

"Hot Topics"

Future Worker Management

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BEFORE THE

COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS

November 8, 1993

Mr. Chairman and Members of the Commission.

I want to thank you for this opportunity to present the position of the AFL-CIO on the issues before this Commission.

Three questions have been put to the Commission. Those questions cannot be answered, however, without a clear understanding of what our national labor policy is and what it should be for the Twenty First Century. That is therefore where I wish to begin.

The essence of the current national labor policy is to assure working men and women full freedom of association and to encourage the practice and procedure of collective bargaining so that workers, acting through representatives of their own choosing, can jointly determine the terms and conditions of their employment. This is, I might add, the policy not only of the United States but of every other industrialized country as well. Here and abroad that policy takes concrete form in free trade unions as the only institutions through which workers have sufficient power and independence to deal with their employers on an equal footing.

The collective bargaining system has served this nation, and its working people, well. It built the middle class by

establishing labor standards which are the foundation for the world's broadest and most vibrant market economy. All workers -- union and non-union alike -- have been the beneficiaries.

More recently, the collective bargaining system has proven its capacity to respond to the new challenges posed by global competition and technological change. In industry after industry -- including the steel, auto, tire, and telecommunications industries to name just a few -- working men and women, acting through their elected representatives, have in many companies joined together with their employers to fundamentally transform work, work organization and worker-management relations in ways that were unimaginable a generation ago and that advance the interests of workers and the firms for which they work.

Notwithstanding all this, there are those in our society who argue that unions and collective bargaining have outlived their usefulness and that a "free market" labor policy better serves our national interest. They contend that sweatshop conditions are now a thing of the past. In our new age of "human resource management," they say, employers -- guided by the invisible hand of the market -- can be relied upon to offer their employees fair compensation and decent working conditions.

This argument is not new; in every age opponents of trade unionism have claimed that unions were needed only in some prior era. As in the past, proponents of this argument misunderstand both the realities of the workplace and the operation of markets.

For millions of Americans, the work place is still a heartless environment. Statistics tell part of the story. There are today over 14 million, full-time, year-round workers -- one fifth of all such workers -- whose earnings are below the poverty level for a family of four.^{1/} There are another 10 million workers who seek year-round, full-time employment and whose earnings are below the poverty level.^{2/} There are 17 million full-time workers who lack health insurance,^{3/} and 39 million full-time workers without pension coverage.^{4/} And for women and persons of color the situation is particularly grim: for example, one in four full-time female workers, one in four full-time black workers, and one in three full-time Hispanic workers earn below the poverty level.^{5/}

It is not just with regard to wages that the market leaves many workers unprotected. Each year 2,000,000 "permanent" employees are fired and have no recourse.^{6/} Each year, at least

^{1/} United States Department of Commerce, Economics and Statistics Administration, Bureau of the Census, Workers With Low Earnings: 1964 to 1990 (1992).

^{2/}Id.

^{3/}L. Mishel & J. Bernstein, The State of Working America, 1992-93 at 402 (1993).

^{4/} Estimate from Employee Benefits Supplement to the 1988 Current Population Survey.

^{5/}U.S. Department of Commerce, Economics and Statistics Administration, Bureau of the Census, Workers With Low Earnings: 1964 to 1990 (1992).

^{6/}Testimony of Professor Theodore St. Antoine, October 13, 1993, Transcript pp. 232-33.

60,000 workers die from occupational injuries or diseases, another 60,000 workers are permanently disabled, and 6,000,000 workers are injured in occupational accidents.^{7/} And the National Institute of Occupational Safety and Health estimates that upwards of 25,000,000 workers are exposed to toxic chemicals in their workplaces.^{8/}

Behind these numbers are our fellow citizens' lives. To those who believe that sweatshops are no more, I say: let them go to Hamlet, North Carolina and talk to the surviving poultry workers; let them go to Carthage, Mississippi and talk to the catfish workers; let them go to the fields from coast to coast and talk to the migrant farm workers; or let them go to any city or town in this country and talk to the janitors, the orderlies, the garment workers, and the millions of other workers who still face conditions that are unconscionable in human terms. Vast number of workers today still need unions for the same elementary reason that unions have been needed for generations: to combat working conditions that deny workers a decent life and rob them of their dignity.

