Chapter III

Worker Representation and Collective Bargaining

Introduction

Since enactment of the National Labor Relations ("Wagner") Act in 1935, the declared policy of the United States has been "to encourage the practice and procedure of collective bargaining." Congress asserted that collective bargaining is an essential instrument for securing "equality of bargaining power between employers and employees," and promoting economic and political democracy for American workers. Public opinion surveys have long made it clear that most Americans approve of unions in general and of the right of employees to join the union of their choice.[1] In presentations to the Commission, representatives of labor and business concurred with the basic principle of the Act that workers should have "full freedom of association, self organization, and designation of representatives of their own choosing."

1 A 1988 Gallup poll found that 69 percent of Americans believe that "labor unions are good for the nation as a whole." A 1991 Fingerhut/Powers survey reported 60 percent of the general public agreeing (and 23 percent disagreeing) that "unions have basically been good for American working people." A 1992 Harris Poll showed that general approval of unions does not necessarily translate into support of their stand on particular issues, such as on NAFTA.

The intent of the Wagner Act was to encourage collective bargaining, not to mandate it in any particular workplace. The Wagner Act made it an unfair labor practice for employers to "interfere with, restrain, or coerce employees in the exercise of their right ... to form, join, or assist labor organizations." The 1947 Taft-Hartley amendments to the NLRA made it an unfair labor practice for labor unions to coerce employees who wanted "to refrain from" union representation.

By making it illegal for either management or unions to coerce employees in their freedom of association, the Nation's labor law seeks to leave the decision whether to form a union or not in the hands of workers.

The second charge to the Commission provides:

"What (if any) changes should be made in the present legal framework and practices of collective bargaining to enhance cooperative behavior, improve productivity, and reduce conflict and delay?"

In most workplaces with collective bargaining, the system of labor-management negotiations works well. Conflict is relatively low, and unions and firms have developed diverse forms of new cooperative arrangements, as Chapter II indicated. The relations among workers, their unions, and management in these workplaces are well-regarded by these parties. In testimony before the Commission, the leaders of major companies and unions attested to their positive experiences with collective bargaining.

Peter J. Pestillo, Executive Vice-President Corporate Relations, Ford Motor Company testified as follows:

> "In this constantly evolving environment of uncertainty, can collective bargaining produce and sustain the type of cooperation the nation requires? I believe it can.
>
> Based on the Ford experience, I believe that management, unions and employees can successfully work together to improve relationships and improve U.S. competitiveness on a firm-by-firm basis. It's a tall order. But it's the only way to proceed if we want to be here for the long run.
>
> We can't afford a collective bargaining meltdown." (July 28, 1993).

Moreover, in some cases, parties develop their own non-conflictual procedures for determining workers' preference for unionism. The Commission heard testimony about some of these efforts to reduce the degree of conflict and resources devoted to confrontational battles over whether new facilities should be organized. Philip Morris, Miller Brewing, and the General Motors' Saturn Division created joint task forces to discuss the organization of work and the management system in their new facilities. In each case this produced union representation without prolonged conflict so that collective bargaining could start in the new facilities on a cooperative basis. Other firms, such as AT&T and Scott Paper, have negotiated rules of conduct to govern union organizing in new facilities or business units.

For instance, AT&T agreed that it would not campaign against organization and that it would recognize the union if a majority of employees signed cards indicating that they desire representation. (This agree-

ment excludes that part of AT&T that was formerly National Cash Register). According to testimony before the Commission, this system has worked well. The Commission notes that in some of these facilities workers have chosen to remain nonunion.

In addition to these cases, other parties have developed their own procedures for voluntary representation elections. Many companies maintain nonunion facilities and good relations with workers and unions without engaging in a "war" over organizing new plants or worksites.

Where much conflict and delay does occur is in the process of providing workers a democratic choice whether to organize a union in previously unorganized workplaces. The history of union organization is not one of a "laboratory condition" election (to use the phrase that has guided the National Labor Relations Board) of employees for or against forming a union to bargain collectively with their employer. Many firms and business organizations in the United States have historically been more resistant to the formation of unions than managements in other advanced economies, and often have sought to discourage unionization. Employees and union organizers who seek to bargain collectively have countered this resistance with their own variety of tactics, with varying degrees of success over time.

General agreement exists on broad principles regarding worker representation and collective bargaining; however, the effort to implement those principles in workplaces encounters a highly conflicted and emotional debate. Since the 1926 Railway Labor Act every major piece of legislation regulating the process of organizing a union has been the subject of bitter partisan political and union-management conflict. Most union organizing drives in the United States today are difficult for both employees and management. Though the number of union organizing campaigns is small compared to the universe of workplaces, the perceptions generated by these conflict-driven situations pervade the broader employee and management relationships.

The first step in moving toward a dispassionate and reasoned discourse on the experiences with worker representation and collective bargaining under U.S. law is to examine statistical evidence on the operation of the National Labor Relations Act.[2] Much of the data in this chapter comes from the statistics of the National Labor Relations Board (NLRB), and the record was developed under both Republican and Democratic administrations over the years.

The Process of Establishing Collective Bargaining

Before examining statistical trends, however, it is useful to set out the key features of the National Labor Relations Act that guide the model for determining whether there is to be a collective bargaining relationship at any given workplace.

2 From the outset, the National Labor Relations Act contained the provision: "Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation or for economic analysis." The paucity of analysis and data, other than operating statistics, hampers efforts to study and appraise the work of the NLRB and the public policies it administers.

1. The majority verdict of employees in an appropriate unit determines whether or not they will be represented by a union for purposes of collective bargaining -- a decision typically made through a secret ballot election conducted by the National Labor Relations Board at the employees' worksite.

2. Prior to this election, the employer and the union are entitled to, and usually do, engage in a vigorous campaign pointing out the pros and cons of changing the nonunion status quo. However, as noted above, both sides are prohibited from threatening or inflicting retaliation against employees who support the other side -- in particular, employers through dismissals of union supporters or of labor organizations through coercing employees in their decision respecting self-organization.

3. If the majority of employees vote for union representation, the employer must recognize the designated union as exclusive bargaining agent for employees in the unit, and must engage in good faith negotiations about terms and conditions of employment that would be incorporated in a collective agreement; but the employer is not required to make concessions to particular union proposals.

4. If agreement cannot be reached voluntarily by the two sides, employees have the legal right to collectively withdraw their labor (i.e., to strike) without fear of dismissal; although the employer is free to lockout workers or to permanently replace striking employees in their jobs.

Not all workers are covered by the National Labor Relations Act. Some, such as managers, supervisors, agricultural workers, and domestic workers, are excluded by the law. Workers in the railroad and airline industries are covered by the Railway Labor Act.

Other workers nominally covered by the law are effectively excluded, because they may be part-time or contingent, as described in Chapter I, or because they may have an independent contractor relationship with a sole employer. These temporary, "leased," on-call, or self-employed contractor status workers, are often low-paid individuals.

Finally, the situation of employers and workers in construction differs enough from that of other employers and workers to merit special attention. We examine first the experience of employees for whom the procedure given above applies, and whose experience dominates the NLRB statistics.

Part A

Experience Under the National Labor Relations Act

1. NLRB Certification Elections

Since passage of the NLRA almost 60 years ago, millions of workers and large numbers of unions and enterprises have used the procedures established by the NLRB. The majority of participants have compiled with the established requirements without resort to tactics that were challenged by either side and later found illegal by the Board.

Exhibit III-1 (see page 81) shows the number of elections held for union certification under the NLRB and the outcome of this stage of the process to form a collective bargaining relationship. It gives the data in five year annual averages from 1950 to 1980 and in single years thereafter.

The first fact that stands out is that the number of certification elections and workers involved has been small compared to the number of workplaces and employees in the United States.

- In the late 1980s, less than 4,000 NLRB elections were held in any given year. This contrasts with the large number of establishments in the U.S. shown in Chapter I. The number of "eligible voters" in NLRB elections has ranged from roughly 200,000 to 250,000 in the 1980s. This contrasts with the approximately 65 million non-union employees[3] potentially covered by the Act.

- The extent of NLRB election activity has trended downward through much of the post-World War II period. In the early 1950s for example, the Board conducted nearly 6,000 elections, involving over 700,000 workers. By the late 1970s, the total number of certification elections had risen to over 7,500, but in smaller-sized units totaling 490,000 employees. From 1975 to 1990 the number of elections fell by 55 percent to 3,628 elections involving 230,000 workers.

- Fewer workers were involved in the NLRB representation process in 1990 than were involved in previous decades, despite the enlarged work force.

One important implication of these statistics is that the NLRB data on organizing campaigns, and on unfair labor practices by management and labor in these campaigns, reflects experiences in a small portion of the American labor market. Even at 1960s or 1970s levels of NLRB election activity, only a relatively small number of workers and workplaces were involved in representation campaigns that reached the election stage.

A second fact is that the success of employees in organizing unions through the NLRB election process has fallen sharply.

- The proportion of elections in which workers voted to unionize fell from the early 1950s levels of 1950 to 1954 of 72 percent to figures hovering about 50 percent in the 1975 to 1990 period.

- The number of workers eligible to vote in NLRB elections has fallen more than has the number of elections. This reflects the fact that union organizing drives have increasingly been located at smaller workplaces.

- The number of employees in newly certified units shows a greater percentage decline than does the number of newly certified units. This is because unions have been less successful in winning elections in larger workplaces in the 1970s and 1980s than in the 1950s and 1960s. In 1990, 79,000 workers were in newly certified units.

The number of NLRB elections held, the number of workers in elections, and the number in units certified for collective bargaining has diminished.

3 The estimate of 65 million is based on applying 74 percent to the 88.1 million total private sector wage and salary workers reported in U.S. Department of Labor Employment and Earnings January 1994, Table A-23. The estimate of 74 percent is based on data in Table I of Dorothy Sue Cobbie's "Making Post-industrial Unionism Possible" Rutgers University, January 7, 1994 .

The number of workers organized through NLRB elections, and the downward trend in such, underlies the decline in the proportion of the private sector workforce whose conditions of employment are shaped by collective bargaining described in Chapter I.

The process of moving from a petition for an election to an election involves several steps. The union seeking to represent the workers first goes to the NLRB with a written authorization petition from at least 30 percent of workers in the relevant unit, but which usually includes close to two-thirds of the workers. Once the Board has directed an election, it also provides the union with a list of names and addresses of employees in the election unit.

