to follow established common sense. In four of the Canadian provinces (including Ontario and British Columbia) a union is entitled to a pre-hearing election if the union demonstrates a certain level of support, and in a fifth province (Nova Scotia) there is a five-day statutory deadline for holding representation elections where the union's petition is supported by at least 40% of the proposed bargaining unit.³

We do not dwell upon these matters, however, because in our view the issues of inadequate remedies and of undue election delay are merely the most transparent -- and in many ways the least profound -- problems with the NLRA representation system as it operates today. While these issues must be addressed, doing so -- providing tougher remedies and speedier processes -- would not in and of itself afford workers an effective right to representation. If the Commission's recommendations are to make a real difference -- if they are to secure for workers an effective right to organize -- the Commission's recommendations must go further and deal with the more fundamental defects in the representation system.

³G. Adams, Canadian Labour Law at pp. 7-52, 7-70 & n.418 (2d ed. 1994).

One of these defects is the extraordinarily one-sided nature of the rules which govern the election campaign. Organizing campaigns do not take place in a vacuum; rather, they occur against a background in which an employer of any size will have carefully screened its employees to "weed out" those with a propensity to organize and will have instituted a sophisticated and systematic program of union avoidance. Such programs begin the day an employee is hired with an orientation session and new employee manual stressing the employer's commitment to preserving its union-free environment, and such programs continue throughout the employee's tenure with the company with the stated aim of detecting the "first signs" of organizing activity and responding in ways that will stamp out that activity.

In this context, the only way employees can overcome the employer's resistance is with union assistance. But under the current law, employers are free to exclude union organizers from the workplace, including non-working areas. Indeed, the Supreme Court has held that organizers even may be denied entry to property which is open to all other members of the public such as a public parking lot or a cafeteria. And employers can do this while at the same time using the workplace for posters, leaflets and other written (and electronic) anti-union messages; requiring employees to attend "captive audience" meetings, often daily, to hear the employer's anti-union speeches; and directing supervisors to "work on" (or work over) union sympathizers throughout the work day.

This puts the union organizer -- and hence the organizing

effort -- at an extraordinary disadvantage. The workplace, after all, is the one place in which those called upon to decide whether they desire representation come together as a group; when they leave work, employees typically disperse throughout large metropolitan or even larger rural areas. The exclusion of the organizer from the workplace both frustrates face-to-face communication with the organizer and turns organizing into a subterranean activity. That sends a powerful message to the employees about the extent to which the law subordinates employee rights to employer prerogatives.

As Richard Bensinger, Executive Director of the AFL-CIO Organizing institute, suggested to the Commission at its last hearing, these rules are analogous to giving one candidate in a political election unlimited amounts of free television time, including several hours a day of compulsory viewing, while restricting the other candidate to door-to-door campaigning.

The law ought to encourage the widest possible dissemination to employees of information about their rights and about the option of representation. Instead, the law allows such information to be drowned out by the employer.

Once again, there is no doubt as to what changes are needed to redress this situation. Union organizers should be permitted complete access to public and other non-working areas within the workplace to meet with employees during non-working time. And, union organizers also should be given a reasonable opportunity to attend employee meetings to address the employee group.

Providing stronger penalties for unfair labor practices, swifter election procedures, and fairer access for union organizers would represent the most rudimentary beginning in righting the current system's wrongs. But these three steps -- separately or together -- still fall short of addressing the essence of the problem with the representation system. The Commission in its Fact Finding Report identified the disease eating at the heart of the right of free association: it is what the Commission termed the "highly confrontational" representation process which the NLRA, almost inadvertently, has institutionalized.

In the Commission's words, under the NLRA's representation system "the issue of union representation sparks a highly contested" and "highly conflictual" campaign "that produces considerable tension at the workplace" and that leads to "an environment of bitter, prolonged and inflammatory debate over the process of worker representation." The United States "is the only major democratic country in which the choice of whether or not workers are to be represented by a union is subject to such a confrontational process in most cases." This process -- in the name of enhancing employee free choice -- in fact undermines democratic employee decision making in two distinct ways.

First and most obviously, workers contemplating union representation and collective bargaining find themselves, as the Commission put it, "[c]aught in the midst of these conflicts"; they "want a voice on their job but fear the tensions, risks and adversarial climate that sometimes" -- we would say, virtually

always -- "accompany efforts to exercise those rights." Allison Porter, the Director of Recruitment and Training for the AFL-CIO Organizing Institute, elaborated on this point in words the Commission quoted in its report and that bear quoting again:

In my experience, fear is the number one obstacle to why workers won't support unions in the first place, and why ... even [if] they support a union, [they] won't want to get involved in an organizing drive.

It starts out as fear of retaliation. What's going to happen to me if I do this? Then it becomes a more generalized fear of what's gong to happen to all of us. What will we lose that we already have? Then it becomes fear of the union as it's being described by management, the outsider, third party aspects. Then it becomes fear of strikes, being forced to strike and plant closing. Then finally, towards the end of the campaign, it just becomes fear of change -- the devil we know versus the devil we don't. That's the essence of the employer campaign.

Indeed, as Ms. Porter testified, while in theory all workers covered by the NLRA have the right to organize, in practice the only workers who have that right today -- who can overcome serious employer opposition to organizing -- are those who are so alienated, so angry or so courageous that they no longer care, or are capable of disregarding, what happens to them and to their job. As one of Ms. Porter's young organizers put it in a report she quoted, "if they care, they're vulnerable."

Second, and of equal importance, because of the kind of anti-union campaigns employers wage, organizing, as President Kirkland pointed out to this Commission, has "become inordinately expensive -- beyond the means of workers at an individual workplace and taxing on the resources available to the already-organized." Given limited resources, our unions find it necessary to be highly

selective in the campaigns in which we get involved. Workers in many workplaces who seek our help must be told that, given the current legal rules, they are "not ready" to organize. The net effect is to make representation inaccessible to most American workers; indeed, as President Kirkland noted, "in any given year just two-tenths of one percent of unorganized workers have the opportunity even to vote as to whether they wish union representation."

It follows that what is called for, if workers are to have a real, rather than a paper, right to organize are measures to make representation accessible to ordinary workers -- workers of ordinary courage, who are not heroes, and who have ordinary concerns about their jobs, their working conditions, and their economic future. The process of deciding whether to select a union representative must be made less confrontational, less threatening and less costly.