These working people are the victims of the free market. In market terms, workers are merely another factor of production -- "human capital" they are called. But in a just society, each worker is a human being with basic human needs. The market

^{7/}Bureau of Labor Statistics, Annual Survey of Injuries and Illnesses; National Council on Safety, Accident Facts.

^{8/}NIOSH, National Occupational Exposure Survey

cannot be relied upon to meet those needs or protect those rights; that is a role of free trade unions.

Of course, not all working men and women fare poorly in the market in strictly economic terms; some do quite well. But all workers have needs that the market cannot meet. For the market is not an agent for achieving democratic workplaces.

At its very best, the market produces benign working conditions autocratically imposed. But there is a world of difference between an industrial dictatorship, however benevolent, and an industrial democracy. In a democratic society, democratic values cannot end at the plant gate or at the office door. Rather, in such a society all citizens are entitled, as a matter of right, to participate in decisions which critically affect any significant aspect of their lives, not just decisions affecting their non-working lives. The market cannot secure that right for workers; unions can and do.

Workplace democracy is not simply a good for working people; it is integral to the national interest in a healthy political democracy. Workers who participate in decision-making in the economic sphere can be counted on to participate actively in the political sphere as well; workers who are denied responsibility for their workplace conditions cannot. It is thus not surprising that vital labor movements nourish political democracy, as the recent experience in Central and Eastern Europe, the former Soviet Union, Chile and South Africa all attest. And where

workplace democracy is extinguished -- where workers are left unrepresented -- political democracy is in jeopardy as well.

This brings me to a third notion of labor policy that is advocated today. There are some who profess to embrace the centrality of workplace democracy but claim that "the jury is still out" as to its appropriate institutional form. These theorists grant that there is still a role for "traditional unions" to deal with "traditional management." But just as Marx predicted that the state would wither away leaving true socialism, this view holds that workplace democracy can be achieved without employee organization and with management leading the way.

This too is an old canard masking as a new insight. It was advanced by opponents of the Wagner Act in the 1930's who claimed that worker representation could be achieved through the American Plan of shop committees created and maintained by employers. This view was wrong then and it is wrong now.

By definition, employee participation or empowerment is not something that can be done "to" workers; rather, effective worker participation requires that workers have a full measure of independent power. We know from long experience what management-created and management-controlled systems of "employee participation" are like: they necessarily reinforce existing hierarchies and leave management's basic prerogatives unchanged.

Moreover, such management-led systems inevitably are confined within narrow bounds. "Participatory management" -- as

it is revealingly called -- has as its aim the participation of front-line employees in improving the quality of the employer's product and the efficiency of the employer's operations. Towards that end, practitioners of this style of management create various committees and teams which are granted varying degrees of responsibility.

But as several of these practitioners have candidly admitted to the Commission, they have no interest in allowing their employees to participate in determining their terms and conditions of employment and they have no use for any independent employee voice. These employers remain committed to autocracy, however benevolent, and hostile to workplace democracy, however productive. Indeed, they resist mightily when democracy -- in the form of a labor union -- rears its head in "their" workplaces.

Participatory management can, of course, produce short-term benefits for workers and for firms which previously followed a Tayloristic management system. Even as to this, it is noteworthy that Jerome Rosow, the President of the independent Work in America Institute, testified before this Commission that on a pure cost basis "joint programs with the union are about 30% more efficient than programs without the union."^{2/}

Moreover, over the long run, management-created and management-controlled systems of employee participation are unlikely to elicit a higher level of commitment from, or

^{2/}Transcript of September 15, 1993 at 192.

performance by, the workforce. Senator Wagner said it best: "cooperation is given only equals."^{10/} Where that is lacking, employee participation programs -- from the American Plan of the 1920's to the quality circle movement of more recent times -- have proven to be short-lived fads. Indeed, studies have found that as many as three-quarters of such programs die within five years.^{11/}

Most importantly, whatever the value that employers may derive from these new structures they have created and however long they may last, there can be no doubt that these systems do not satisfy the deeper needs of workers or forward the full range of our national interests. Working men and women seek the right to participate in determining not only how their work is done but also how the rewards of the work are distributed and in the host of other issues that affect their working lives. That is what workplace democracy is all about. It is a current and universal need of working people. And by definition, employer-created and employer-controlled systems of participation cannot provide workers with such a right.