The union can speak to the employees on its own premises or in the employees' homes, if the employees are willing. The employer can speak to the employees at the workplace, whether through one-on-one conversations between supervisors and workers, or in general meetings which employees are required to attend and from which individual workers who support unionization may be excluded. Union organizers are excluded from these meetings and are typically banned from speaking to workers in some places accessible to the general public, such as company parking lots, or cafeterias. Supervisors who refuse to engage in the company's campaign may be legally discharged. Studies show that consultants are involved in approximately 70 percent of organizing campaigns and that unions are less successful in those campaigns than in others. There are no accurate statistics on consultant activity.

How long does an NLRB election campaign last? Exhibit III-2 (see page 82) shows the time between union petitions for an election and the actual election. The median time from petitioning for an election to a vote has been roughly fifty days for the last two decades (down considerably from the time taken in the 1940s and 1950s).

The union determines when to file an authorization petition, and employers can influence the election date by raising issues about the relevant election unit and insisting on a pre-election hearing and decision about them. Employers and unions can also agree on the definition of the unit or exclusion of certain categories of employees from its scope, producing consent or stipulated elections that will take place more quickly.

It is difficult to determine the effect of the time between a petition and an election on whether workers vote for or against unionization. Unions are more likely to win elections held relatively quickly, but this does not prove that time in fact affects the election result. Many things will differ between elections that take place quickly and those that take a long time. Management is more likely to be resistant to the organizing drive in the latter case. Approximately 20 percent of elections take more than 60 days.

Compliance with the NLRA

The NLRA makes provision for identifying and remedying unfair labor practices involving any participant.

The NLRB statistics provide information about management and union illegal behavior under the labor law.

Exhibit III-3 (see page 83) records the number of unfair labor practice charges against employers, the percentage held meritorious, the decomposition of the charges between those under Section 8(a)(3) (which prohibits discriminatory discharges and other retaliatory actions against union

supporters) and those under Section 8(a)(5) (which prohibits employers from bad faith bargaining in a collective bargaining situation). The last three columns give the number of backpay awards, amount of awards, and the number of employees ordered reinstated due to employer unfair practices. The Exhibit gives figures as annual averages in five year intervals through 1980 and for single years thereafter.

- Through 1980, there was an upward trend in unfair practice charges against employers. In the early 1950s, when the number of certification elections was running at roughly 6,000, approximately 3,000 8(a)(3) charges were filed each year against employers, and a little over 1,000 8(a)(5) charges were also filed. By the late 1970s, with approximately 7,500 NLRB elections per year, Section 8(a)(3) charges had risen five-fold, to almost 16,000 a year, while Section 8(a)(5) charges were up to nearly 7,500 annually.

- From 1980 to 1990, the number of Section 8(a)(3) charges against employers fell by 50 percent while the number of Section 8(a)(5) charges against employers remained stable. The fall in Section 8(a)(3) charges tracks the fall in NLRB elections over the period.

- More than 60 percent of unfair labor practice charges are either withdrawn by the complainant or judged to be without merit by the National Labor Relations Board. This means that the number of charges under the law exaggerates the extent of violations. In 1990, there were about 10,600 charges of unfair labor practices against management that were found meritorious by the NLRB.

- The proportion of charges found meritorious has trended upward over time. In 1990 44 percent of charges against employers were held meritorious compared to less than 40 percent in the 1950 to 1975 period.

- The number and amount of backpay awards given to employees and the number of employees reinstated under the Act because of meritorious charges against employers rose from about 1960 through the mid 1980s. The number of backpay awards roughly stabilized thereafter, in the 17,000-18,000 range, while the amount of backpay awarded continued to grow. The number of employees ordered reinstated dropped from the early 1980s to around 4,000-4,500 in the late 1980s and 1990.

Taken by themselves, the statistics in Exhibit III-3 may overstate the degree of employer interference with employee free choice about union representation. Because the legal reach of Sections 8(a)(3) and 8(a)(5) has been considerably expanded by the Board and the courts over time, many meritorious complaints do not take place within the context of representation campaign or attempted negotiation of a first contract.

The NLRB does not separately catalogue meritorious 8(a)(3) complaints that are precipitated by a representation contest. However, the Commission used a methodology developed by University of Chicago Professors Bernard Meltzer and Robert Lalonde[4] to calculate the share of reported NLRB reinstatements that were connected to union organizing campaigns.

Exhibit III-4 (see page 84) presents one set of estimates of the number of workers offered reinstatement arising from NLRB certification elections, the ratio of those workers to workers voting for unions, and the percentage of elections producing reinstatement offers.[5]

- In the early 1950s, approximately 600 workers were reinstated each year because of a discriminatory discharge during a certification campaign. By the late 1980s, this number was near 2,000 a year.

- Adjusted for the number of certification elections and union voters, the incidence of illegal firing increased from one in every 20 elections adversely affecting one in 700 union supporters to one in every four elections victimizing 1 in 50 union supporters.

The number of reinstatement offers arising from certification elections, while small and relatively constant since 1975, has risen significantly when compared to the total number of workers voting for unions.

As noted earlier, section 8(b)(1)of the NLRA makes it an unfair labor practice for a labor organization to restrain or coerce employees in the exercise of their rights of self-organization guaranteed by law.

Exhibit III-5 (see page 86) shows the number of unfair labor practice charges against unions, using a format similar to that in Exhibit III-3 for charges against employers.[6]

- In 1990, nearly 9,700 unfair labor practice charges were filed against unions, constituting 29 percent of the nearly 34,000 unfair labor practice charges filed with the Board. The proportion of charges held meritorious was just over a quarter, so that charges against unions represented 17 percent of the charges found meritorious, 10 percent of complaints issued, and 11 percent of cases in which formal decisions were made by the Board that year.

- The trend in unfair labor practice charges against unions, like that

---

4 See Robert LaLonde and Bernard Meltzer, "Hard Times for Unions: Another Look at the Significance of Employer Illegalities," 58 University of Chicago Law Review 953, 1991.

5 The estimates are imperfect as a measure of discriminatory discharges during elections. One problem is that they only include workers offered reinstatement and exclude those offered backpay. Another problem is that some of the reinstatement offers may occur in situations in which the union petitions for an election but does not proceed to an election. There is no reason to expect these problems to bias the trends over time shown in the Exhibit. Though not taking issue with the Meltzer-Lalonde methodology and findings regarding the rate of illegal discharges during organizing campaigns, former NLRB Chairman Edward Miller pointed out to the Commission that unions actually file objections to employer conduct in only six percent of elections, and these objections are found meritorious in only two percent of the cases.

6 The NLRB does not have available statistics that show the number of unfair labor practice charges against unions in certification elections, so Exhibit III-4 cannot be replicated for unions. However, the NLRB tends to set aside an election, and orders a new election, on a finding that a union has coerced employees in their free choice.

against firms, is upward from 1950 through 1980, and falls in the 1980s coincident with the falling number of NLRB representation elections.

- The percentage of unfair labor practice charges held meritorious against unions was below 30 percent in the 1980s and trended downward since roughly 1970.

Unfair labor practices against unions grew until the 1980s. The proportion of charges against unions held meritorious is lower than the proportion held meritorious against employers.

Comparing the statistics in Exhibits III-3 and III-5 shows that a larger proportion of unfair labor charges and of charges held meritorious are against employers than are against unions. In 1990, 71 percent of unfair labor practice charges (Section 8(a) and 8(b)) were against employers and 81 percent of charges held meritorious were against employers.

2. Unfair Labor Practice Sanctions

What penalties does the law impose on employers or unions who engage in unfair labor practices?

The philosophy of the NLRA has been to repair the harm done to injured employees by providing employees who were fired for union activity with backpay and by ordering them reinstated in their jobs.

The monetary penalty for an employer firing a union supporter in violation of Section 8(a)(3) is the back pay that was lost by the employee-victim, minus any sums the employee did (or should have) earned in another job while awaiting relief from the NLRB. In 1990, the average back pay award amounted to $2749 per discharge.

The "in kind" relief of reinstating workers who were illegally fired often takes a long time to effectuate. Before an employer is legally obligated to reinstate a discharged employee, the case goes through a four-stage procedure. The employee's charge must first be judged meritorious by the Board's regional office, then by an Administrative Law Judge following a full-scale trial, then by the Board itself, and then by a federal appeals court -- a process that takes an average of three years to complete. In practice, however, most such cases are resolved long before they reach the end of this legal path.[7] Earlier disposition of a charge requires voluntary agreement between the parties.

Empirical research shows that most illegally fired workers do not take advantage

7 As former NLRB Chair Edward Miller pointed out to the Commission, the source of delay is not at the Board's initial investigative stage. The Regional Offices screen out or settle the bulk of charges and issue formal complaints in meritorious cases within 45 days or so, a track record that just about any other labor or employment agency would be proud to have. The crucial delay occurs at the next stage, the administrative law judge proceedings, which typically takes a year to complete, and then only with a recommended disposition to the Board itself. Rather than superimpose on this administrative process the additional avenue of interim injunction sought from judges, Miller would rather move the trial of all NLRA unfair labor practice cases into a specialized federal labor court which had full judicial authority to move as quickly and effectively as the legal circumstances required. (See Edward B. Miller, An Administrative Appraisal of the NLRB (Rev. ed. 1980).)

of their right to reinstatement on the job, following an order, and most reinstatees are gone within a year.[8]

Employers who violate Section 8(a)(5) by engaging in surface bargaining typically are ordered by the NLRB not to repeat this conduct in the future. The Board cannot award any specific contract term that employees may have been denied by reason of their employer's bad faith bargaining. Most NLRB orders directing employers to cease bargaining in bad faith do not lead to a first contract, and of those that do, most do not see a contract renewal.[9]

Board remedies against employer unfair labor practices can be compared to the remedies available to employers against the unfair labor practice of unions, the secondary boycott, that was outlawed by the 1947 Taft-Hartley amendments to the NLRA. Section 8(b)(4) of the Act makes it an unfair labor practice for unions to engage in any such secondary pressures, either for "top down" organizing of nonunion employees, or where employees on strike in a bargaining dispute with their own employer have asked fellow union members working for other employers not to handle goods and services produced by their strike replacements.