That, we recognize, is a daunting task. As Professor Matthew Finkin stated in his testimony to this Commission, the challenge is to "patch together an effective system of representation where an employer simply doesn't want to deal with that system at all" -- where there are "no shared values between the employer and .. the employees." It is, as Professor Finkin went on to testify, difficult to be "sanguine about being able to put Humpty Dumpty back together under those circumstances, but surely something more needs to be done."

Our recommendations to the Commission outline all of the steps

that we believe should be taken towards this end. These proposals form a coherent whole. But allow me to highlight two reforms of especial importance: our proposal for first contract interest arbitration and our proposal for a system of recognition based upon authorization or membership cards.

1. The principal reason that anti-union employers find it a simple matter to run fear campaigns is that the current law gives them much raw material to work from. Section 8(a) of the Act was passed because Congress and the country at large recognized that permitting employers to use their superior economic power against employees who seek to form a union would, as a practical matter, nullify the right to organize and, as a moral matter, is indefensible. But the prohibitions of employer discrimination and of employer interference, restraint, and coercion have proven empty.

Because the law allows employers wide latitude -- through "hard bargaining," lockouts, forced strikes, and through "economically-motivated" business decisions -- to settle scores with employees who choose a union, it is easy enough for employers, during the organizing campaign, to sow the seeds of fear. The employer cannot, of course, tell the employees that it will respond to organization by retaliating against the employee group; that would be a § 8(a)(1) "threat" and would be illegal. But the employer is perfectly free to "report" about what "could" happen to the employees if they organize or about what other employers have done when their employees formed a union. Lawyers may be beguiled

by such distinctions but working people see through them; as President Kirkland put it, workers "know who the employer is, what his powers are, and what he is saying."

The NLRB could, and in our view should, recognize these campaign tactics for what they are and what they are understood to be by the employees: veiled threats of employer retaliation which -- no less than overt threats -- interfere with, restrain and coerce the exercise of the right to organize. But in the end the aim of the law should not be to insulate employees from knowledge of the risks of employer retaliation against those who form a union but rather to eliminate those risks. Unless and until the substantive rules which allow employers to put employees who choose to organize at such peril and which guarantee employees so little are fundamentally changed, employer anti-union campaigns will continue to be permeated by the threat of employer economic retaliation covered over with the cosmetics of employer free speech.

A proven starting point for taking the sting out of such campaigning is to guarantee workers contemplating union representation that if they choose to organize they will be assured a fair, first collective bargaining agreement and will not be forced to put their jobs on the line to secure that agreement. The prospect of negotiating a first labor contract is daunting for many workers, at least after the employer finishes propagandizing about "bargaining from scratch," take-backs, strikes, replacements, plant closing and the like. That fear could be dispelled -- and the

process of negotiating an initial agreement facilitated -- by following what is now the predominant Canadian rule, i.e., by assuring workers that, if they organize and after a specified period of time are unable to come to an initial collective bargaining agreement on their own or with the help of a mediator, a neutral arbitrator will resolve all unresolved items and establish a fair and reasonable first contract for the parties.⁴

The Canadian experience belies the concerns that have been expressed by some about the consequences of authorizing interest arbitration in "first contract" disputes. The AFL-CIO has secured from the provinces which provide for first contract interest arbitration, and from the national government, data on the frequency with which first contracts are imposed under these Canadian laws. That data, which is appended to this statement, proves that rarely is first contract interest arbitration sought and even more rarely is a contract imposed; in 1993, for example, there were a total of 23 imposed contracts arising out of the 1,233 certifications issued that year.

Nor is this in any way surprising. The reason that 40% of first contract negotiations in the United States fail today is that "no contract" is the employers' desired outcome; the employer wants the negotiations to fail so as to be able to reinstitute its unilateral control over the workplace and to defeat the workers' choice of a representative. If that were no longer a possible outcome -- if a first contract were guaranteed through arbitration

⁴See G. Adams, supra, pp. 10-134 to 10-140.

if need be -- it is to be expected that in most cases the parties would view a private resolution as preferable to the "wildcard" of an arbitral decision and that the bargaining process -- with the aid of mediation where appropriate -- would produce an agreement in the overwhelming majority of cases. That is precisely what has happened in Canada.

Lest there be any doubt, I want to make it crystal clear that we are not advocating interest arbitration merely as a remedy for bad faith bargaining. Most of the Canadian provinces which at one time provided for such limited first contract interest arbitration have moved to a system in which arbitration is at least available as the dispute resolution mechanism of last resort in first contract cases -- and with good reason.

So long as an employer goes through the motions of meeting with the union at reasonable times and places, it is virtually impossible for an administrative agency removed from the bargaining process to distinguish "bad faith" bargaining from "hard bargaining." This is especially true given the rule that good faith bargaining does not "compel either party to agree to a proposal or require the making of a concession." Thus, an interest arbitration law which applied only to bad faith bargaining situations would be likely to have little practical effect other than to push employers towards going through the motions of bargaining.

Moreover, the ultimate point of our proposal is to strip out of the representation process the inordinate fear of employer

economic retaliation against employee organization. Assuring employees who are contemplating choosing a representative of a first contract, through arbitration if need be, goes a long way towards that end. In contrast, such a "guarantee" limited to cases in which the employer eventually is found guilty of bad faith bargaining is too uncertain to be of practical consequence.

Thus, if, as we urge, the ultimate aim is to make representation accessible to ordinary workers, first contract interest arbitration must be made available as a last resort means of dispute resolution in all cases.

2. A second major step towards creating an effective right to organize would be to alter -- or at least to create alternatives to -- the present process through which the fact that workers have chosen a representative is certified by the government.

The NLRA's premise is that union organization is entirely compatible with every legitimate employer prerogative and with sound and efficient production. The collective bargaining system is a means of improving employer-employee relations not of destroying those relations or the employer. Organization, then, is not and has never been seen by the law as a zero sum game.

But elections are structured as zero sum games. They are a method of choosing one of the two contestants who run against each other and of rejecting the second. Following that inherent characteristic, representation elections inevitably transform what should be a decision by employees as to whether or not they desire representation into contests between unions and employers as to

which side will defeat the other. It is this artificial, contest structure and win-lose mentality that so intensifies the adversarial nature of the representation process.

Clifford Ehrlich, the Senior Vice President for Human Resources of Marriott Corporation and a member of the Board of Directors of the Labor Policy Association, made this point clearly in his testimony before the Commission. Asked by Tom Kochan "what should we do to de-escalate the amount of resources going into this kind of activity" and "[h]ow do we de-escalate the ideological warfare," Ehrlich responded, in part, as follows:

I don't have a good response to that. ... When you talk about elections you're talking about winning and losing, and in a competitive society, I think you're going to be applying resources to [winning]. No one likes to turn out to be the loser in that situation.