None of this is meant to say, of course, that the collective bargaining system is without blemish. Winston Churchill's observation about political democracy applies equally to

^{10/}Address to the New York State Federation of Labor, 1928, quoted in Barenberg, The Political Economy of the Wagner Act: Power, Symbol and Workplace Cooperation, 106 HARV. L. REV. 1379 (1993).

^{11/}Goodman, Realities of Improving the Quality of Work Life, LABOR LAW JOURNAL August, 1980, at 487-94.

workplace democracy: "No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of Government except for all the other forms that have been tried from time to time."^{12/} But given that democracy is, in Churchill's terms, the "least worst" form of Government, it should remain the aim of our national labor policy.

In principle, then, we have a sound labor policy for achieving the ends of employee participation, private dispute resolution and labor-management cooperation -- the goals stressed in this Commission's charter. That policy is embodied in the National Labor Relations Act. Against that background, the central task for this Commission is to determine whether the labor laws are adequate to effectuate that policy and, if not, to recommend changes in those laws. It is to the question of the adequacy of the law on the books that I wish to now turn.

Let me state at the outset that it is not my intent today to set forth detailed proposals for amending the labor laws. In short order the AFL-CIO will present our specific suggestions to you. But the details can be addressed only after it is understood how the law, in fact, operates today and how it should operate. I therefore wish to discuss this morning three basic areas in which, in our view, the law has proved an abject failure and to outline the principles that must underlie reform of the law.

^{12/} Address to the House of Commons, November 11, 1947, quoted in Oxford Dictionary of Quotations at 150 (1979).

First, and most fundamentally, the law does not, in practice, assure workers full freedom of association.

Almost sixty years after Congress set about to encourage collective bargaining as a means of establishing terms and conditions of employment, only about 15% of private sector workers are covered by a labor contract. That is a smaller percentage of the private sector than was organized in 1935, prior to the passage of the Act.^{13/}

This relatively low level of union membership does not, standing alone, necessarily prove a failure of law; the memberships level in theory could be -- and some argue is -- explained by a lack of desire for organization on the part of workers. But the facts disprove this hypothesis. The experience in the public sector makes clear that when workers are given a free and uncoerced choice, they continue to opt for union representation.

Thirty years ago, the public sector in the United States was the leading edge of what then comprised the "non-union sector." Public employees were not covered by the National Labor Relations Act, they had no bargaining rights under state law, and the public sector was essentially "union-free."

Over the past three decades, 36 states have enacted laws allowing some or all of their public employees to organize and bargain collectively. Of the workers covered by those laws, 6,650,000 now belong to unions and over 7.8 million are covered

^{13/}cite

by collective bargaining agreements. That means that 60% of those public employees who have the right to bargaining are exercising that right today.^{14/}

Public employees are not a breed apart from employees who work in the private sector. Public and private employees are raised together in the same way, go to the same schools, and live in the same communities. Public and private employees do the same kinds of work: there are publicly-employed janitors, drivers, secretaries, nurses and the like just as there are in the private sector. The public sector experience thus belies the claim that workers today no longer want labor unions and proves that the continued existence of a so-called "non-union sector" is not an inevitable fact of life.

The public sector experience also goes far to explain the failure of our national labor laws. On paper, the public and private sector legal systems are quite similar; indeed most public sector labor laws are modeled after the National Labor Relations Act. But in practice there is a world of difference between the two systems.

In the public sector, once a state grants its employees the right to organize, the state almost invariably respects that right and does not seek to prevent its exercise. There are a handful of private employers that do likewise -- that agree to a position of neutrality with respect to whether their employees

^{14/}Public Employee Department, AFL-CIO, Public Employees Bargain for Excellence: A Compendium of State Public Sector Labor Relations Laws 1993.

desire representation. But the norm in the private sector is for the employer to exercise its economic power over its employees to override the exercise of the organizational right. At the same time, public sector workers understand that if they opt to organize their employer will honor that choice and will work with their representative to arrive at a mutually satisfactory agreement; in the private sector the opposite is true.