Both the secondary and the primary employers affected by such union actions have the right under Section 10(l) of the NLRA to have the Board's regional office seek immediate injunctive relief (typically within a few days) from a federal district judge; as well as the right under Section 303 of the Labor Management Relations Act to sue the union in court for all damages sustained as a result of its illegal behavior (including recovery of the employer's legal costs of suing the union). Those statutory sanctions have greatly reduced the use of secondary boycotts.

Congress did not, however, enact the same enforcement provisions for cases in which employers illegally discharge union supporters in an organizing campaign or engage in bad faith bargaining with newly-elected union representatives as they do for secondary boycotts. The Taft-Hartley law (Section 10(j)) empowers the Board itself (not its Regional Office), following issuance of an unfair labor practice complaint, to petition a federal district court for interim injunctive relief.[10] In practice, this legal avenue is pursued infrequently each year, and is usually too late in discriminatory discharge cases to undo the damage done.

More recent employment law including the Civil Rights Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and related antidiscrimination laws that Chapter IV examines, and

8 The first study, by Les Aspin of reinstatement cases in New England in the early 1960s, is summarized in Hearing on H.R. 11725 before the Special Subcommittee on Labor of the Committee on Education and Labor, 90th Congress, 1st Sess. 3-12 , 1967. The second study, by Elvis C. Stephens and Warren Chaney of cases in Texas in the early 1970s, is reported in "A Study of the Reinstatement Remedy under the NLRA," 25 Labor Law Journal 31, 1974, and "The Reinstatement Remedy Revisited," 32 Labor Law Journal 357, 1981.

9 Philip Ross, The Labor Law in Action: An Analysis of the Administrative Process Under the Taft-Hartley Act, An Independent Study Supported by the NLRB, Typescript, 1966; Benjamin Wolkinson, "The Remedial Efficacy of NLRB Remedies in Joy Silk Cases ," Cornell Law Review 1, 1969.

10 The Board may delegate this authority to its Regional Office.

the tort of wrongful dismissal,[11] use a very different enforcement model. Over and above the back pay lost by the fired employee, the employer is liable for consequential financial and psychological harm to its victims, punitive damages for willful misconduct, and the attorney fees of victorious plaintiffs.

The NLRA mode of dealing with employers or unions who violate the rights of workers under the Act is remedial or reparative. There are stiffer sanctions available to employees whose rights are violated under most federal and state employment laws.

3. The Trend in First Contracts

NLRB certification that employees voted to be represented by a union is one step in establishing collective bargaining in the workplace. The next step is for employees and their union to secure a written agreement from the employer.

Data about the historical trend in success in negotiating first contracts is less firm than the data on certification elections. One set of estimates is from independent analysts who have used various samples in different years to determine the extent to which workers who elect a union to represent them in collective bargaining obtain a contract. The earliest estimate in the late 1950s found that unions failed to secure a first contract 14 percent of the time,[12] whereas estimates of the union failure rate in the 1980s are on the order of 20 to 37 percent.[13]

The Commission received new information on first contracts from the files of the Federal Mediation Conciliation Service (FMCS). Since fiscal year 1986 the FMCS, by informal arrangement with the NLRB, has received notice and copies of all new certifications. Exhibit III-6 (see page 87) presents these new data.

- Of the 10,783 certification notices the FMCS received between 1986 and 1993, initial agreements were reached in 6,009 or 56 percent of those units. Another 4 percent were found not to need mediation or to fall outside the FMCS jurisdiction. Thus, on the order of two-thirds of certification elections lead to a first contract, whereas one-third or so do not.

- Because many newly certified units do not produce a first contract, the number of workplaces which obtain a col-

11 See Clyde Summers, "Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals," 141 University of Pennsylvania Law Review 457, 1992.

12 Philip Ross, The Labor Law in Action: An Analysis of the Administrative Process Under the Taft-Hartley Act 12, An Independent Study Supported by the NLRB, Typescript, 1966. Also see, Philip Ross, The Government as a Source of Power, The Rule of Public Policy in Collective Bargaining, Brown University Press, 1965, Theodore J. St. Antoine, "The Role of Law" in U.S. Industrial Relations 1950-1980: A Critical Assessment, Industrial Relations Research Association, 1981, pp. 172-77.

13 An analysis done for the AFL-CIO's Industrial Union Department, Gordon Pavy, "Winning NLRB Elections and Establishing Stable Collective Bargaining Relationships With Employers," found that of NLRB certifications secured by AFL-CIO affiliates in 1987, the union had by 1992 negotiated a first contract for 65 percent of the units and a second contract in just 47 percent (covering 59 percent of the employees).

lective bargaining contract through the NLRB process is lower than indicated in the election figures in Exhibit III-1. Applying two-thirds to the percent won figures in that Exhibit indicates that just one-third of NLRB elections resulted in a collective bargaining contract in 1990, and that on the order of 53,000 workers ended up with a contract.[14]

- FMCS data also show that strikes occurred in 356 of these first contract negotiations. First contract strikes tended to last longer than contract renewal strikes handled by FMCS -- an average of 45 days versus 30 days -- and to produce fewer agreements at the end of the strike -- 54 percent versus 82 percent.

Studies of representative samples of first contract situations[15] indicate that roughly a third of employers engage in bad faith "surface" bargaining with the newly-elected union representative, and that this illegal tactic significantly reduces the odds that employees will secure an initial agreement from their employer (or if they do, that the bargaining relationship will survive the next round of negotiations).

The Commission is aware that many factors can contribute to the failure of the parties to reach agreement including bad faith bargaining.

4. Cost of the NLRB Election Process

There do not exist national data on the amount of resources spent by management and labor in fighting NLRB election campaigns, but most participants and observers assess the dollar and human cost as high in relation to the extent of such activity. Firms spend considerable internal resources and often hire management consulting firms to defeat unions in organizing campaigns at a sizable cost. Unions have increased the resources going to organizing and spend considerable money in organizing campaigns. Employees who want representation devote considerable time and effort to this activity.

In testimony before the Commission both union and employer spokespersons stressed the confrontational nature of the election process. (See Exhibit III-7, page 88)

Ms. Allison Porter of the AFL-CIO Organizing Institute explained the problem faced by union organizers who must tell workers the risk they face from illegal firings. Mr. Clifford Ehrlich of Marriott International explained how employers view "perpetual conflict" in organizing drives. Public opinion polls show that many Americans recognize the problems involved in organizing drives as well.

In a 1988 Gallup Poll, 73 percent said that "workers' rights and abilities to organize unions have faced a strong challenge from corporations in the past few years," 69 percent stated that "corporations sometimes harass and fire employees who support

14 Because the FMCS data do not give us the number of employees covered in different situations, we apply the distribution of new certificates to the number of workers in elections won.

15 William N. Cooke, "Failure to Negotiate First Contracts," 38 Industrial and Labor Relations Review 163, 1985.

unions," and 44 percent reported that "if employees attempted to form a union in my workplace, serious conflict among employees would be inevitable."

In a 1991 Fingerhut-Powers poll, 59 percent said it was likely they would lose favor with their employer if they supported an organizing drive; 79 percent agreed (versus 16 percent who disagreed) that it was either "very" or "somewhat" likely "that nonunion workers will get fired if they try to organize a union."[16] Of employed nonunion respondents, 41 percent believed (versus 50 percent who did not) that "it is likely that I will lose my job if I tried to form a union."

While no survey has documented the disturbance that a "war" for unionization brings to the employer nor the effects on productivity or profitability, the statement by Clifford Ehrlich makes it clear that the confrontational process brings tension and pain to employers as well as to workers.

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. One reason for this is that the exclusive representation doctrine in the United States means that workers who want union representation must constitute a majority of the relevant work force: unionization is an all-or-nothing choice. Another reason is that in the United States unionization often raises the labor costs at a worksite, whereas in many other countries, collective bargaining or administrative decrees establish wages for all workers in a given sector regardless of unionization at the local site, while many benefits are nationally mandated. A third reason is that the legal framework poses the issue of worker representation as a campaign struggle between employers and unions.

The issue of union representation sparks a highly contested campaign between employers and unions that produces considerable tension at the workplace.

Summary

The four major findings that emerge from the NLRB and related evidence on representation elections, unfair labor practices, and first contracts are:

1. Relatively few new collective bargaining agreements have been created in recent years under the procedures of the NLRB.

2. The rights of most workers who seek to unionize are respected by employers, but some employers do violate the rights of some workers.

3. Employer unfair labor practices have risen relative to the declining amount of NLRB representation activity.

4. The NLRA process of representation elections is often highly confrontational with conflictual activity for workers, unions and firms that thereby colors labor-management relations.

16 The polling data referred to in this section are detailed in Richard Freeman and Joel Rogers, "Who Speaks for Us? Employee Representation in a Nonunion Labor Market," from Bruce E. Kaufman and Morris M. Kleiner, eds. Employee Representation: Alternatives and Future Directions 13, 2834, 1993.

5. The Human Face of the Confrontational Representation Process

Behind the NLRB and other statistics are real people -- American employees -- rather than spokespersons for organized labor or business groups. A number of employees testified before working parties of the Commission about experiences with employer reprisals in organizing campaigns.[17] These examples are not necessarily representative of organizing campaigns generally, and do not reflect on the behavior of employers at millions of worksites in the U.S. any more than the examples of criminal activity by some union leaders that sparked the Landrum-Griffin Bill of 1959 reflected on the overwhelming majority of union members and leaders. Still, the testimony "of workers trapped ... in the dark ages of labor-management antagonism" show that there is a negative side to American labor relations that reflects the highly charged nature of the debate and contrasts sharply with the efforts of employers and their workers to establish cooperative and productive relations documented in Chapter II of this Report. (See Exhibit III-8, page 89)

As the Commission has neither the investigative staff nor subpoena power to examine these examples in detail, the Commission simply reports the testimony before it, as in Chapter II.

6. Debate on Labor Law and Union Organizing Campaigns

The debate over labor law and union organizing goes beyond concerns over illegal conduct.

The Commission heard from labor leaders, front-line union organizers, and workers, and some scholarly experts that, as currently operated, the design and administration of the NLRA are ill-suited to providing workers a free choice about union representation.

The Commission also heard from many business representatives who believe the current law is working well, at least for the vast bulk of employers and workers, and does not need any major revision. The business representatives agreed that the Act should be effectively enforced; some acknowledged that the misconduct of those firms that violate the law needs to be dealt with more effectively; and others called for a new vision for labor law that breaks out of the current highly adversarial pattern.

The issue dividing labor and management is not about the illegal actions of some employers or unions but about how the current operation of the law affects the ability of workers to organize. No one before the Commission condoned the tactics of employers who violate the law.