Indeed, as Martin Jay Levitt demonstrates in his book Confessions of A Union Buster, the anti-union consultants build their campaigns on precisely this drive for victory. One of the key jobs of the consultant is to persuade first-line supervisors that a vote for a union is a vote against supervision; describing his strategy in a campaign he ran to prevent a group of mineworkers from organizing, Levitt writes:

We'll convince the foremen that when the National labor Relations Board holds the representation election, the workers will not be voting for or against the union, but for or against the management, including all of them. To lose the election would be a humiliation, an indictment of their management abilities. Once they see it my way, the foreman will gladly join the war on the [Mineworkers].⁵

In his testimony Ehrlich went on to suggest that if the

⁵M. Levitt, Confessions of a Union Buster at 11 (1993).

Commission wants to de-escalate the warfare, "you've got to go back and take a look at how it got escalated in the first place." We agree. And, because, as Ehrlich's testimony shows, the electoral process is itself one of the roots of the problem, we propose that workers be allowed to decide whether they desire representation without requiring a tortuous electoral contest.

Our proposal, it should be emphasized, does not represent some radical departure from the principle of employee free choice. In virtually every other industrialized country, unions are established without elections or written authorizations. Moreover, in this country, many employees -- including the employees of the companies with the very best labor-management relations -- make their decision about representation through authorization cards. Such cards, if freely signed by a majority of the employees in an appropriate unit, are a legally sufficient means of establishing the employees' desire for representation. An employer who determines to accept a proper card showing and to voluntarily recognize a union so designed by a majority acts in full conformity with the law. Indeed, such a voluntary recognition is as legally enforceable as an NLRB certification following a Board election.

The problem with the current law is that the NLRB -- with Supreme Court approval -- has interpreted the 1947 Taft-Hartley Amendments to mean that the decision whether to give authorization cards this effect is a decision that is left entirely to the employer as a matter of its unbounded discretion. No matter what the facts, employers are entirely free to disregard the employees'

expressed desire for a representative and to insist upon an NLRB-conducted representation election.

This regime transforms the function of an NLRB election from what was originally intended. Section 9's election machinery was established to address situations where a demand for recognition creates a genuine uncertainty as to whether, or by whom, the employees wish to be represented and where a neutral governmental resolution of that uncertainty is a sensible response to the employer's demand for reasonable certainty. Representation proceedings, in other words, were to be investigations into a question of fact: have a majority of an employee group, as it is claimed, designated a particular union as their representative.

Now, however, employers can and do trigger NLRB elections where there is not a shadow of a doubt as to the employees' desire when they request recognition of their chosen representative; indeed, this Commission has heard of cases in which the entire unit went to the employer as a group to request recognition of their representative and the employer stood on his right to an NLRB election. In these cases, a representation election is not needed to clear away the obstacle to collective bargaining posed by a genuine uncertainty as to the employees' desires. Rather, the only point of an election is to afford the employer an opportunity to change the employees' desires. There is no reason for the law to indulge this employer desire.

We recognize the argument that without an election there will be no opportunity for employees to hear the employers' perspective

on organizing. It is far from clear that this is, in fact, true: as I already have noted, union avoidance begins the very day an employee is hired and continues throughout the employee's tenure. Moreover, in the ordinary course most employers learn of efforts by their employees to form a union at the very inception of the organizing effort and commence the anti-union campaign at that point. The election process merely allows the employer to extend the time for campaigning beyond the point at which the employees have manifested their desire for representation and to force the employees to prove that they have, indeed, selected a union by coming to the workplace and casting a vote "against" their employer.

More fundamentally, the employee decision as to whether to have a bargaining representative is just that -- a decision for the employees to make. Employees are fully competent to make that decision on their own, just as employees make a host of other decisions of far greater moment in their lives without the intervention, or the assistance, of their employer.

The proposition that employees do not have sufficient facts to act on their own gravely underestimates the state of employee knowledge and is directly refuted by every relevant opinion poll of which we are aware. The proposition that employees will sign authorization cards frivolously or out of fear has no basis in reason or experience. And the proposition that employers who run anti-union campaigns act from a disinterested desire to facilitate informed and reasoned employee free choice and therefore perform a

public service is a fantasy.

Indeed, no one can seriously doubt that the employer's intervention in the employees' representation decisions is animated by the employer's perceived self-interest and that the employer's campaign takes its inordinate force not from the employer's persuasive power but from its economic power -- that is, from the employer's ability to retaliate against the employees if they make the "wrong" free choice.

It is also very much to the point to note that no certification is forever. If authorization or membership cards cease to reflect employee desires, the employees will have ample opportunity to correct the error within a relatively short period of time.

The short of the matter is, then, that the benefits of the current election system in advancing free and informed employee choice are marginal at best. Any such benefits are outweighed by the certainty that the representation election system exacerbates the very evils the Commission has identified.

For that reason, the NLRA should take from employers the final authority to reject written expressions of employees' desire for representation and should permit the NLRB to certify a union where the evidence presented demonstrates that a majority of the appropriate employee group, through such designations, has unequivocally authorized the union to serve as their representative. Permitting the NLRB to certify a representative based upon signed authorization or membership cards would restore

to the Board a power that it enjoyed for the first twelve years after the law was enacted and would give our Labor Board the same power that most of the Canadian labor boards exercise.⁶

First contract arbitration and card check recognition would be major steps forward in reducing the fear, and the heat, that today envelops the representation process. But neither these measures nor the others I have discussed today are panaceas. And I want to emphasize again that the proposals I have discussed are by no means the limit of the changes that need to be made if the NLRA is to deliver on its promises to working men and women.

The AFL-CIO stands ready to assist the Commission in any way we can in the coming months. We look forward to a final report in November clearly defining for the nation the full set of changes required in the "legal framework of collective bargaining" if the collective bargaining system is to be able to fulfill its mission once again.

⁶G. Adams, supra, at 7-68.