The private sector employer's campaign to discourage workers from organizing often begins even before the employer has workers to discourage. It has become quite common for employers to select sites for new facilities based at least in part upon the perceived propensity of the labor force to join a union. It is even more common for an employer to make individual hiring decisions on that same basis, after carefully screening a large pool of applicants using intrusive psychological testing. And upon entering the door as a new employee, workers are handed a personnel manual openly declaring the employer's anti-union "philosophy."

All this is merely the prelude to the orchestrated anti-union campaign which begins when an employer learns that some of "his" employees are bold enough to exercise their right of self-organization. The Wagner Act created a system to resolve what it termed "questions of representation" -- that is, to ascertain employees' desires with respect to representation. But that system now operates to prevent such questions from arising and to suppress the desire for representation should it surface.

What happens during an organizing campaign is, at bottom, quite simple: the employer exerts its economic power over its employees in order to, in the words of the former union buster Martin Levitt, "get hold" of "the collective spirit" and "poison it, choke it, bludgeon it ... anything to be sure it would never blossom into a united work force."^{15/} By word and by deed, the employer sounds a single theme: "I will not tolerate a union at 'my' workplace and I have the power to defeat it. Those disloyal enough to form a union will be punished." This message is communicated -- and the employer's power asserted -- in a myriad of ways.

One element of the anti-union campaign is to isolate and ostracize the union and its supporters. The union organizer is excluded from company premises; even property that is open to all other members of the public, like a cafeteria or a parking lot, are closed to the organizer. Union literature, pins and T-shirts are sometimes banned; union talk silenced. Organizing is thus turned into a suspect activity that must be conducted only in the shadows, and union activists and supporters are made into workplace pariahs.

The second phase of the anti-union campaign involves the exercise of supervisory authority to change the tone of the workplace or, perhaps, certain parts of the workplace. Managers and first-line supervisors are taught that a worker's vote for representation is proof of a management failure and will count on

^{15/} M. Levitt, Confessions of a Union Buster at 2 (1993).

the supervisor's record as such. Union supporters thus become the enemy: they are more closely watched and more frequently questioned. What once was condoned, now is condemned; what once was friendly now is hostile; what once was relaxed now is tense. Only those individuals or groups who renounce the organizing effort are spared.

The third element of the anti-union campaign is the propaganda war. Anti-union leaflets are distributed on a regular basis; in some campaigns, the employer distributes upwards of 50 or more separate leaflets, sometimes as often as three times a day. Posters are displayed throughout the worksite -- huge pictures of and blown-up newspaper articles about shut-down plants, and signs like "Wear the union label, UNEMPLOYED." One company even went so far as to line the entrance to the workplace with gravestones each with the name of a unionized company which had closed.

As part of this propaganda campaign, captive audience meetings are scheduled, sometimes daily. All workers must attend these meetings except for union activists; they are often prohibited from attending. These meetings feature speech after speech skillfully crafted to take advantage of the employer's superior economic position. Overt threats are not necessarily part of the script; it is often enough for the employer to discuss what "could" happen to the workers' wages and benefits, and to their jobs, if they elect to exercise their statutory rights. To underscore that this is not just idle speculation,

top management of the company is brought in -- often from corporate headquarters -- to deliver these messages.

To supplement the captive audience meetings, individual workers believed to be undecided are called in for one-on-one meetings between a supervisor or higher management official. These meetings are designed to exploit the individual worker's vulnerabilities -- identified through a systematic employer intelligence gathering operation.

This entire anti-union campaign, it should be emphasized, has nothing to do with a fair debate; indeed, I know of no instance in which an employer has ever agreed to debate a union representative face-to-face in front of the employees. Nor do these anti-union campaigns have anything to do with improving any of the ends to which employers profess allegiance such as productivity, efficiency, quality or labor-management cooperation. To the contrary, during the anti-union campaign all these lofty goals are subordinated to the employer's all-consuming drive to prevent his workers from organizing.

It is also critical to keep in mind that the careful, well-counseled employer can do all this more-or-less within the limits of the law through veiled threats and acts of discrimination which cannot be proven to be unlawfully motivated. Only the clumsy employer -- or the calculating employer who concludes, after examining the Act's meager remedies, that wrongdoing does pay -- will wage an anti-union campaign in blatant disregard of

the law with more overt threats and more blatant acts of discrimination and retaliation.