On the union side, the trend in union representation shown in Chapter I and the trend in NLRB election results shown in this chapter illustrate why union leaders are gravely concerned about the operation of the law in general.

The Commission received testimony from union leaders that the primary problem facing workers who want to organize is not the illegal actions of some employers (although those actions harm an organizing campaign). It is rather, in the words of

17 Professor Richard Hurd of Cornell and several union representatives provided additional case studies of employee experiences.

AFL-CIO President Lane Kirkland, "veiled threats and acts of discrimination which cannot be proven to be unlawfully motivated."

Union witnesses felt that employers had certain advantages in NLRB election campaigns: access to the workplace and to employees during working time, and exercised their economic power over employees to override the right to free representation:

> "The reality of employer opposition and the kind of latitude employers have in how they campaign under current law has totally invaded the way that unions select and run campaigns ... and a clearly defined bargaining unit...organizing a union today is so risky, it's so hard, it's so technical, and so scary for workers, that only the most resourceful, the most fed-up, and the most heroic workers will even pursue it ." (Allison Porter in testimony before the Commission.)

Based on their experiences union representatives recommend various changes in the representation system, such as: stronger penalties to deter unlawful employer conduct, expedited procedures to remedy such conduct, an equal time provision to give workers the same access to union spokepersons as they have to management spokespersons, an obligation of an employer to recognize a representative designated by a majority of employees through authorization cards, and interest arbitration to guarantee a first contract to employees who vote for a union.

The employers do not believe the trend in union representation is due to any flaws in the NLRA and are opposed to those changes advanced by labor.

The Commission heard testimony from management representatives that they did not feel that unfair labor practices contributed to the difficulty of organizing. Employers further contend that a meaningful campaign is an indispensable means for enlightening employees about the issues before they cast their secret ballot vote for or against union representation.

Overall, both sides are in apparent agreement that employer resistance to unionization reduces the probability of a union election win, and thus of the establishment of a collective bargaining arrangement.

One question that is often raised is whether any significant number of workers currently not covered by collective bargaining in fact want such coverage.

Public opinion surveys provide some evidence on this question for the millions of American workers who are not involved in NLRB election campaigns. These data while informative about attitudes, do not tell us how workers would in fact vote in an NLRB representation campaign after management and unions gave their respective arguments nor how they would vote in such campaigns absent unfair labor activities, or in an environment with less stringent employer opposition.

Public opinion surveys on this issue tell a fairly consistent story from 1977 through 1991: approximately 30 percent of the non-union workforce typically answers "yes" to questions normally worded as follows: "If a union representation election were held on your job, how would you vote?" Non-Whites are generally twice as likely to express desire for unionization as Whites; women also often tend to express a greater preference for unionization than men.

If the 30 percent figure is applied to the number of private sector workers covered by the NLRA and not in unions, approximately 15 million nonrepresented workers may indeed want representation.[18] Many of these workers may be at worksites where the majority of employees do not want representation. Some will be at worksites where the majority does want such representation. While the NLRA protects the concerted activity of nonunion employees as a group, the doctrine of exclusive representation makes minority unionism or nonunion concerted activity by workers rare in the United States.

Information was presented to the Commission regarding the results of representation elections in the public sector. Over the past three decades, 36 states have enacted laws allowing some or all of their public employees to organize and bargain collectively. Certification win-rates by unions in public employment are high, in 1991-92 averaging 85 percent nation-wide, reflecting substantial union wins in the elections. Studies show that the union win rate in public sector elections exceeds their win rate in private sector representation elections in the same state.[19] The reasons for the difference in union success in elections in the two sectors is an issue for debate. Union representatives testified before the Commission that they believed an important reason was that public employers seldom campaign against union organizing and that employees believe if they vote union the outcome will be a collective bargaining contract.

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

Many factors are undoubtedly at work behind these trends, including management actions, union actions, government regulations, and the changing needs of workers and their assessment of how best to meet those needs. The relative influence of these (and other) factors would be very difficult to determine, including the significance of unfair labor practices.

There is disagreement about the relationship between unfair practices and legal employer and union tactics in NLRB elections and the declining success of unions in representation elections.

There is no disagreement that illegal discharges and related illegal activity harm the lives of the individual employees who were fired, and that the legal and administrative process should afford those employees effective redress and try to reduce illegal activity.

18 This is a conservative estimate obtained by applying 30 percent to the approximately 58 million private non-agricultural wage and salary workers covered by the law who are not union members. We obtained the 58 million by adjusting downward the roughly 65 million private non-agricultural wage and salary workers who are covered by the law by the 11 percent of workers who are union.

19 Kate Bronfenbrenner and Tom Jurawich, The Current State of Organizing in the Public Sector: Final Report. Transcript, February 24, 1994.

7. Summary

Part A of Chapter III has focused on how effectively the NLRA works in providing American workers the free choice to choose whether or not to bargain collectively with their employers, which is the unifying principle on which labor, business, and the American people concur.

Only a small proportion of the U.S. workforce is involved in NLRB representation elections and only a small number of employers and unions have been found guilty of violations of the NLRA. Still, the issues in this Chapter are important to U.S. employee-management relations. They are important because NLRB representation elections are the way the nation offers workers the right to choose union representation and because conflicts in this arena can create an atmosphere of conflict and confrontation in worker-management relations throughout the economy.

Our principle findings are summarized in the following points:

1. **American society -- management, labor, and the general public -- support the principle that workers have the right to join a union and to engage in collective bargaining if a majority of workers so desire.**

2. **The number of NLRB elections held, the number of workers in elections, and the number in units certified for collective bargaining has diminished.**

3. Representation elections as currently constituted are a highly conflictual activity for workers, unions, and firms. This means that many new collective bargaining relationships start off in an environment that is highly adversarial.

4. **The probability that a worker will be discharged or otherwise unfairly discriminated against for exercising legal rights under the NLRA has increased over time. Unions as well as firms have engaged in unfair labor practices under the NLRA. The bulk of meritorious charges are for employer unfair practices.**

5. **The legal relief afforded individual employees fired for exercising their rights under the NLRA was designed to be remedial. The legal relief afforded individuals under more recent employment law is more severe.**

6. **Relief to employees whose employer has bargained in bad faith with them requires the employer to cease and desist such tactics.**

7. **Roughly a third of workplaces that vote to be represented by a union do not obtain a collective bargaining contract with their employer.**

8. **There is a dismal side to American labor relations in which the rights of some individual workers are violated by some employers who resist the effort to organize.**

The analysis of Part A poses a host of questions about possible labor law reforms, to which the Commission will be looking for information from interested parties and the general public. Here are some critical questions for further discussion:

- How can the level of conflict and amount of resources devoted to union recognition campaigns be de-escalated?

- What new techniques might produce more effective compliance with prohi-

bitions against discriminatory discharges, bad faith bargaining, and other illegal actions?

- Should the labor law seek to provide workers who want representation but who are a minority at a workplace a greater option for non-exclusive representation?

- Should unions be given greater access to employees on the job during organizational campaigns, and if so how?

- What if anything, should be done to increase the probability that workers who vote for representation and their employers achieve a first contract and on-going collective bargaining relationship?

- How might cooperation in mature bargaining relationships be increased?

EXHIBIT III-1

Final Outcome of NLRB Union Representation Elections in Cases Closed

Year	Total Number Elections	Total Number Elections Won	% Won	Total Eligible Voters	Size of Newly Certified Units (in % of Employees)	% of Eligible Voters in Newly Certified Units
1950-54	5,906	4,257	72.1	715.541	554,098	77.4
1955-59	4,731	3,013	63.7	443,770	277,707	62.6
1960-64	6,780	3,944	58.2	495,593	273,026	55.1
1965-69	7,374	4,419	59.9	545,057	302,031	55.4
1970-74	7,911	4,297	54.3	538,108	248,402	46.2
1975-79	7,593	3,746	49.3	488,226	181,352	37.1
1980	7,296	3,498	47.9	478,821	174,983	36.5
1981	6,658	3,019	45.3	403,837	147,353	36.5
1982	4,247	1,857	43.7	258,626	86,439	33.4
1983	3,483	1,663	47.7	171,548	76,659	44.7
1984	3,561	1,655	46.5	211,696	92,231	43.6
1985	3,663	1,745	47.5	217,331	78,073	35.9
1986	3,663	1,740	46.5	223,018	76,272	54.2
1987	3,314	1,608	48.5	204,235	81,396	39.9
1988	3,509	1,736	49.5	211,438	85,525	40.4
1989	3,791	1,878	49.5	247,638	98,709	39.9
1990	3,623	1,795	49.5	231,069	79,814	34.5

EXHIBIT III-2

NLRB ELECTIONS (1975-1993)[1]

Median Days from Filing of Petition to Election

Intervals	1975 Cases	1975 %	1980 Cases	1980 %	1985 Cases	1985%	1990 Cases	1990 %	1991 Cases	1991 %	1992 Cases	1992 %	1993 Cases	1993 %
0 to 30 Days	992	11.0	729	9.0	387	8.1	258	6.2	224	6.0	263	7.5	231	6.6
31 to 60 Days	5222	57.9	5004	61.8	3425	71.4	3001	72.1	2740	73.2	2498	71.4	2530	72.3
61 to 90 Days	1812	20.1	1782	22.0	790	16.5	693	16.6	603	16.1	541	15.5	552	15.8
91 to 120 Days	458	5.1	321	4.0	110	2.3	100	2.4	77	2.1	89	2.5	83	2.4
121 to 150 Days	175	1.9	85	1.0	34	.7	41	1.0	36	1.0	40	1.1	27	.8
151 to 180 Days	100	1.1	45	.6	13	.3	19	.5	11	.3	15	.4	20	.6
181 or Greater Days	257	2.9	132	1.6	38	.8	52	1.2	50	1.3	53	1.5	55	1.6
TOTALS	9016[2]		8098		4797		4164		3741		3499		3498	
Median Days	50		50		48		49		49		48		49	

[1] This table is based on initial representation election cases processed by NLRB regional offices during a given fiscal year (tallied from Regional Monthly Report 4770). Note: R cases statistics in the NLRB Annual Report are based on cases closed during a fiscal year and include blocked and consolidated cases.

[2] Reporting of 1975 data is subject to error since the current casehandling tracking systme was not in place in 1975. Accordingly, some information may not correspond to that in other reports on the same subject.