RECOMMENDATIONS OF THE AFL-CIO
TO THE
COMMISSION ON THE FUTURE OF
WORKER-MANAGEMENT RELATIONS
CONCERNING
CHANGES IN THE NATIONAL LABOR RELATIONS ACT AND
RELATED LAWS

September 8, 1994

The Commission on the Future of Worker-Management Relations has been asked by the Secretaries of Labor and Commerce to submit recommendations as to the "changes [that] should be made in the present legal framework and practices of collective bargaining ...". To assist the Commission in formulating its recommendations, the AFL-CIO, through its Committee on the Evolution of Work, has engaged the unions and departments affiliated with the AFL-CIO in formulating this proposal which seeks to identify the changes that, in the labor movement's view, must be made in the labor laws if the National Labor Relations Act is to become, once again, the Magna Carta for American working men and women.

The AFL-CIO also is submitting to the Commission Workplace Rights, a white paper prepared by the Industrial Union Department of the AFL-CIO which elaborates on many of the recommendations contained herein and which includes a number of additional proposals as well.

I. Coverage

The National Labor Relations Act extends rights to persons who fall within the statutory definition of the term "employee" in § 2(3) and who are employed by an entity falling within the statutory definition of the term "employer" in § 2(2). Both of those terms are defined or have been interpreted to deny millions of working men and women of the right to organize; indeed one recent estimate finds that upwards of 25% of all working women fall outside the Act's coverage.¹

The largest single NLRA exclusion -- that of public employers -- is not within this Commission's jurisdiction to address. But this Commission does have authority to recommend measures to rectify many of the other statutory restrictions on the Act's coverage. Specifically:

1. **Agricultural and Domestic Workers** -- The term "employee" in the Act is defined to exclude "any individual employed as an agricultural laborer or in the domestic services of any family or person at his home." These exclusions reflect little more than a plantation mentality and should be eliminated.

2. **Supervisors** -- The Act likewise excludes "supervisors" from the definition of "employee." As we previously have argued to this Commission, the supervisory exclusion is both over and under inclusive and, as in Canada, should be replaced by a narrowly-defined provision excluding "managers" from the Act, or, as in

¹Cobble, Making Postindustrial Unionism Possible, in S. Friedman, R. Hurd, R. Oswald & R. Seeber (eds), Restoring the Promise of American Labor Law (1994).

Sweeden, replaced by a provision excluding managers from bargaining units of non-managers while allowing them to organize into their own units. In either event, such a managerial provision should not encompass employees who exercise so-called managerial authority on a collective or collegial basis.

3. **Independent Contractors** -- The 1947 Taft-Hartley Amendment to the NLRA expressly excluded "independent contractors." This exclusion should be repealed. Doing so would not necessarily extend the Act's coverage to self-employed individuals since the Act even without the independent contractor provision still would extend protection only to "employees." But repealing the independent contractor exclusion would give the NLRB the authority -- which it had and exercised prior to 1947² -- to define the term "employee" in a way that reflects the policies of the labor law rather than forcing the NLRB to use the outdated, common-law line separating employees from independent contractors. In addition, as we have previously urged, "dependent contractors" should be specifically included within the definition of employee.

4. **"Guards"** -- Although individuals denominated as "guards" technically are "employees" under the Act, under the 1947 Amendments guards cannot be represented by a union which also represents employees other than guards, even if the guards and non-guards are in separate units and separate locals. As a practical matter this limitation severely restricts the right of guards to

²See, e.g., Labor Board v. Hearst Publications, Inc. 322 U.S. 111 (1944) (Upholding the NLRB's decision's treating "newsboys" as employees without regard to their common law status).

workplace representation. To make matters worse, the NLRB has interpreted the term "guard" to include not only individuals who are responsible for enforcing discipline vis a vis other employees (and as to whom there may be concerns of divided loyalty) but also other security personnel, such as armored truck drivers, night watchmen and the like, who guard property from harm by outsiders.³ The guard provision should be amended to require only that guards be in separate units and local unions from non-guards and the term "guard" should be interpreted or amended to apply only to those employees whose primary responsibility is to prevent misconduct by employees of their employer.

5. **Government Contractors** -- The NLRB has treated private entities which are funded through government contracts or grants as excluded "public employers" if the government is deemed to exercise "sufficient control" over labor relations through the contracting process.⁴ The result is that the employees of these entities find themselves in a no-man's land: they are not public employees and generally are not covered by state public sector collective bargaining laws yet they are excluded from the NLRA's coverage as if they were public employees. This makes no sense and creates incentives to privatize public services in order to exploit this loophole. The NLRA should be interpreted or amended so as to eliminate this no-man's land.

³E.g., Brinks, Inc. 226 NLRB 1182 (1976); A.W. Schlesinger Geriatric Center, 267 NLRB 1363 (1983).

⁴Res Care, 280 NLRB 670 (1986)

6. **Race Track Employees** -- The NLRB has held that race tracks are not in and do not affect interstate commerce, and that therefore the NLRA does not apply to those employers. This rule is inconsistent with the modern understanding of commerce and should be administratively or legislatively overturned.

6. **Joint Employers** -- The NLRA does not contain a definition of the term "employ" and the NLRB has developed a constricted concept of employment. The Fair Labor Standards Act, in contrast, defines "employ" as "to suffer or permit to work," 29 U.S.C. § 203(g), and that definition is incorporated in other employment legislation, such as the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1802(5). This definition provides the basis for a more expansive conception of joint or co-employment and should be incorporated into the NLRA along with a more specific definition of "joint employer" as previously proposed to the Commission.

II. The Representation Process

The right of working men and women to associate freely in labor organizations which are independent of their employer is essential in a democratic society. Such organizations enable workers to participate effectively in decisions in the workplace and in the broader society. And through such organizations, working men and women are able to exercise their collective strength to improve their situation.

Section 7 of the National Labor Relations Act states that "Employees shall have the right to self-organization, to form, join

or assist labor organizations..." But the NLRA's rules and procedures surrounding the representation process make a mockery of that right. The following changes are needed in the representation process if working men and women are to enjoy full freedom of association.

1. Certification Based Upon Authorization or Membership Cards

-- NLRA § 9(a) provides that a union shall be the employee's bargaining representative if it is "designated or selected by the majority of the employees" in a bargaining unit. But the 1947 Amendments to the Act have been interpreted to mean that the NLRB must conduct a representation election where the employer insists on an election, and that other forms of employee support for representation -- such as signed membership cards or unambiguous cards authorizing the union to serve as their representative -- are determinative only if the employer chooses to treat them as such.⁵ So interpreted, the Act pushes the representation process into a prolonged contest between the employer and the union.

The NLRA should be amended to authorize the NLRB to certify a labor organization as the employees' exclusive representative if a majority of the employees in an appropriate unit have joined the organization or have signed unambiguous authorization cards designating the union to be their representative.

