Letters

We welcome letters from readers, particularly commentaries that reflect upon or take issue with material we have published. The writer's name, affiliation, address, and telephone number should be included. Because of space limitations, letters are subject to abridgment.

Dissecting the Dunlop Commission

TO THE EDITOR:

The Dunlop Commission on the Future of Worker-Management Relations consisted of some of the finest minds currently at work in the employment field. Yet its final report, probably because of last November's political windshift, seems to have sunk leaving barely a ripple. I commend you for the serious attention paid to the report in your last issue.

The Dunlop Commission had many worthwhile things to say about the need for a greater employee voice in both nonunion and unionized workplaces. But I agree with Samuel Estreicher ("The Dunlop Report and the Future of Labor Law Reform," *Regulation*, 1995 Number 1) that the commission missed the opportunity to paint with a broader brush about the long-term future of employer-employee relations. Specifically, I agree with him that the commission's report was too narrowly focused on traditional forms of union organization. At least the commission urged more flexibility in allowing employee-involvement programs and alternative systems of dispute resolution.

Having said that, I also think that few persons appreciate how employer retaliatory action, and not merely employee indifference, has stifled conventional union organizing. Drawing on figures that Paul Weiler has compiled, and that I believe generally stand up under scrutiny, I have calculated that an employee covered by the National Labor Relations Act was somewhere between four and seven times more likely to be fired for union activity in 1980 than in the 1950s.

During roughly the same time that union membership in the private sector was declining from a high of 35 percent in 1954 to less than 12 percent today, the unionized full-time workforce in the public sector soared from almost nothing to about 50 percent. I realize that public employers enjoy a monopoly and do not face the fierce competition confronting private employers today. But I am here concerned with the fact of employer resistance to unionization, not its motivation. And fear of reprisal seems to be one likely explanation for those sharp differences in employee responses to unionization. Agency heads do not really fight organization if a state legislature and the governor have authorized it.

In contrast to Estreicher's balanced and nuanced assessment, Leo Troy ("Sacred Cows and Trojan Horses") indulged in a heavy-handed assault on the Dunlop Commission and its conclusions. Even so, I must agree with one of his criticisms. The commission's recommendation that union representation elections be held within two weeks of the filing of the petition is probably unrealistic.

In my experience, smaller employers in particular are just not capable of responding adequately to a union's organizing drive in less than three or four weeks. However much some of us might think employees would profit from union representation, the decision must ultimately be the employees'. And employees should have the opportunity for an informed decision, which includes hearing the employer's side of the story.

Troy's main complaint seems to be that the Dunlop Commission was out to "revitalize the decaying private-sector union movement" by the artificial respiration of legal intervention. For him, union decline in America is simply part of a worldwide phenomenon fueled by impersonal market forces. But union density in Canada and Western Europe remains at least twice as high as in the United States.

Furthermore, federal labor law has not always promoted unionization. Studies by Professor Harold Levinson, myself, and others have indicated that the 1947 and 1959 amendments deprived unions of economic weapons needed for effective organization. Thus, even if Troy is right in his charge that a "blatantly pro-union" Dunlop Commission was seeking to use the law to strengthen unions, it was at most only trying to offset in part what anti-union forces had done in the past to weaken them. Such a strategy should hardly be considered reprehensible. Under the NLRA, the officially declared policy of the United States is still "encouraging the practice and procedure of collective bargaining."

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Looking Forward

TO THE EDITOR:

The Commission on the Future of Worker-Management Relations offered the business community and the labor movement what may have been their last chance to reform the New Deal labor-management system and policy framework through reasoned compromise and evolutionary experimentation. The commission's fact-finding report documented the failure of the current system to meet its obligations in four areas: (1) to protect workers' rights to choose whether or not to be represented by an independent labor organization; (2) to encourage competitiveness; (3) to encourage use of private procedures for resolving disputes over workers' public rights; and (4) to use the tools of employee participation and dispute resolution to promote workplace self-

governance as an alternative to command-and-control regulation. The commission's recommendations then offered a moderate set of proposals to reform the existing system and to encourage experimentation with different forms of participation, self-governance, and alternative dispute resolution that, if utilized fully, could eventually produce the more fundamental transformations in workplace relations that many of us recognize are needed.

But alas, this moderate, evolutionary approach failed. The representatives of labor and business and their allies in Congress remain locked in a bitter stalemate over fundamental principles. Rightly or wrongly, the commission adopted a strategy of trying to find a moderate path of reform that balanced the concerns expressed to us by business and labor representatives. However, no compromise agreement was to be found between the current leaders of the labor movement and the organized business community before or after the November elections. The parties were unable to look beyond their specific and short-run interests and power positions to consider the long-run needs of the total workforce and the overall economy.

If the commission failed in some fundamental way, it was in giving too much weight to the views of the Washington representatives of the old-line business and labor groups. The next time these issues are debated, the voices of the workforce itself, women's and civil rights groups, and professional associations need to be given as much weight as those of traditional labor and business representatives. Only when the American public is ready to demand change and drive the process are we likely to be successful in achieving a breakthrough in national labor policy.

I agree with one of Samuel Estreicher's points: the New Deal labor-management system has failed. It is, therefore, time to move beyond old debates over what caused its demise and begin focusing on the workplace of the future and the needs of the workforce and economy as we move to the 21st century.