Exhibit III-3
Unfair Labor Practice Charges Against Employers

Year*	Total Number of 8(a) Charges	% of Charges Found Meritorious	Total Number of 8(a)(3) Charges	Total Number of 8(a)(5) Charges	Backpay Awards (Number/ Average Amount)		Employees Offered Reinstate-ment
1950-54	4,345	32.9	3,036	1,266	2,940	$ 458	2,194
1955-59	5,175	21.8	3,993	1,047	1,627	495	9,437
1960-64	9,067	33.9	6,746	2,279	4,349	444	2,876
965-69	11,397	37.4	7,657	3,902	9,156	517	4,180
1970-74	16,428	34.6	10,684	5,306	6,407	846	4,317
1975-79	25,199	37.9	15,912	7,420	8,729	1,607	4,817
1980	31,281	42.6	18,315	9,866	15,433	2,050	10,033
1981	31,273	40.2	17,571	9,815	25,793	1,415	6,463
1982	27,749	40.1	14,732	10,898	N/A	N/A	6,332
1983	28,995	42.5	14,866	12,211	17,984	1,713	6,029
1984	24,852	41.1	13,177	10,349	34,863	1,050	5,363
1985	22,545	41.4	11,824	9,186	18,482	2,066	10,905
1986	24,084	42.6	12,714	10,131	17,635	1,937	3,196
1987	22,475	41.4	11,548	9,760	17,175	2,093	4,307
1988	22,266	44.4	11,196	9,501	17,496	1,928	4,179
1989	22,345	45.0	11,567	9,479	18,956	3,007	4,508
1990	24,075	43.9	11,886	10,024	16,082	2,733	4,026

*Numbers represent annual averages.

EXHIBIT III-4
Discriminatory Discharges During NLRB Elections[1]

Five Year Period	Reinstatement Offers Arising From Certification Elections[2]	Ratio of Workers Offered Reinstatement to Workers Voting for Unions[3]	% of Elections Producing Reinstatement Offers[4]	% of Workers Involved in Elections Whose Units Voted to Unionize[5]
1951-1955	608	1/689	5%	75%
1956-1960	429	1/584	4%	59%
1961-1965	1019	1/272	8%	56%
1966-1970	1346	1/225	8%	54%
1971-1975	1473	1/171	8%	43%
1976-1980	2238	1/92	14%	37%
1981-1985	2855	1/38	32%	38%
1986-1990	1967	1/48	25%	38%

[1] The figures in this Table represent annualized averages for each five year period reported.

[2] The figures in this column represent the number of all reinstatement offers recorded by the NLRB, reduced to reflect only those resulting from firings that took place during representation election campaigns. The figures do not represent all election-time discriminatory discharges, but only those leading to the particular remedy of reinstatement. In other words, they do not account for 1) illegal firings not reported to the NLRB; 2) those reported to the NLRB but not producing an NLRB charge or complaint; 3) those producing a complaint but not a favorable resolution; 4) those resulting a favorable resolution not including reinstatement, such as an award of back pay.

Robert J. LaLonde and Bernard D. Meltzer developed the method for estimating the portion of reinstatement offers attributable to election-period firings in "Hard Times for Unions: Another Look at the Significance of Employer Illegalities," 58 U. Chi. L. Rev., 953 (1991). The figure is derived by 1) multiplying the gross number of Board-adjudicated or settled reinstatment cases by 0.51, the fraction that arises in the election context, and 2) multiplying that product by 2.2, the estimated number of persons offered reinstatement in each case. Lalonde and Meltzer looked at a period beginning with 1964, the first year the NLRB reported the number of reinstatement cases (in addition to its long reported figure for the number of individuals offered reinstatement). We employed a method suggested by Professor Lalonde in order to extend this figure back before 1964. We multiplied the number of individuals offered reinstatement by 0.30, which represents the ratio between individuals offered reinstatement as a result of election-period firings and all individuals offered reinstatement for the period 1964-1969. Sources: 16-55 NLRB Annual Reports Table 4 (1953-1990), Table 3 (1951-1952).

[3] This column shows how many workers voted to unionize for every one worker offered reinstatement as a result of an illegal firing during election campaigns. The figures are derived by dividing all workers voting to unionize in NLRB elections by the number of election-time reinstatement offers (column one). The figures may be turned into percentages simply by dividing the numerator by the denominator. Thus, .14% of workers voting to unionize were fired and offered reinstatement in the early 1950s, whereas 2% were in the late 1980s. The source for the number of pro-union voters is 16-55 NLRB Annual Report Table 14 (1951-1990).

The column analogous to this one in Lalonde and Meltzer's table contains two errors which taken together, understate the steepness of the rise in the percentage of union supporters illegally fired from the early 1960s

to 1980s. For the period 1964-1969, the appropriate figure is 1/219, not 1/209. For 1980-1984, the correct figure is 1/48 not 1/57. These corrections indicate that illegal terminations were somewhat less of a problem in the early 1960s and more a problem in the early 1980s than their table suggests. Their mistake for 1964-1969 appears to be a simple arithmetical one. As for 1980-1984, they arrived at the wrong figure by forgetting to eliminate the number of pro-union voters in 1982 from the equation. The other side of the equation for 1982, the number of "discriminatory discharges" (reinstatement offers), was already eliminated because the NLRB did not publish the relevant figures for that year.

[4]The figures in this column are derived by dividing the number of reinstatement offers arising in the election context (column one) by the number of collective bargaining elections. The source for the annual number of elections is 16-55 NLRB Annual Report Table 13 ("RC" and "RM" elections only) (1951-1990).

[5]This column represents what one might call organized labor's effective yield in NLRB elections. It reveals the percentage of workers in such elections whose group ended up unionizing. The percentages are derived by dividing the number of workers in units that voted to unionize by the total number of workers eligible to vote in NLRB elections. The source for both halves of the equation is 16-55 NLRB Annual Report Table 13 (1953-1990), Table 10 (1952), Table 12 (1951).

EXHIBIT III-5
Unfair Labor Practice Charges Against Unions

Year*	Total Number of 8(b) Charges	% of Charges Found Meritorious	Total Number of 8(b)(2) Charges	Total Number of 8(b)(3) Charges	Backpay Awards (Number/ Average	Amount)
1950-54	1,247	29.2	736	141	742	$ 194
1955-59	2,300	28.9	1,482	157	256	360
1960-64	4,231	30.5	1,827	284	201	494
1965-69	5,585	31.8	1,587	453	125	1,002
1970-74	8,657	31.8	1,743	653	324	763
1975-79	11,503	27.3	1,760	858	373	1,999
1980	12,563	29.7	1,690	913	285	1,740
1981	11,882	28.3	1,513	945	460	1,619
1982	10,230	26.0	1,514	778	N/A	N/A
1983	11,526	27.8	1,749	1,158	437	1,055
1984	10,580	26.5	1,660	991	329	4,567
1985	10,065	28.7	1,420	825	158	5,940
1986	10,259	27.9	1,324	735	509	1,823
1987	9,495	27.7	1,298	716	171	20,549
1988	9,111	27.2	1,171	638	142	6,366
1989	9,928	26.5	1,250	616	210	2,758
1990	9,684	25.4	1,269	649	344	1,434

*Numbers represent annual averages.

SOURCE; Statistics provided by the NLRB to the Commission. Section (8)(b)(1) charges against unions are for re-training or coercing employees in exercise of their statutory rights...; in (8)(b)(2) cases unions are charged with discriminating against employees; in (8)(b)(3) cases unions are charged with bad faith bargaining.

EXHIBIT III-6
Estimates of the Outcome of Certification Cases

	Number of Cases	Fiscal Year 1986 to Fiscal Year 1993 Percent of Cases
Number of Certifications	10,783	100.0
Reason for Closing the Case		
Agreement Reached	6,009	55.7
Diverse Factors for Closing	488	4.5
Question of Representation	580	5.4
Referred to NLRB	563	5.2
Plant Closed	341	3.2
Other	2,802	26.0
Strikes of Certification Cases	356	100.0
Agreement Reached	191	53.7
Diverse Factors for Closing	3	0.8
Question of Representation	18	5.1
Referred to NLRB	27	7.6
Plant Closed	8	2.2
Other	109	30.6

SOURCE: Tabulated for the Commission by the Federal Mediation and Conciliation Service.

EXHIBIT III-7

Allison Porter, Director of Recruitment and Training
AFL-CIO Organizing Institute

"I believe regular people with ordinary concerns about their jobs . . should be able to choose union representation and have an accessible mechanism for achieving it. Sadly, that is not the case in America today . . . When [workers] hear what the process actually is -- signing up a majority, requesting the federal government to conduct an election, then waiting several weeks or months for an election to occur -- the first question you hear is, can I be fired? New organizers are usually daunted by this question. "If I'm honest, I'll scare them away. If I'm not, and something happens, how will I live with myself?". . . It's every organizer's job to develop the ability to confront and work through worker's fears. In my experience, fear is the number one obstacle to workers supporting a union in an organizing drive. It starts out as fear of retaliation, then becomes fear of losing what they have, fear of the union as it is described by management, fear of strikes and plant closings, until finally it just becomes fear of change."

Clifford Erhlich, Senior Vice President of Human Resources
Marriott International

". . . most American companies would prefer operating without a union present at the worksite . . . [The reason is that] in the swirling seas of change sweeping over the workplace there remains all too often one island of constancy -- organized labor's view of the employment relationship. That view, unfortunately, has kept many labor leaders in a mindset that sees employee needs and company interests in perpetual conflict. I would refer the Commission to a quote from a recent article in Labor Research Review by Joe Crump, Secretary-Treasurer of the United Food and Commercial Workers Local 951, who testified before a panel of the Commission.

> "Organizing is war. The objective is to convince employers to do something that they do not want to do. That means a fight. If you don't have a war mentality, your chances of success are limited."

If Mr. Crump's quote represents how a union approaches an unorganized worksite, I have a difficult time understanding why anyone should be surprised that most companies respond in kind.

EXHIBIT III-8

The Human Face of the Confrontational Representation Process

> "The federal Commission on the Future of Worker-Management Relations heard two stories about those relations in Louisville yesterday. One story told of cutting-edge programs for cooperation and training. The other told of workers trapped in ... the dark ages of labor-management antagonism." (Joe Ward, The Courier-Journal, Sept 23, 1993).