There is a dispute among academics about how often the latter type of unlawful campaign occurs. Even the conservatives in this debate -- the apologists who claim that the Act works for employees -- acknowledge that in one-third of all representation election campaigns, workers are unlawfully discharged.^{16/} That estimate -- which, interestingly enough, closely parallels the results of a recent study of 261 organizing campaigns^{17/} -- reveals that the Act is powerless against endemic employer lawlessness.

But to focus on these illegalities (as measured by the number of complaints brought to or the number of remedies obtained by the Labor Board) obscures the far more fundamental point: with the possible exception of very small businesses, it is quite the norm for employers to take it upon themselves to use their control of the workplace to make sure their employees do not exercise their right of self-organization. Indeed, the study of organizing campaigns to which I just referred found intense employer opposition 75% of the time.

^{16/}Lalonde & Meltzer, Hard Times for Unions: Another Look at the Significance of Employer Illegalities, 58 U. CHI. L. REV. 953, 994 (1991).

^{17/}Kate Bronfenbrenner, Seeds of Resurgence: Successful Union Strategies for Winning Certification Elections and First Contracts in the 1980's and Beyond (unpublished Ph.D. dissertation, Cornell University, 1993).

While there is some debate among academics on the exact impact of this virulent anti-unionism, workers understand the matter perfectly. Workers are not fools. They know who the employer is, what his powers are, and what he is saying. They know too, who pays their wages; what life would be like working in an unremittingly hostile plant or office; and what life would be like without a job. Inevitably, when the anti-union campaign is over, the workers must take these factors into account in deciding whether to exercise their statutory right to organize.

The impact of the employer's conduct is apparent from the data. A recent study of every public sector representation election in 1991 and 1992 -- 1,911 in all -- found that in 85% of the elections the workers voted for representation;^{18/} in the private sector the comparable figure is 49%.^{19/} Even more telling is the fact that in larger private sector elections, in which the anti-union campaign is more elaborate and intense, workers vote for representation in only 20% of the elections. Indeed, what is truly remarkable is that after all they go through, there are still 100,000 private sector workers who each year are willing to stick their necks out to form a union.

If the Commission has any doubt on this score -- any doubt that the purpose and the effect of anti-union campaigns in to

^{18/} K. Bronfenbrenner & T. Juravich, The Current State of Organizing in the Public Sector (unpublished, 1993).

^{19/} This figure has been calculated from computer records supplied to the Industrial Union Department, AFL-CIO by the National Labor Relations Board.

suppress "the collective spirit" -- I would urge you to visit workplaces in the midst of an organizing effort. See for yourselves what is done; hear what is said; experience at first-hand the raw exercise of economic power. And ask any employer with the audacity to claim that these tactics have no effect why the employer goes to such great pains, and expends such large sums, to mount the anti-union effort.

The impact of anti-union campaigns is felt even beyond the particular workplaces in which they occur; that impact reverberates throughout the workforce. Given the intensity of employer opposition, workers today cannot organize without their own lawyers to fight the legal battles and their own publicists to fight the propaganda war. That means organizing becomes inordinately expensive -- beyond the means of workers at an individual workplace and taxing on the resources available to the already-organized. The net effect is that in any given year just two-tenths of one percent of organized workers have the opportunity even to vote as to whether they wish union representation.

In every other context of which I am aware, when the law grants workers a statutory right it is understood that workers are to be free to exercise the right without interference. It would be inconceivable, for example, to allow employers to run orchestrated campaigns to stop minority employees from asserting their right to equal treatment, or to discourage employees from exercising their newly-won right to parental leave. Yet NLRA

rights are somehow understood to co-exist with an employer privilege to stop employees from exercising their rights -- a privilege broad enough and strong enough to swallow up the rights of the employees. Indeed, an entire industry has grown up in this country whose sole business is to prevent workers from exercising their right to organize.

The time has come to call anti-unionism what it is: an attack on working people and on their freedom. No less than racism or sexism, anti-unionism eats at the fabric of our national life.

The time likewise has come to make the law serve its purposes -- to protect employee freedom of association through legal rules and remedies that are up to the task and not just through pious declarations that employers can and do ignore. The starting point must be that employers have no business meddling in the decision by workers as to whether to form a labor organization. That is a decision for working people to make for themselves, just as the employer has full freedom to decide on its representatives. Workers do not need employers to participate in the organizational decision; workers are fully capable of making that decision themselves, after considering all the relevant considerations, without any "help" from the employer.