In addition, NLRA § 8(b)(7) should be amended to permit picketing to secure recognition of a bargaining representative where a majority of the employees have signed authorization cards

⁵Linden Lumber Co. v. NLRB, 419 U.S. 301 (1974).

and the employer nonetheless has refused recognition. (Under current law such picketing is unlawful after 30 days unless the union petitions for a representation election.)

2. Eliminating Delays and Bias in the Conduct of Representation Elections -- Since 1947, NLRA § 9(c) has required the Board, before conducting a representation election, to conduct "an appropriate hearing upon due notice" unless the employer agrees to stipulate to the terms of an election. This gives employers inordinate leverage in negotiating the terms of stipulations because of the prolonged delay that can result from a representation hearing.

The NLRA should be amended (i) to authorize the NLRB to conduct elections before resolving all "questions concerning representation" and (ii) to require that such elections be held promptly after the filing of the petition. The California Agricultural Labor Relations Act provides a model, as it requires that representation elections be held within five days.

The NLRB also should use its rulemaking authority to resolve recurring unit issues and thereby shorten representation hearings.

In addition, the Act should provide for voting to take place off the employer's premises so as to insulate employees from the intimidating effect of voting at the workplace for a representative opposed by the employer.

3. Facilitate Union Access to Voters -- Although the NLRA prohibits employers from interfering with employees in the exercise of their right to form unions, the Supreme Court has held that an

employer may prevent union organizers from entering even non-working areas of the workplace during non-working hours to meet with employees contemplating organizing, and may do so even if the property is open to all other members of the public.⁶ The union thus must go door to door to meet the employees, and the NLRB does not require the employer to supply the union with a list of the names and addresses of the employees until after the election is scheduled.⁷ In contrast, the employer can and does propagandize the employees at the workplace from the moment the organizing effort begins. The end result is a one-sided process in which only the employer's voice is heard. Accordingly,

(a) The NLRA should be amended to grant union organizers access to nonwork areas of the workplace (both outdoors and indoors) to meet with employees during nonworking time.

(b) The NLRA should be amended to grant union organizers a fair opportunity to address employees on company property at specified times and to post material on employee bulletin boards.

(c) The NLRA should be interpreted or amended to grant unions the right to receive the names and addresses of employees at the outset of the organizing campaign.

4. Reducing the Costly and Conflictual Nature of Representation Campaigns -- As the Commission's Fact Finding Report observes, most employers seek to thwart their employees from exercising their right to organize by waging a bitter, anti-union

⁶Lechmere Inc. v. NLRB, ___ U.S. ___ (1992).

⁷Excelsior Underwear, 156 NLRB 1236 (1966).

campaign. Those campaigns make organizing costly and highly conflictual and produce "an environment of bitter, prolonged and inflammatory debate" which disserves the interest of all parties. The following measures would contribute significantly to "turning down the heat" and provide for a less coerced, freer choice by employees:

(a) Repeal NLRA § 8(c). The decision by workers as to whether to form a labor organization is one the workers should be free to make for themselves without employer involvement. Whatever right employers may have to wage an anti-union campaign under the First Amendment should not be augmented by any additional, statutory privilege. Section 8(c), which was added to the Act in 1947, does just that and has provided the basis for NLRB decisions permitting employers to compel attendance of captive audience meetings while refusing to allow unions access to such meetings.⁸ The section ought to be repealed.

(b) Remove the federal subsidies that exist for anti-union campaigns. The Social Security Act provides that, under Medicare, "In determining reasonable costs, costs incurred for activities directly related to influencing employees respecting unionization may not be included." 42 U.S.C. § 1395x(v)(1)(N). Similarly, funds appropriated for Head Start "shall not be used to assist, promote, or deter union organizing." 42 U.S.C. § 9839(e). But with these two exceptions, government contractors and grantees may

⁸See Babcock & Wilcox Co., 77 NLRB 577, 578 (1948); Livingston Shirt Co., 107 NLRB 400 (1953).

charge expenses incurred in anti-union campaigns (including the cost of hiring consultants, preparing literature etc.) to the government. Moreover, all employers may deduct from their income such expenses as "ordinary and necessary expenses incurred in carrying out [the] business." The Tax Code and federal procurement laws should be amended to incorporate the principle embodied in the Medicare and Head Start statutes that expenses incurred in resisting organizing are not deductible expenses.

(c) Require full disclosure of the identity, activities, and fees paid to consultants engaged in anti-union campaigns. Title II of the Labor-Management Reporting and Disclosure Act of 1959 was intended to require such disclosure, but that Title has been interpreted not to apply to "behind the scenes" activity by consultants, such as coaching supervisors or writing campaign literature and speeches. Title II should be amended to cover all such activity and to require disclosure to employees during an organizing campaign.

(d) Require posting of notices informing employees of their rights under the Act.

5. Create Stronger Penalties For Employers Who Violate the NLRA During the Representation Process -- NLRA § 10(c) authorizes the NLRB, upon finding a violation of the Act, to order "such affirmative action ... as will effectuate the policies of this Act." The Supreme Court has held that this provision permits only make-whole remedies, and not remedies designed to deter unlawful

conduct.⁹ Not surprisingly, the NLRB's remedies have proved insufficient to discourage employer unfair labor practices. The following changes are required in the Act:

(a) Individuals who are discharged or otherwise discriminated against because of their union activity should be entitled to recover consequential damages and attorneys fees. In addition, such remedies as personal notice and plant access for union organizers should be available as a matter of course. (The NLRB may well have unexercised authority to grant these latter remedies under current law.)

(b) Employers who willfully violate the Act should be subject to punitive damages or fines and should be precluded from enjoying the benefit of government contracts or grants. Where backpay is also awarded (as in cases involving illegal discharges), the punitive damages or fine could be set at a multiple of the backpay award as in the Fair Labor Standards Act (which provides for double damages) or the anti-trust laws (which provide for treble damages). For other types of violations, such as illegal threats, surveillance and the like, punitive damages or fines should be authorized along the lines provided in the Civil Rights Restoration Act of 1991, 42 U.S.C. § 1981 a(a), (b).

(c) Undocumented workers whose rights are violated should be entitled to the same remedies as all other workers.

⁹Phelps Dodge Corp. v. Labor Board, 313 U.S. 177 (1941); Republic Steel Corp v. Labor Board, 311 U.S. 7 (1940).