Testimony given by Judy Ray at the Regional Hearing in Boston, Massachusetts on January 5, 1994 recounted:

> "I was a ten year employee of Jordan Marsh, in Peabody, up until this day after Thanksgiving, on which I was fired. I was fired, I truly believe, solely because I was a union organizer within the store. I was a dedicated employee, for ten years, for that company ...
>
> I cannot impress upon you what an organizer, what an employee who is just fighting for their rights in a campaign, goes through this day and age. I wouldn't have believed it, myself. I have been followed, on my day off, to restaurants, by security guards with walkie-talkies. I had an employee, a management person, assigned to work with me eight hours a day, five days a week, who was told he was there solely to work on me, to change my ideas about unions.
>
> I was timed going to the bathroom. I could go nowhere in my workplace without being followed. It's a disgrace. It's harassment beyond what I could ever tell you. Unless you have lived through it, you couldn't know what it feels like. ..." [1]
>
> At its Regional Hearing in Atlanta on January 11, 1994, the working party heard testimony from Mrs. Florence Hill of High Point, North Carolina, whose firm, Highland Yarn Mills, decided to undertake a

---

1 The NLRB issued a formal complaint against Jordan Marsh, alleging that the store discharged her because of her union activities. On April 11, 1994, Ms. Ray filed a suit in Essex County Superior Court for violating her civil rights through intimidation and coercion, falsely imprisoning her for two hours before firing her, defaming her character, injuring her career and causing her emotional stress.. See Meg Vaillancourt, "Clerk Wins NLRB Decisions, Sues to Get Former Job Back," The Boston Globe, Tuesday, April 12, 1994.

drive to decertify an existing union. Mrs. Hill is the wife of the local union president:

> I was not allowed off of my little section that I worked in. When I'd go to the bathroom, the supervisor would follow me. Anywheres I went, I was being followed. I'd go take my break; they'd cut me down to two 10-minute breaks and a 15-minute break. I was checked. I'd go through the mill. I'd always been a happy-go person, I could speak and I -- you know, be friendly with people. But I got, as time -- I'd have to hold my head down when I walked, because I didn't know what I was going to see, I didn't know what these people were going to do to me....
>
> And then, the stress got so bad that I did have a heart attack. But when I came back, they didn't let up on me. They continued even worse than what they were doing in the beginning. And my supervisor made the remark that he didn't know how I had been taking what I was taking without walking out the door or dropping over dead. That was what they was waiting for, is for me to drop over dead ...
>
> And it was all because that we stood up for what we believed in, for what we thought was right, and for what we thought the other people wanted. The people wanted the union there; we've had it there all these years. And, yet, they did this campaign against us, and it was terrible."

In Louisville, the Commission working group heard testimony from Carol Holman and Steve Lazar on September 22, 1993, about the blacklisting of nurses for seeking to exercise their legal rights. Here is Ms. Holman's testimony:

> "In June of 1988 I was employed by Humana Audubon on Four East. Because of my concern for understaffing and other conditions affecting patient care, I became active in the NPO (Nurses Professional Organization). I openly spoke for the union. ... On August 1st, 1989, I and my friend, who was also active in NPO, were so frustrated and upset with the conditions of understaffing on our nursing unit that we resigned our positions at Humana Audubon. ...
>
> It was a time of the nursing shortage when all hospitals were desperate to recruit nurses. Jewish Hospital at that time was anxious to recruit nurses and offered a hundred dollars to each -- to all nurses who agreed to come for an interview. My friend and I both went to Jewish and were paid a hundred dollars to do interviews. Jewish Hospital hired us for the Transitional Care Unit. The critical care supervisor

called us and had arranged for us to attend the critical care classes. We had our physicals, TB skin tests, chest X-rays, and other lab tests. We were told to report to work on TCU at Jewish on September the 25th..

On September 20th we each received by UPS Next Day Air at our homes the following letter from Jewish Hospital: Quote, "We regret to inform you that we have no position of employment for you.". The letter was signed by the Vice President of Human Resources at Jewish. My friend and I went to Jewish Hospital and asked to speak with him. He was there, but would not see us. ... On September 26, Jewish Hospital ran a nurse recruitment ad in the Courier-Journal listing TCU as a unit where positions were available.

I had a very good evaluation at Humana-Audubon, a 3.6. A 3.0 is a satisfactory-plus. A 4.0 is excellent ... In all, I received on my evaluation a total of 22 fours and fives. Despite this very good evaluation, Audubon marked me as ineligible for rehire on the personnel form. ...

We knew we had been blacklisted ... It was very scary when my friend and I received the letters from Jewish Hospital denying us our TCU jobs for which we had just been hired. We knew deep in our hearts that there was no reason for this. Someone had to be out to get us. It was very devastating...

Mr. Lazar, former manager in the employee relations department at Humana, Incorporated, testified:

> "I was present in the office of the human resource director of Audubon Hospital when he received a call from the human resource director of Jewish Hospital about Carol and her friend. The conversation I overheard was directed at the fact that both nurses were considered to be union red hots, very active in the Audubon campaign, extremely pro-union individuals. The Audubon human resources director went to so far as to say, "You probably don't want them working for you."...
>
> "I fully expect that by testifying as I have today every effort will be made by Humana to discredit me. But my testimony is not rumor, it is not innuendo, and it is certainly not falsehood. Rather, I have told you what I have seen, what I have heard, and what I have personally done to combat unionizing efforts."

In its East Lansing Hearings on October 13, 1993, the Commission working party heard the testimony of an employee in a unit that had voted for a union but which had not been able at that time to negotiate a first contract:

"I am on the bargaining committee for a union certified to represent employees of a food processor in Eastern Michigan ... Because we are still in bargaining, I'm not going to give my name or the employer's name, because I don't know what he'd do if he knew I was even here right now. He might fire me, he might not, I don't know and I don't want to take the chance.

"... I make $6.80 an hour ... About over two-thirds make less than $6.00 an hour ... We have no benefits, no health insurance, no meaningful pension, nothing, nothing to go on. ... So low wages and benefits were an obvious reason why we went for the union.

"And the other reason is, we have no voice in this work place. He don't listen to anything we have to tell him. Example ... five people come down with some kind of rash that they got off of the sauce or something they were allergic to. Their skin started cracking, it started bleeding. He wouldn't even give them gloves to wear ... he told them if they wanted to go to the doctor they got to go on their own and pay for it out of their own pocket. He wouldn't acknowledge that it come from that shop.

"... we started organizing in April of '92 ... we won by a three to one vote, and he filed objections to it ... it took a year for certification ... after the certification he wouldn't bargain with us. ... he offered us a raise if we would sign a petition saying that we did not want a union there.

"Then he withheld our annual wage increase, and we haven't gotten nothing since. So when we filed these charges they were settled and that's when he come to the table and started bargaining with us ... We've been to seven meetings that we've had with him; nothing's been done ... He has not agreed to anything ...

"... me and my fellow workers, we need our jobs. We don't want to strike, we don't want to walk out ... If we can't even get a first contract, we're in big trouble,

These stories are representative of testimony presented to the Commission by individual citizens.

Part B

Experience with "Contingent" Workers and Other Sectors

1. "Contingent" Worker-Management Relations

As noted in Chapter I.20, one of the significant developments in the American economy in the past decade or two has been the growth in the number and proportion of workers with relationships to those that provide job opportunities that diverge from full-time continuing positions with a single employer. This cluster of types of worker-management relations, or self-management arrangements, has been expanding, but there are few reliable statistics beyond those summarized in Chapter I.20.

These marginal job relations to a single employer have always existed in American labor markets. Hiring halls and various other arrangements have been developed to match worker qualifications and availabilities with the fluctuating and specialized demands of employers in such industries as maritime, construction, home nursing, printing and hotel banquets. But these contingent work relations now encompass many more workers and take ever more forms.[1] The term "contingent workers" often includes part-time workers, some of whom are voluntarily part-time, some of whom would like full-time work, and some of whom are multiple job holders. It also includes employees of temporary help agencies - who may be full-time workers - and some of the self-employed including "owner-operators" or independent contractors with only a single contract of employment.

The Commission encountered many reports of these diverse worker-management arrangements in its hearings and in written submissions:

In the cleaning of office buildings, in some cities, owners have sub-contracted the cleaning to businesses who may perform the work with their employees or even franchise parts of the work to groups of workers.[2]

Many public and private employers have sub-contracted activities to enterprises using the same workers part-time performing identical tasks at lower benefits and wage rates.

In trucking, agriculture and construction the device of owner-operator has expanded rapidly.

Temporary work agencies have grown in white collar and specialized occupations.

Homework and sub-contracting has expanded in a number of sewing industries.[3]

---

1 See, Francoise J. Carre, Virginia duRivage, and Chris Tilly, "Piecing Together the Fragmented Workplace", Unions and Public Policy on Flexible Employment, Lawrence G. Flood, ed. (forthcoming), and Dorothy Sue Cobble, "Making Postindustrial Unionism Possible", Rutgers, October 1993.

2 The Commission was told of a large Seattle cleaning contractor which, after its low bid won the contract for a number of commercial buildings, sold the franchise to clean individual floors to a largely immigrant workforce.

These developments reflect market pressures on labor costs and the need for flexibility. They also at times result in the avoidance of social security taxes, workers' compensation, unemployment insurance and benefits such as health insurance and pensions. These arrangements often attract new immigrants, minorities and women in the labor force. As Chapter I.20 noted, the problem is how to balance employers' needs for flexibility with socially determined job protections and labor-relations statutes.

Introduction of these contingent relationships just to reduce the amount of compensation (whether wages or benefits) paid by the firm for the same amount and value of work raises serious social questions. To the extent that free collective bargaining is considered a valuable instrument for protecting the economic and personal situation of both contingent and regular workers, the predominant industrial model of unionism is somewhat ill-suited for this task, based as it is on the actions and representation of a group of employees who work together for a single employer. The NLRA framework for collective bargaining was, however, primarily designed for this kind of employment relationship and union representation.

Mr. John Sweeney, President of the SEIU, devoted a considerable part of his testimony to the human and economic situation of the contingent worker. He and other witnesses have placed the following important legal and policy issues before the Commission for its deliberations.

- What is the proper interpretation of the "community of interests between regular full-time and temporary or part-time workers for purposes of defining the "appropriate unit" within which representation decisions are made and collective bargaining carried on?