There is a second, equal basic respect in which our current laws are failing to achieve their ends and in which change is sorely needed: the rules governing the bargaining process must

be reformed so that collective bargaining can once again serve as a method through which workers participate on an equal basis in formulating the terms and conditions of their employment.

In an ideal world, perhaps, collective bargaining might function as an exercise in disinterested reason leading to a perfect understanding. In such a world, the relative power of the parties -- other than their powers of persuasion would be of no moment. But in the real world in which we live "economic force" is "a prime motive power for agreements in free collective bargaining" as the Supreme Court has stated.^{20/} And in such a world, the rules that control the economic weapons available to the parties are of the essence in determining the outcome of the bargaining process and the opportunity of bargaining to achieve real accord.

As the result of sixty years of judicial interpretation and two rounds of Congressional amendments, those rules now so aggrandize employer bargaining power and so diminish employee power as to undermine the collective bargaining system. Employers are left free to do as they will; workers are constrained by an increasingly elaborate set of rules.

The law allows employers what is termed the "free play of economic force." If the employer is unable to secure an agreement to its satisfaction, the employer can unilaterally impose the terms proposed at the bargaining table. Alternatively, the employer can lock out his employees and, as

^{20/}Labor Board v. Insurance Agents, 361 U.S. 477, 489 (1960).

the law is currently interpreted, replace the employees until such time as they succumb to the employer's demands. Or the employer may choose to go through the motions of reaching an agreement and then effectively escape the agreement by transferring the work covered by the agreement to another location, another employer, or even to another legal entity created by the employer -- euphemistically known as a "double breast."

Employees, on the other hand, are anything but free to exercise their economic force. On paper the law says that employees have the right to "engage in concerted activity for ... mutual aid or protection." But the Labor Board and the courts have held that employees are not protected when they engage in partial strikes, in intermittent strikes or in various types of "in-plant" activities.

Employees enjoy even less freedom when they seek to go beyond their own workplace and enlist the support of others in their cause. In 1947, Congress, over President Truman's veto, enacted the Taft-Hartley Act which, among other things, makes it illegal for employees engaged in a labor dispute to make common cause with workers at other workplaces in mutual defense; such appeals for support are now condemned as secondary boycotts. And in 1959 Congress enacted the Landrum-Griffin Act which tightened Taft-Hartley's provisions and added a new provision which makes it unlawful for a union even to negotiate an agreement protecting its members from having to handle "hot cargo."

As a result of these decisions and amendments, essentially the only method open to employees to protect themselves is a full strike. But under recent decisions, union members who decide to strike may not require all members to abide by the group's decision, even where each member agreed to such a requirement in joining the union. Moreover, under the Supreme Court's Mackay Radio decision, an employer may, in effect, dismiss striking workers and hire new employees as "permanent" replacements. Thus, for un-skilled and semi-skilled workers -- and all other employed in loose labor markets -- the only economic weapon available to them is a knife pointed inward.

The bottom line is this: for those workers most in need of the law's protections there is no longer a right to collective bargaining but only a right to collective begging.

To be sure, many employers -- especially those with long-standing bargaining relationships -- have come to realize the benefits of dealing with their employees through a representative of the employees own choosing. These employers understand collective bargaining as an ongoing and flexible process to address mutual needs and concerns and these employers willingly enter into good faith negotiations in a sincere effort to reach an agreement. But even in these situations, the inequality of power built into the law looms in the background. In recent annual surveys of employers with impending negotiations, the Bureau of National Affairs has repeatedly found that upwards of 80% are committed to, or are contemplating, permanently replacing

their workers if the employers are unable to reach an agreement to their satisfaction.^{21/}

Moreover, there are many more employers who want nothing to do with the collective bargaining process and who enter negotiations seeking discord, not accord. They view the bargaining process not as a means of determining what the agreed-upon terms of employment will be but as a continuation of their campaign to prevent their workers from enjoying any agreement or, indeed, any representation at all. Their hope is to wear down union supporters and undermine union support through a long and drawn-out process of so-called "bargaining" or, if necessary, provoke a strike and replace the "disloyal" employees with a more pliant workforce.