(d) Where the employer's wrongdoing makes a fair determination of the employees' desire for representation impossible, the NLRB should be authorized to issue a bargaining order even where, because of the wrongdoing, the union never was able to achieve a card majority.

(e) In extreme cases, the government should have the power to appoint a trustee ad litem to oversee the employer's labor relations until the unlawful conduct is remedied and safeguards established to avoid repetition. Also in appropriate cases the NLRB should be empowered to compel payment of potential damages into an escrow account pending the outcome of the litigation.

6. Improve the NLRA's Enforcement Procedures -- If an employer chooses to contest an unfair labor practice complaint, the median time for the NLRB to adjudicate the complaint is two years,¹⁰ and if the employer appeals the NLRB's determination, the case will be delayed for another year or more. This potential for delay gives employers extraordinary leverage to negotiate cheap and inadequate settlements. To remedy this, the following changes should be made in the Act:

(a) The NLRB should be given sufficient resources to enable it to schedule hearings and render decisions promptly. Decisions of Administrative Law Judges should be final unless the NLRB elects, on a discretionary basis, to review them. Attorneys or other advocates who engage in frivolous appeals or otherwise delay NLRB adjudication should be subject to sanctions.

¹⁰1990 Annual Report of the NLRB, Table 23.

(b) If during the pendency of an organizing campaign a charge is filed alleging illegal employer conduct, the preliminary investigation of such a charge should be given the same priority as is currently given to secondary boycott charges under NLRA § 10(1). Where reasonable cause exists to believe such a violation has occurred, the regional office should be required to seek injunctive relief just as such injunction proceedings are now mandatory under § 10(1).

(c) Once the NLRB issues a final order in an unfair labor practice proceeding, the employer should be obligated to comply unless the employer appeals within a short, specified time frame and obtains a stay from an appellate court. (Under NLRA § 10(e), the employer can ignore the NLRB order with impunity and the NLRB must initiate an action to enforce the order; only after the order is reviewed and "enforced" by a court does the employer come under a legal obligation to comply.)

7. Authorize Interest Arbitration to Resolve Impasses in the Negotiation of the Initial Collective Bargaining Agreement -- All too often, employers use the process of negotiating a first contract not as a means of determining the agreed-upon terms of employment but as an occasion to refight the representation issue and prevent the employees from enjoying any agreement or any representation at all. This is possible because the current duty to bargain does not "compel either party to agree to a proposal or require the making of a concession," NLRA § 8(d). And employers can exploit the potential for a protracted negotiating battle in

the organizing process to fuel a sense that organizing against employer opposition is a futile gesture.

After a specified period of time for negotiations and mediation, the NLRB (or another federal agency such as the Federal Mediation and Conciliation Service) should be authorized to appoint an arbitral panel to arbitrate any unresolved issues in the parties' negotiations.

III. Alternative Forms of Representation

Under current law, an employer is not obligated to deal with an employee representative unless the representative has been selected or designated by a majority of the employees in a unit deemed appropriate by the NLRB. But there are many workplaces in which the employees who desire representation constitute less than a majority. The law's all-or-nothing approach frustrates the desire of these workers to participate in decisions affecting their working lives.

As we previously have suggested to the Commission, the NLRA should be amended to obligate employers to meet, confer and share information with a representative designated by a specified percentage (e.g. 10%) of the non-managerial employees within the workplace.

To assure that such an organization can function effectively as a representative: (i) the elected employee leaders of the representative should be entitled to reasonable amounts of time off with pay to perform their representational functions; (ii)

officials of the representative should have access to non-working areas of the employer's premises to meet with employees during non-work time; and (iii) the employer should be obligated to honor requests by employees to have dues withheld from their paycheck and remitted to the representative. Such rights, of course also would have to be extended by law to majority representatives lest the law discourage majority representation.

If more than one representative is designated within a single workplace, the employer may insist upon joint consultations with the representatives.

IV. The Collective Bargaining Process

The ultimate purpose of creating a representation system is, of course, to enable employees and employers to resolve jointly issues affecting the employees' working lives. The likelihood of achieving that result is very much a function of the rules governing the collective bargaining process and especially the rules that determine the economic weapons available to each side in the event of a bargaining impasse.

As presently written and construed, the NLRA artificially constricts the bargaining process, systematically tips the balance of power in the employers' favor, and grants employers wide leeway to evade agreements in force. The following legal changes are therefore required to redress the imbalance in power that the Act was passed -- but has failed -- to redress.

1. Facilitating Bargaining Above the Level of the Individual Bargaining Unit -- Under current law, once a grouping of employees

is determined to be appropriate for purposes of holding a representation election, that unit becomes the unit for bargaining as well. Bargaining thus must proceed on an employer-by-employer - - and, indeed, on a unit-by-unit -- basis unless the parties mutually agree otherwise. The employer is not even obligated to discuss the scope of the bargaining group with the union and the union cannot take actions to compel the employer to deal with employees on a multi-unit basis. Yet in many instances, collective bargaining can work only if it involves multiple facilities of an employer or multiple employers within an industry. The following steps should be taken to remove the single unit straight jacket:

(a) Where multiple units of an employer in a common industry are organized, the union or unions representing the employees should have the right to compel combination of the units for purposes of bargaining. This also should hold true if the employer is a joint employer with another entity with respect to some units.

(b) Where units of multiple employers in a common industry or in an integrated production process are organized, the NLRB should have the authority to combine the units for bargaining purposes. In addition, the union or unions representing the employees of those employers should be free to demand multi-employer bargaining and to engage in protected concerted activity to secure such bargaining.

2. Mandatory Subjects of Bargaining -- NLRA § 8(d) defines the duty to bargain as an obligation to "confer in good faith with

respect to wages, hours, and other terms and conditions of employment ..." The Supreme Court has held that this duty does not extend to at least some decisions involving the "scope and direction" of the enterprise even where such decisions vitally affect terms and conditions of employment.¹¹ As a result employees have no right to participate in, e.g., decisions to shut down part of a business no matter how vitally the employees' interests are affected, and employers have no obligation to deal with employees on such issues. This rule negates the point of collective bargaining.

The NLRA should be amended to mandate bargaining on all matters that significantly affect wages, hours, and other terms and conditions of employment, including such issues as the scope of work to be performed by bargaining unit employees; work processes, work organization and the use of new technology; and product quality and safety.

3. Information Sharing -- The Supreme Court has held that the duty to bargain includes a duty to share financial information with the union where the employer claims a financial inability to pay wages or benefits proposed by the union.¹² For almost forty years, the Supreme Court's decision has been understood by the lower courts and the NLRB to state the limit of the employer's obligation to share financial information with the union. As a result,

¹¹First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981).