- Should the definition of "employee" be expanded (or supplemented) to bring under the NLRA workers who are labeled "contractors," but who function not as entrepreneurs but as individuals in a dependent relationship with the firm(s) for whom they work?

- Should the definition of "employer" be retailored to include the enterprise that owns the structure or finances the project on which work is being done, but utilizes a contractor to hire and manage the people who perform this work?

- Are the standard legal picture and restraints on representation, negotiation, and economic pressure suited for an employment world in which employee interests are focused much more on the sector within which they (hope to) work regularly, rather than on the specific firm for whom they happen to be working at any one time?

While the contingent worker issue was identified by labor representatives, the Commission realizes that it poses a number of important and complex questions about the application and enforcement of employment laws, such as the Fair Labor Standards Act,

3 "Labor Relations and the Contingent Work Force: Lessons from the Women's Garment Industry," a statement submitted by Jay Mazur, President, International Ladies' Garment Workers' Union, April 29, 1994.

and labor-management statutes. The Commission intends to devote more attention to this subject.

2. Construction Sector

Some forms of "contingent" employment relationships have characterized the construction industry for more than a century.

The construction industry is large and diversified, widely spread throughout the country with specialized contractors and a skilled and relatively mobile workforce.

- In June 1992 the industry was composed of 622,975 establishments with the employment of 4.6 million. The industry contained 10.5 percent of all establishments and 5.2 percent of all employment in the economy.

- In June 1992 the industry contained 524,741 firms (legal entities), 11 percent of all firms.

- Construction is an industry of small business. In June 1992 425,000 firms had less than 10 employees (for a total of 1.15 million employees) while 120 firms had more than 1,000 employees (for a total of 290,000 employees).

- The number of single proprietorships or independent contractors with no employees has expanded greatly in the past several decades. One government estimate places the increase from 687,000 in 1970 to 1.46 million in 1990.

Many branches of the construction industry reflect significant cyclical and seasonal fluctuations in employment.

The major proportion of employees work on shifting construction sites which often contain variations in employees and crafts during the course of a single project or work site. These variations relate to the branch of the industry, the size of the project, and the diverse practices of contractors under collective agreements and those operating nonunion.

The Commission heard sharply different testimony and points of view from representatives of the collective bargaining and the nonunion segments of the construction industry.[4] The Commission would welcome further information and analysis of some of the factual information in contention:

- The extent to which construction activity and employment is transitory by firm -- and how this varies by sector and occupation and trade.[5]

---

4 The Building and Construction Trades Department, AFL-CIO testified on December 15, 1993 and the Associated Builders and Contractors, Inc. on January 5, 1994. Also see the Supplemental Statement of the Building and Construction Trades Department, AFL-CIO, of March 29, 1994 and the comments of the Associated Builders and Contractors, Inc. and the comments of the Associated General Contractors of America, both dated April 29, 1994. There are numerous other contractor associations in the industry that have presented no views.

5 Data were furnished to the Commission from jointly-trusted benefit funds that give some indication of the variability of employment, at least in the unionized sector; 1) The Massachusetts Laborers Benefit fund, for instance, reports for 1993 that of 8967 employees, 5208 worked for a single contractor averaging 1033 hours. But 1780 employees worked for 2 contractors, 871 worked for 3 contractors, 482 worked for 4 contractors, 252 worked for 5 contractors, 144 for 6 contractors, and so on, with 1 person having

- The union-nonunion differences, if any, in occupational safety and health enforcement and industry and fatality rates, again identifying construction sector characteristics and job classifications.

- The union-nonunion differential, if any, in the expenditures made by construction workers and firms in the acquisition and retention of skills through apprenticeship and other training programs.

Clearly, these and other questions are crucial to the Commission's appraisal of the human and social consequences of worker-management transformations in the construction work place.

Also vital is evaluation of the difference, if any, that labor law has made in the sharp drop in collective bargaining in the construction industry. The Associated Builders and Contractors, Inc. believes that the true explanation for the decline in building trade unionism is that construction workers now prefer this group's "merit shops" to traditional union representation. The Building Trades believes that it is employers, not employees, who have effectively made the decision to deunionize this industry, a decision they have been able to implement because of the apparent misfit between the general design of the NLRA and the special features of construction employment.

Though the original Wagner Act of 1935 made no exception for construction, the NLRB quickly decided not to exercise jurisdiction over this industry (Brown and Root, 1943). The Board adopted that "hands-off" policy because it believed that the legal framework for certification and bargaining decisions by stable units of employees could not sensibly be applied to a construction industry workforce that regularly moved from job to job and employer to employer. Formation and termination of labor-management relationships were left to voluntary actions by the parties themselves, with construction unions having the instrument of picketing and boycotts through which to secure their position in the industry.

In 1947, however, the Taft-Hartley amendments to the NLRA clearly brought construction under the orbit of the statute by subjecting building trade unions to section 8(b)(4)'s new ban on secondary boycotts and jurisdictional disputes. The significance of this new legal status became clear with the Supreme Court's 1951 Denver Building Trades decision, which restricted picketing at a construction site by a union representing one building trades craft that was also being worked by other contractors and employees from other trades. (As noted earlier, Section 8(b)(4) was and is an unfair

---

reported working for 18 different contractors in a single year, 2) The National Electrical Benefit Fund reports a similar pattern of variability on a national basis. In 1992, while 63 percent of employees worked for a single contractor, 18 percent worked for two, 9 percent worked for three, 5 percent for four, 2 percent for five , and on up to those who worked for ten or more contractors in the year. 3) The Bricklayers & Trowel Trades International Pension Fund reports the following pattern of variability on a national basis. In 1992, while 58 percent of employees worked for a single contractor 23 percent worked for two, 9 percent for three, 5 percent for four, 2 percent for five, and on up to those who worked for ten or more contractors in the year.

labor practice provision with effective enforcement teeth).

When Congress returned to the NLRA in 1959, its Landrum-Griffin amendments acknowledged in two ways the special features of the construction employment relationship.[6] One was an exception to the new ban on "hot cargo" agreements, and the other was permission given to building trade unions and contractors to enter into "pre-hire" agreements, with NLRB-conducted votes reserved for after the fact, if the employees so desired. Subsequent decisions by the NLRB have, however, restricted the scope and effectiveness of both of these exceptions, at least as compared to what the building trade unions believed they had secured from the Congress in 1959.

Even more important, in the early 1970s construction firms developed and the NLRB endorsed a device called "double-breasting" (see Peter Kiewit Sons, 1977). What this label refers to is the ability of a single construction enterprise to operate one corporate entity for purposes of securing a contract on a project whose terms of employment are set by union agreements, and another corporate entity to work on nonunion projects at lower wages and benefits.

In the view of the Building and Construction Trades Department, the major issues in the legal framework of worker-management relations in the construction industry requiring change include:

- On the expiration of a pre-hire agreement, a contractor is free currently to repudiate the agreement without the obligation to bargain. (John Deklewa and Sons, 282 NLRB 1375, 1987).

- A contractor signatory to a collective bargaining agreement is free to establish a construction entity under its control that is not bound by the agreement and can bid and perform work through this entity on a non-union basis. (Peter Kiewit Sons' Company, 206 NLRB 562). The term "double breasting" or "dual shop" is used to characterize such activity.

- A general contractor and its sub-contractors or separate prime contractors working on the same job site are separate entities for purposes of the secondary boycott prohibition. (NLRB v. Denver Building and Construction Trades Council, 341 U.S. 675, 1951).

The Associated Builders and Contractors, Inc. opposes changes in the law advocated by the Building and Construction Trades Department. In particular, it opposes the "anti-dual shop" bills, the proposed change in "pre-hire" agreements, advocating that contractors be free to call for an election and escape at any time, under Section 8(f), and it opposes the changes urged in Section 8(e).

The Associated Builders and Contractors, Inc. provide a further list of matters that include the following to achieve "true

6 The garment industry has also long been characterized by contingent work relationships with its heavily immigrant and female labor force and with highly competitive manufacturing and sub-contracting arrangements. Congress expressly modified the NLRA in 1959 to give garment industry unions protection from "hot cargo" and secondary boycott provisions in cases involving "an integrated process of production in the apparel and clothing industry".

labor law reform": federal laws to prohibit labor violence; enforcement of the Beck decision; amendment or repeal of the Davis-Bacon Act; make it unlawful for a public or private employer to require a sub-contractor to adopt a labor agreement as a condition of performing work, etc.

With the preceding brief background, the Commission poses the following questions for further presentations and deliberations:

- Is the source of the decline in collective bargaining in the industry the unattractiveness of union representation to the present-day construction worker, or resistance to unionization on the part of construction employers, or the inappropriateness of the general legal framework for representation to the special features of construction employment and what importance should be attached to each?

- Which, if any, of the provisions of the NRLA (or interpretations) should be altered?

To the extent that changes are warranted in the legal treatment of construction employment under the NLRA, can some or all of these be accomplished by the NLRB (perhaps via the Board's rule-making procedure), or should these issues by reserved for Congressional action?

3. The Railway Labor Act

The special legal treatment sought for the construction industry would not be unprecedented. Indeed, the Railway Labor Act (RLA) of 1926 was this country's first national labor-management relations law, one that was extended in 1936 to embrace the fledgling airline industry. The Commission held a session on October 20, 1993 at which management and labor representatives from both these industries offered their views about the present-day operation of the RLA. They also submitted subsequent statements and comments.

The factual evidence presented to the Commission reflects changes in the economy, the development of labor laws enacted after RLA, and changes in the Administration of the RLA. While representatives of railway and airline labor and management recognize that "there is much that could be changed for the better" under the RLA, they were virtually unanimous in contending that the primary purpose of the Act has been satisfied. That is, disputes between the parties have been settled through the Act's provisions for negotiation and mediation without resort to strikes or major disruption of the national transportation system. These representatives were united in the common and repeated refrain with respect to the RLA: "if it isn't broke, don't fix it." Nonetheless, the evidence reflects that there is room for improvement.

A brief overview of the history of the Act, and highlights of the significant differences between the RLA and the National Labor Relations Act follow. These elements are critical to understanding the impact of the economic changes that have occurred since the RLA's adoption.

A. Historical Overview

Enactment of the RLA in 1926 was the product of a consensus reached by railway management and railway unions, in stark contrast to the intense labor-management and partisan political conflicts that took place over enactment of the NLRA and all later amendment efforts. The original intent of the RLA was to provide mechanisms that would guarantee the continuity of

interstate transportation service in the event of labor conflict. The unique provisions of the RLA were deemed necessary due to the crucial role of rail transportation in the free flow of interstate commerce.