This approach is particularly prevalent when a union is initially organized and seeks to negotiate a first contract. Having failed in its effort to thwart the organizing drive, the employer typically will delay the start of negotiations by contesting the results of the election before the NLRB and the courts. When finally compelled to bargain these employers reject the possibility of any economic improvements -- even improvements granted by the employer to workers outside the bargaining unit. Proposals for anti-discrimination clauses, occupational safety and health clauses, and grievance procedures are likewise peremptorily dismissed; what the employers propose instead are provisions to preserve all management prerogatives with respect

^{21/}BNA Employee Relations Weekly, Oct. 18, 1993, at 1145.

to hiring, firing, transfers, promotions, work assignments, training and the like. No room is left for compromise.

Once again, the numbers tell the story. Over the past two decades, seven separate studies have been done of negotiations for first labor agreements. Each of those studies has found that between 20% and 40% of the time, workers who select a bargaining representative are never able to secure a first contract. The most recent study, by the AFL-CIO and its Industrial Union Department, of all union election victories in 1987, finds that in one out of three instances, no agreement was ever reached and that in one-fourth of the remaining cases a second agreement was not reached. The net effect is that more than half of the time, workers who vote for representation have no contract five years later.^{22/}

As always, the bare numbers are inadequate to convey the meaning of these events. At its hearing in East Lansing, this Commission heard from an individual who identified himself only as "L.M." because he was afraid that if he gave his full name his employer might find out that he had testified and fire him. L.M. works in a food processing plant in Detroit where he earns \$6.80 an hour; that, he testified, makes him one of the highest paid workers in the plant. He has no health insurance or pension. He cannot even afford a phone or a car and walks to work each day.

^{22/} Pavy, Winning NLRB Elections and Establishing Stable Collective Bargaining Relationships With Employers (unpublished paper, presented to the AFL-CIO/Cornell University Conference on Labor Law Reform, October 25, 1993).

L.M. and his fellow workers voted for union representation in April, 1992; eighteen months later they still have no contract. Bargaining has gone nowhere; in typical fashion the employer refuses any economic improvements (even though no wage increases have been granted since the union was organized) and insists on such provisions as advisory arbitration and an absolute right to subcontract the employees' work.

L.M. closed his testimony with these words:

[M]e and my fellow workers, we need our jobs. We don't want to strike, we don't want to walk out. We have to have our jobs. ... But as a result the people in the shop, they're saying that the union is giving up, the union ain't doing nothing for them. And it ain't the union that's given up and doing nothing for them it's the system that's not doing nothing for them. The system has to come out and do something, because we're all stuck. If we can't even get a first contract, we're in big trouble, very big trouble. So we have to have some outside help somewhere.

L.M. could not be more right. Collective bargaining should be a right which working men and women enjoy rather than a privilege which exists only when, and for so long as, the employer chooses to bargain. Legal changes are needed to redress the imbalance of bargaining power created by present law. While the law may not be able to assure that, in each negotiation, labor and management enjoy equal bargaining power, there is no excuse for a law which systematically tips the balance of power in the employers' favor. And legal changes are also needed to prevent employers from using the negotiating process as a means of contesting the workers' choice of a representative.

If the Commission were to address the two broad issues I have discussed today -- the representation issue and the

bargaining issue -- your recommendations would go far towards enabling the National Labor Relations Act to deliver upon its promises to the workers covered by that Act. But there is a third fundamental respect in which the law is failing today and a third respect in which basic change is needed: in today's economy there are millions of workers wholly outside the Act's purview.

Some of those workers -- the over 5.5 million employees of state and local governments who have no bargaining rights, and the over 2 million federal employees who enjoy the most limited of rights -- fall outside this Commission's jurisdiction. Other excluded groups can be dealt with rather easily by a simple amendment of the NLRA's definition of "employee" and related terms; there is no justification, for example, for excluding agricultural workers from the law's protection or for the second-class status accorded armored truck drivers, building security personnel and others similarly situated.

All of these groups are excluded from the Act's protections de jure on the basis of the identity of their employer or the nature of their occupation. But there is a large and growing group of workers who, de facto have no rights under this Act not because of what they do or who they work for but because they lack a stable employment relationship which, as a practical matter, is indispensable to the exercise of rights under the NLRA. I refer, of course, to the "contingent workforce."