¹²NLRB v. Truitt Manufacturing Co., 351 U.S. 149 (1956).

through artful negotiations employers are able to avoid any duty to disclose such information and can force the union to negotiate in the dark. This gives employers an unfair advantage and makes it impossible for the parties to carry on informed discussions or for unions to make informed judgments.

The NLRA should be amended to grant unions the right as a matter of course to such financial and operational information as is relevant to the bargaining process. Such information should be provided at an early stage of the negotiations and in a useable format.

4. Remedies for Breach of the Duty to Bargain -- The limitations on the NLRB's remedial authority previously discussed have an especially severe impact when it comes to addressing breaches of the duty to bargain. An employer who refuses to bargain in good faith will be ordered to cease and desist from that conduct and nothing more; such a slap-on-the-wrist has no deterrent effect.

First contract interest arbitration would, of course, obviate this problem in the negotiating of the initial contract. To remedy bad faith bargaining at other times, the NLRB should be authorized to award the employees the wages and benefits the employees would have received had the employer bargained in good faith or, alternatively, to impose a labor agreement retroactive to the date of the infraction. Punitive damages or fines, attorney fee awards, and debarment also should be available remedies.

5. Equalizing the Economic Weapons Available to the Parties

-- In labor negotiations, "economic force" -- that is the ability of one party to inflict economic harm on the other -- determines each party's leverage in negotiations, and such force is a "prime motive power for reaching agreements."¹³ Current law places virtually no constraints on what employers can do to exert economic pressure on their employees while imposing severe limitations on the economic weapons available to employees.

This Commission has viewed the striker replacement issue as outside of its mandate. But there are a number of other steps that can and should be take to redress the imbalance of power created by current law.

(a) The statutory prohibition on secondary boycotts which was added in 1947 should be repealed. In our economy businesses are increasingly unlikely to be free standing entities but rather to be one part of an interdependent, interrelated set of creditors, suppliers, contractors and the like. Yet NLRA § 8(b)(4) seeks to artificially constrict labor disputes to a single "primary" employer and treats all other businesses as "neutrals" essentially without regard to the inter-relationships between the businesses. Employees of the primary employer are thus largely prohibited from making common cause with the employees or customers of businesses on which that employer depends, and the primary employer is largely immunized from economic pressure aimed at cutting off lifelines to the employer such as credit, contracts, etc.

¹³Insurance Agents v. NLRB, 361 U.S. 477, 489 (1960).

To make matters worse, the NLRB and the courts have drawn the primary/secondary distinction essentially without regard to its purpose -- to the protection of neutrals in disputes not their own. Thus, for example, a parent can be deemed a neutral vis a vis its subsidiary; a general contractor and its sub-contractor on a common jobsite are deemed neutrals with respect to each other; and a building or property owner is a neutral with respect to contractors it hires and can fire.

The NLRA could be interpreted or amended to give a more realistic meaning to the concept of "neutrality" so as to cover only businesses wholly unconnected to the primary employer. In our view, however, especially given the employer's privilege to break a primary strike by hiring replacement workers, employees who cannot reach an agreement with their employer should be wholly free to make common cause with their fellows at other workplaces and with consumers who share the employees' concerns. The Railway Labor Act does not include a prohibition on secondary activity nor did the original Wagner Act, and this section ought to be removed from the NLRA.

(b) The Act should be interpreted or amended so as to preclude employers from hiring temporary replacements if the employer elects to lock-out its employees. In a lockout, the incumbent employees, by definition, are prepared to continue working under the current terms of employment; if the employer is unwilling to accept their services the employer should not be free

to hire a new workforce. This was the rule until the NLRB held otherwise eight years ago.¹⁴

(c) The Act should be interpreted or amended to require an employer, if a bargaining impasse is reached, either to implement its final offer in toto or to maintain the status quo. Employers should not be able -- as is presently permissible -- to pick and choose parts of the final offer to implement.

(d) Restrictions on the primary strike should be removed. The NLRB has held, with Supreme Court approval, that union members who participate in a decision to strike and who then act to break the strike cannot be subject to union discipline if the members "resign" from the union before returning to work.¹⁵ That ruling should be legislatively reversed.

6. **Preventing Employers From Escaping Bargaining Relationships and Contractual Obligations** -- Under current law, employers are readily able to escape bargaining relationships and/or contractual obligations by the artifices of corporate restructuring or work relocation. A series of legal changes is needed to protect ongoing bargaining relationships and bargaining agreements:

(a) The Supreme Court has held that when the assets of an organized workplace is sold to a new entity which continues the operation, the successor is not bound by the collective bargaining

¹⁴Harter Equipment Inc., 280 NLRB 597 (1986), enf'd sub nom. IUOE Local 825 v. NLRB, 829 F.2d 458 (3d Cir. 1987).

¹⁵Pattern Makers v. NLRB, 473 U.S. 95 (1985).

agreement regardless of its terms, and the successor is not even obligated to bargain with the union for a new contract unless a majority of the successor's workforce is drawn from the predecessor's employees.¹⁶ (The opposite rule applies if ownership of the business is transferred through a stock sale.) This potentially makes organized businesses more attractive to would-be-purchasers (who have the possibility of operating without a union) than to existing owners thereby creating an economic incentive for organized employers to sell out (through asset sales) and for successors to refuse to hire the predecessor's employees. The law should be amended so as to require that the collective agreement and the bargaining relationship continue with respect to a successor employer who maintains (or resumes) the predecessor's operation, regardless of the form of the sale. In addition, in successorship situations -- including situations in which one contractor is substituted for another -- the employees of the predecessor should have priority hiring rights for new jobs with the successor.

(b) Under current NLRB law, a second way organized employers can escape bargaining and contractual obligations is to transfer that work to another, unorganized facility of the same employer or of an affiliated employer. Employers should not be permitted to relocate bargaining unit work during the term of a bargaining agreement as a means of avoiding performing the work under the agreed-upon terms. And, after the expiration of the contract, if

¹⁶Howard Johnson Co. v. Hotel Employees, 417 U.S. 249 (1974).

bargaining unit work is so transferred the bargaining duty should follow the work.

(c) A third evasive tactic available under current law is the creation during the term of a collective bargaining agreement of a non-union entity to perform the same type of work as an organized entity and to serve the same market. Where that occurs, both entities should be deemed to be a single employer and the collective bargaining agreement should extend to both "breasts" of the employer.