The RLA created different mechanisms to achieve this goal, based on whether the dispute was a "major" dispute or a "minor" dispute. (These disputes are roughly analogous to disputes over collective agreements (major) and grievances (minor)). If the parties are unable to resolve a "major" dispute through direct negotiation, the dispute is subject to mandatory mediation through the National Mediation Board. If mediation efforts do not succeed, the parties have the option of proceeding to arbitration. If either party rejects the offer of arbitration, there is a 30 day status quo period, during which time the President may appoint an Emergency Board. Emergency Boards have been invoked 224 times in the last 67 years,[7] 191 times in the railroad industry and 33 times in the airline industry. Congress has been called upon 17 times to extend the status quo, to impose a settlement, or to provide for final and binding arbitration in the railroad industry.

In exchange for labor giving up the right to strike over "minor" disputes, these disputes are subject to mandatory arbitration. The government bears the expense of railroad arbitrations. The budget for grievance arbitration averaged $2.5 million a year for the period 1983 to 1992, or an average cost of $264 per grievance closed. Arbitrators in the airline industry are appointed to System Boards of Adjustment: each party shares the costs of the neutral arbitrator on the System Board.

The RLA was amended in 1981 to establish a special procedure for publicly funded and operated rail commuter service, including Amtrak. The procedures provide not only for a emergency board to report the facts (including recommendations), but should that report not settle the dispute, another emergency board may be created requiring each side to submit final and binding offers for settlement. This emergency board shall select "the most reasonable offer" and prescribed penalties are to apply to the party refusing to accept the award.

B. Differences Between the RLA and the NLRA

The railroad and airline industries under the RLA differ in a number of respects from other private sectors governed by the NLRA.

- Enactment and amendment of the RLA, and appointment of members to the National Mediation Board, has regularly been the product of consultation and consensus. Enactment and revisions of the NLRA and appointments to the National Labor Relations Board have been characterized by acrimony and conflict.

- Coverage under the RLA is limited to two major industries, railroads and airlines. The NLRA covers all other private industries, with specified exceptions.

7 In addition, a presidential commission was appointed under Executive Order 10891 to consider a series of work rules and manning issues. Report of the Presidential Railroad Commission, Washington, DC., February, 1962.

- Representation under the RLA is based on the majority vote of all employees eligible to vote through a mail-in ballot. Representation under the NLRA is based on the majority vote of those who do vote, almost always in elections conducted at the work place.

- Employees under the RLA are represented for purposes of collective bargaining in nation-wide "class or craft" units for a single employer. Employees under the NLRA are placed in bargaining units that rest on the NLRB's judgment of their "community of interests," typically on a site by site basis.

- Employees in the two industries covered by the RLA are almost entirely represented by labor unions and governed by collective bargaining agreements. (Total employment in railroads in 1992 was 275,000, down from 1.2 million in 1950; in airlines, employment has risen from 76,000 to 540,000.)

- Arbitration over minor disputes is mandatory under the RLA. Arbitration is a negotiable and occasionally contentious issue under the NLRA.

- Secondary picketing during a labor dispute is permissible under the RLA; it is prohibited in industries covered by the NLRA.

- Under the NLRA, collective bargaining agreements typically have specific termination dates. Contracts do not expire, as such, under the RLA. The contractual terms continue until Section 6 notices are filed and negotiations take place to amend, in whole, or in part, existing contracts.
- Under the RLA, the parties cannot seek self-help, i.e., strike or lock-out, until they are specifically released by the NMB, which in most instances does not occur for many months or years. Under the NLRA, parties can engage in self help, if they follow the notice requirements provided in the NLRA and in the collective bargaining agreement.

C. The Changing Economy

The changing environment depicted in Chapter I has had a distinctive impact on the railroad and airline industries.

- From the RLA's inception until the end of the 1970s, the two industries subject to the Act were highly regulated. Deregulation (of airlines in 1978 and railroads in 1980) had two major effects on the RLA industries. First, deregulation exposed the two industries to increased price competition, which resulted in downsizing or elimination of a number of employers. Second, those firms that survived found themselves competing against other firms covered by the RLA as well as some covered by the NLRA.

- In the 1930s, a railroad strike had great potential to shut down the entire country. A national or regional railroad strike rapidly affected many other industries that depended upon the railroads for essential transportation services. A strike could soon become a serious threat to the nation's economy and welfare. Today, the impact of a railroad or airline strike is questionable. On the one hand, adoption of "just in time" inventory management systems, such as those used by

the major auto companies, risks shutdown of manufacturing operations within 24 to 72 hours of a rail strike. Moreover, in some parts of rural America, just as in the 1930s, there are no other viable freight options besides railroads. On the other hand, in most settings, the external impact of a strike has been sharply diluted. Due to the fractionalized nature of both train and air services, there generally are other transportation methods available. In 1926 railroads carried 80 percent of inter-city freight. Today, they carry under 30 percent.

- In the 1930s, the role of railroads (if not airlines) was unique in that no other industry had such an impact on the overall economy. Strikes in other industries principally affected the companies involved, their employees, customers and suppliers. This statement is no longer true. Other industries, e.g., communication, have as great or greater impact on the economy as a whole as did the railroads six decades ago.

- In the 1930s, coverage under the Act was clearcut. Firms providing similar services operated under the same rules. Today, due to the complexities of corporate structuring and the combinations of services provided, the line between an RLA covered and non-covered firm has become sometimes ambiguous. (For example, Federal Express is covered by the RLA while its competitor, United Parcel Service, is covered by the NLRA. The growth of inter-model transportation further complicates the separation.) As in other industries, the line between employer and employee is no longer clearcut. Not only has changing organization of work created new roles and blurred distinctions between managers and employees, but employee ownership and participation on corporate boards has become a regular response to financially troubled airlines.

- Administration of the RLA has become characterized by increased governmental involvement and excessive delay.

Over the last decade, average time taken to grant or dismiss certification petitions has ranged as high as 175 days for airlines and 130 days for railroads. During that same period, the number of RLA arbitration cases has reached as high as 14,000 in a single year -- an overall growth of ten percent during a period when employment has dropped by 30 percent.

-- In 1992 there were a total of 11,708 pending cases in all boards to hear minor disputes. In 1992 there were 7,755 cases docketed and 6,951 case closed. The National Mediation Board reports that "virtually all cases submitted to the National Railroad Adjustment Board have required the services of neutral arbitrators".

-- There is increasing litigation over what constitutes a "major" or a "minor" dispute, producing considerable delay before the cases can even make their way into the proper dispute system.

-- Average time spent in mediation of "major" disputes trebled over the last decade -- now taking three years after the parties had already engaged in direct bargaining.

-- Out of the 17 times that Congress has had to intervene in rail disputes, five occurred in the last ten years, giving Congress a role it does not relish. As Congressman Swift, chairman of the subcommittee that had handled the last two national rail

shutdowns, noted in his written statement to the Commission:

> "Congress is not a body mandated or temporarily suited to interfere with complex labor-management disputes, some of which require the experts in the field to negotiate for 4 years and still they do not reach agreement. Yet, it comes to this body and we are somehow supposed to...resolve what the experts cannot resolve in years."

D. The Parties' Recommendations

As noted at the outset, representatives of both labor and management in the major railroad and airline firms concurred in their judgment that, by any measure, "RLA labor relations are in better working order than labor relations in the NLRA sector, the Federal Labor Relations Act sector, or any of the state or local public or private labor relations law sectors." For this reason, these constituencies stated emphatically to the Commission that they wanted their labor relations to be governed by the RLA, not placed under the NLRA. They further agree that "there is no compelling need to seek changes in the RLA and to risk the unforeseeable consequences that might result. Any defects in the system are attributable to its administration, not its statutory design."

In contrast, the group of smaller Regional Railroads of America, a coalition of 117 class II and Class III carriers with an aggregate of 10,000 employees, as well as some of the transit systems that have rail operations under the RLA, expressed a need for change. The problems unique to small railroads are highlighted by the class and craft distinctions which prevent the parties from cross-utilizing employees and can result in separate units comprised of just two or three people. The regional railroads claim that the resulting cumbersome negotiating process prevents their smaller lines from reaching effectively to today's competitive marketplace, and that a collective bargaining process more like that available in the traditional industry contracts governed by the NLRA could be more effective.

While recommendations for change were sparse, the following suggestions were made. Some parties called for the use of mandatory arbitration of major disputes to eliminate the need for emergency boards. Others called for a prohibition against permanent striker replacement to achieve the same results. Some advocated use of the NLRA model that counts only votes that are actually cast, rather than counting abstentions as a "no" vote. Some recommendations were made to revise RLA definitions so as to reduce the amount of litigation over who is covered and/or what constitutes a "major" or "minor" dispute.[8]

Summary

This initial factual inquiry has raised a number of important questions about the operation of the RLA. For example:

- Does interstate transportation still require all of the distinctive provisions of the RLA? Would the parties' interests be better served by utilizing (perhaps modified) provisions that now exist under the NLRA?

8 See National Research Council, Transportation Research Board, Compensating Injured Railroad Workers Under the Federal Employer Liability Act, 1994.

- If the special provisions of the RLA are still needed, are the right industries covered? Specifically, are there other industries that should today be brought within its coverage, and are there segments of the railroad and/or airline industry that need to be exempt from the RLA? How is the experience with commuter railroads to be evaluated? Even if the right industries are covered, have changes in the country's economic structure made the RLA's coverage tests obsolete?

- Has the administration of the RLA become so burdensome that it is counterproductive?

- Should the Federal Government continue to pay for grievance arbitration handling pursuant to Railroad Adjustment Boards and/or Public Law Boards under the RLA?

The Commission is mindful of the labor and management representatives who testified that the RLA was just fine: "If it isn't broke, don't fix it!" There was also, though, testimony to the contrary conclusion including the concerns voiced by members of Congress. While the Commission is respectful of some key parties' evident wish to be left alone, its stated mission requires that it at least consider these questions. The Commission is aware that some of the problem areas can be corrected under the current RLA regime (for example, by the National Mediation Board changing its procedures for resolving disputes more expeditiously and by more aggressive and effective mediation).

Before the Commission makes any recommendations, it will explore these questions and explore whether the problems can and will be addressed by the parties and the NMB in the context of the existing statutory framework.