There are today over 30 million workers in this group, constituting between 25% and 30% of working Americans.

Indicative of this trend is the fact that the single largest employer in the United States today is Manpower, Inc. which on any given day has upwards of 360,000 workers on its payroll for the day. And some projections indicate that by the end of this decade the contingent workforce may constitute as much as one half of the total labor force.

Contingent work relationships take numerous forms: employment on a day-to-day basis by what are called temporary services agencies; direct hiring on a temporary or contract basis by an individual employer; casual arrangements whereby the worker goes from one employer to another for short, irregular periods of time; employee leasing arrangements in which the worker is paid by one entity but works for another; permanent part-time employment; or self-employment ostensibly as an "independent contractor."

Some of those who make up the contingent workforce are highly-skilled professional who work on a free-lance or consulting basis. But many of the contingent workers are unskilled or semi-skilled workers forced into temporary or contract work; even janitors in some places are being labeled as "self-employed" entrepreneurs, "contracting" for the franchise to clean a particular suite of offices.

What all these working people have in common is this: they do not have the support of even the traditional employment

contract and are left untethered and alone. They have no benefits, no security, no rights, and they have no legal means to organize to advance their interests. They move from job to job like the migrant workers who move from farm to farm following the harvest. They are what Time magazine calls "disposable workers."^{23/}

The contingent workforce falls outside the reach of the labor laws. The NLRA was written in 1935 to address the prototypical employment relationship that existed at that time: long-term employment by a stable employer. The Act therefore provides a mechanism for workers at an individual workplace to join together to form a representative to deal with their employer on an ongoing basis. But that prototype -- and hence the Act's legal rules -- does not fit workers who have no particular workplace, no particular employer or who are "employed" by an entity which in practical terms has no control over employment conditions.

Thus, entirely new structures and new procedures are needed if the contingent workforce is to have democratic rights in shaping their working lives. At a minimum, these workers must be permitted to organize and bargain above the level of the individual workplace or individual firm. And the contingent workers likewise must be permitted to deal with the entities which as a practical matter control the terms and conditions of

^{23/} Time, March 29, 1993, p. 43.

the workers' employment regardless of whether those entities are, in fact, technically denominated as the employer.

The issues I have raised here this morning are not, of course, the only issues which the AFL-CIO believes need to be addressed by this Commission, nor has my critique of the NLRA exhausted our concerns over that law. But in the interest of time, I will leave other matters to be raised with the Commission through the opportunities for continuing discussion the Commission is providing.

I wish to close with one final point. Our best common efforts are needed if this country is to provide working men and women an opportunity for stable, productive and rewarding employment. Working together, labor and management have much to contribute, as the experiences this Commission has examined demonstrate. But as Senator Wagner stated sixty-five years ago, we can "turn to these newer tasks and to the greater vision" only when "organized labor is accepted as an integral and necessary part of our social structure and ill-advised efforts to destroy it are abandoned and the struggle for mere existence terminated."²⁴

Peter Pestillo, Executive Vice President of Ford, made the same point in his testimony to this Commission:

If management wants unions to be an ally in the struggle with foreign competition, management must accept the validity of employee chosen unions as a legitimate institution in our society. Management must accept the

²⁴/Address to the New York State Federation of Labor, 1928, quoted in Barenberg, 106 HARV. L. REV.

union role, must honor it, must value it, must work with it. A strong alliance requires two strong members. There should be no quibbling about that.^{25/}

In that spirit, I wish to conclude by emphasizing that the AFL-CIO is willing -- and always has been willing -- to meet with representatives of the employer community concerning the issues I have raised today. There is no reason for this country -- in contrast to virtually every other industrialized country -- to continue to debate whether freedom of association should be a basic right of working people or a mere privileges open to nullification by the economically powerful.

We are under no illusions, and trust the Commission is under no illusions, as to the possibilities for such agreement at the present time. There is no consensus between labor and management on first principles -- on the value of workplace democracy or on the role of trade unions and collective bargaining in democratizing the workplace. The Commission's role, if I may is to help forge such a consensus by articulating a labor policy for the Twenty First Century and recommending the concrete steps needed to effectuate such a policy.

Thank you very much.

^{25/} July 28, 1993 Transcript at 10.