(d) In addition to these devices, current law permits employers to withdraw recognition based upon a "good faith doubt" of the union's continuing majority status. This is true even though employers are not obligated to extend recognition to a union where the union's majority status is beyond doubt. The good faith doubt rule should be administratively or legislatively overturned so that bargaining relationships can continue unless the employees act to decertify their representative.

V. The Building and Construction Industry

The NLRA system of representation presupposes a stable employment relationship and stable complement of employees within which organizing and bargaining can take place. In the 1959 amendments to the NLRA, Congress recognized that this model does not fit the building and construction industry because employment in that industry is largely casual in nature. In this industry, if employees are to participate in shaping the terms of their employment, they must be free to organize into unions outside of

the employment relationship, and negotiate "pre-hire" contracts which establish the terms on which employees will be hired and future work will be performed.

NLRA § 8(f) and the "construction industry proviso" to § 8(e) were intended to create -- or more precisely to authorize the continuation -- of such a system of labor relations. Both of those provisions have been systematically weakened by the NLRB and the courts and are no longer fit to accomplish their purpose. The following changes should be made in the law:

1. Prohibit Employers From Evading Their Agreements Through "Double Breasting" -- Because construction contractors are generally small employers with low capital, it is easy enough for an organized entity to establish a non-union entity during the term of a collective bargaining agreement. The NLRB has held that when that happens, the non-union entity is not subject to obligations under the collective bargaining agreement.¹⁷ That creates an enormous incentive for "double breasting." This incentive should be removed -- administratively or statutorily -- by treating the two entities as a single employer and subjecting that employer to the collective bargaining agreement it voluntarily entered into.

2. Enforce the Recognition Clause of A Pre-Hire Agreement -- Organized construction employers which do not wish to go through the trouble of double breasting have a second way of escaping the union: they can wait until their agreement expires and then renounce the bargaining relationship. In any other industry this

¹⁷Peter Kiewit Sons, 231 NLRB 76 (1977)

would be unlawful because once an employer extends voluntary recognition to a union that recognition continues even after the agreement itself expires. But the NLRB, with court approval, has held that construction industry employers are free to discontinue the bargaining relationship at the end of the contract, and that the unionized employees cannot even exert economic pressure against the employer to preserve their work.¹⁸ This ruling, if not administratively reversed, should be legislatively overturned by giving pre-hire agreements the same legal status as an agreement with a majority representative under NLRA § 9(a) and by allowing pre-hire agreements to be repudiated only through a decertification election procedure.

3. **Protect Agreements to Secure or Preserve Work** -- Because of the nature of construction employment, agreements by those who let construction contracts to do business only with contractors who have entered into a collective bargaining agreement are an essential element of the system. The secondary boycott provision largely prevents building trades unions from exerting economic pressure to secure such agreements; this is one of the reasons that § 8(b)(4) needs to be modified or repealed.

Even voluntary agreements to do business only with union contractors are subject to challenge under NLRA § 8(e), the "hot cargo" provision of the Act. That section contains a "construction industry proviso" designed to protect such agreements but the

¹⁸John Deklewa & Sons, 282 NLRB 1375 (1987), enf'd sub nom. Ironworkers Local 3 v. NLRB, 843 F2d 776 (3d Cir.)

proviso applies only to agreements with "construction employers." Today the key management entity is often the owner, the developer or a construction manager rather than the traditional general contractor. The proviso to § 8(e) prohibition itself should be clarified accordingly. In addition, the § 8(e) prohibition should be interpreted or modified so as not to be triggered by construction agreements aimed at preserving work for area labor pools since such agreements are not secondary in nature.

VI. The Contingent Workforce

As the Commission has recognized, the "contingent workforce" encompasses a number of different, non-traditional work relationships including part-time employment, temporary employment, contract employment, and employment by a nominal employer such as a leasing firm. The NLRA representation system is not well suited to any of these forms of relationships and each requires its own set of adaptations.

Some of the proposals outlined above -- such as the recommendation to facilitate bargaining above the level of the individual bargaining unit and the recommendation to permit concerted activity aimed at entities other than the immediate employing entity -- would be a start toward bringing the labor law more in line with the needs of contingent workers. Other measures are needed, in addition, if this aim is to be realized.

To briefly summarize our prior proposals to the Commission, we advocate the follow changes:

1. The definition of "employee" should be amended to cover contract workers who may not be common-law employees of a business but are in a position analogous to employees in their dealings with the business.

2. The definition of "joint employer" should be amended to cover workers who are nominally employed by one legal entity but whose terms of employment are effectively controlled by another. This would include employees of temporary help agencies, leased employees, and employees of service contractors. Employees would be permitted to organize along with the other employees of the joint employer and to bargain with and engage in lawful concerted activities with respect to the joint employer.

3. To enable individuals who work on a casual or free-lance basis for multiple employers (as is true, for example, in the entertainment industry) to participate in shaping the terms of their employment, § 8(f) -- and the amendments outlined above to effectuate that section -- should be extended to protect pre-hire agreements in all industries.

4. The economic incentives for shifting work from permanent to part-time, temporary, or contract workers should be eliminated by (i) equalizing wages and benefits across all classes of workers doing equal work for an employer; (ii) counting all types of employees in determining the coverage of federal employment laws; and (iii) imposing obligation on those businesses which contract with others for services to assure compliance with employment laws in the delivery of those services.

VII. Fair Share Obligations

Union representation offers a classic example of a collective good: at least within any given bargaining unit, the benefit cannot be confined to those who choose to support the union but rather by its nature runs to all employees. That creates the classic free-rider problem: it is in the economic self-interest of any individual employee to refrain from funding the union in the hopes of deriving the benefit available to all bargaining unit members without paying the cost of producing those benefits.

The solution to this problem is, of course, to obligate every employee within the unit to pay a fair share of the costs of producing the collective good. That is what union security clauses do. But NLRA § 14(b) authorizes states to prohibit such agreements and where states do so there is no constraint on free riderism.

Whatever justification may have once existed for that section has completely collapsed in light of the Supreme Court's decision that the NLRA does not permit unions to require unwilling workers to join a union or to fund all of the union's activities but only allows union security agreements which require support for those expenses germane to bargaining and contract administration.

The NLRA should be amended to follow the Railway Labor Act and displace the so-called state right to work laws. Absent repeal of § 14(b), union security agreements which require payment of full union dues should be permitted.