Unfortunately, Leo Troy seems more interested in carrying on a side debate over an old and largely irrelevant question. He has been frustrated by what he sees as the failure of other researchers to account accurately for the decline of the U.S. labor movement. Whether or not he is right about the causes of union decline, his views have nothing to say about future labor policy. We noted in our fact-finding report that it is not the size of the labor movement that should motivate labor policy. It is the need to assure that workers, not lawyers or consultants of businesses or unions, decide whether or not workers will be represented by an independent labor organization.

Any objective reading of the evidence—some of which is recited again in Estreicher's article—can only lead to the conclusion that current labor law, when faced with determined employer opposition, simply does not provide workers with this choice. Until the business community and its allies in Congress, the research community, and elsewhere face these facts honestly and recognize their obligation to address this problem, the stalemate will continue, and America will stand out as a country that requires its workers to put their jobs and careers at risk in order to gain access to representation.

Minor patching up of the existing system regulating representation elections will not work. Instead, the commission proposed changes in each step of the process to (1) de-escalate the level of conflict; (2) shorten the time and resources devoted to campaigning and tactical legal maneuvering before an election is held; (3) assure swift and certain reinstatement of workers found to have been fired for exercising their rights; and (4) ensure that workers who do vote to be represented get what they voted for—a fair contract.

We could have gone farther by encouraging alternative forms of representation such as works councils and models of representation that move with individuals rather than being worksite- or employer-based. Those and other options warrant continued exploration and debate. The American workforce is too diverse and contemporary work settings are too varied to be well served by relying on the single-model exclusive representation and collective bargaining now available.

As Estreicher points out, the current labor policy, which constrains employee participation in both nonunion and union settings, also makes no sense. We documented this in our fact-finding report. Our recommendations take a modest step in the right direction. They would allow broader forms of employee participation and encourage experimentation with new forms of dispute resolution and workplace self-governance on safety and health and other areas of government regulation. Again, we could, and perhaps should, have gone farther. Indeed, some of us individually have proposed going much farther and will continue to support alternative conceptions of employee participation, provided they are part of a comprehensive updating of labor law and policy.

But piecemeal reforms of this part of our law will do more harm than good. That is why I, along with a large number of other industrial relations academics, oppose the Teamwork for Employees and Management Act now being debated in Congress. That bill fails to provide protections against discrimination for workers who want to initiate employee participation or speak openly against an existing program; it fails to address the need to build partnerships between unions and managers in existing bargaining relationships; and it fails to encourage expansion of participation to issues now subject to government regulations. Moreover, by again casting a blind eye toward the other critical issues in the workplace and ignoring the need to reform the representation process, the bill will further polarize relations between business and labor and further reduce the competitiveness of the organized sector of the economy.

The commission members also thought long and hard about how to best promote experimentation with alternative dispute resolution. We chose to encourage it on a voluntary basis, rather than allow employers to mandate it unilaterally. We took this voluntary approach for a simple reason: alternative dispute resolution systems have to prove their value and establish their credibility before being endorsed as a part of national policy. Estreicher and I might prefer it to be otherwise, but one cannot ignore the deep skepticism that employees have of employer-imposed systems that restrict access to the agencies and courts charged with protecting work-

ers' rights. A new system of private dispute resolution is sorely needed, but it will only work if it is credible and acceptable to all the interested parties. Experimentation and demonstration of the merits of these alternatives is the best way to earn this trust and credibility.

One of the forward-looking features of the commission's final report is the set of goals it outlines for the workplace of the 21st century. These goals reflect the full range of concerns of the workforce and the economy. They reflect the need to expand employee participation to more issues and more workers; to reduce the conflicts that occur when workers exercise their right to organize a union; to experiment with new forms of participation and representation to resolve disputes; to provide self-governance as an alternative to government regulations; and to address the economic interests of the entire workforce and economy—including contingent workers and those at the bottom of the earnings distribution. With hindsight, I would add another goal: to address the issues of workforce diversity through a combination of affirmative action, management-led diversity programs, and self-help groups such as the black and women's caucuses that can be found in many leading companies today. Only by taking this holistic approach to the workplace and the workforce of the future and experimenting with new approaches to solving problems and innovating at the grassroots level will the foundations be laid for a labor policy that looks forward to the 21st century.

It is clear that it will take some time to lay this foundation. In the meantime we need to redouble our efforts to create the workplace of the future by experimenting with new approaches, monitoring progress towards these goals, and speaking out more vocally about the inefficiencies and inequities associated with the current system. We should not only experiment with the ideas discussed in the commission report, but also explore other means of encouraging our workplaces and improving the standards of living of the workforce.

The workforce of the future must be directly involved in this process. Perhaps it is time to create a new 21st-century workplace coalition that cuts across old interest-group lines and includes the full diversity of the workforce—business, labor, women's groups, civil rights groups, professionals, and the like. By engaging in this type of broad-based grassroots experimentation and analysis, perhaps we will produce the ideas, evidence, and support necessary to shape a forward-looking labor policy—if and when our political leaders are ready to act in the national interest.

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**Mr. Kochan served as counsel to the Dunlop Commission. The views expressed here are his own.*

A Correction

TO THE EDITOR:

I apologize to your readers for not having noticed earlier a glitch in my discussion of Canadian laws using interest arbitration to resolve "first-contract" collective bargaining disputes ("The Dunlop Report and the Future of Labor Law Reform," *Regulation*, 1995 Number 1). For a time (until repealed by the Tory government in 1990) Manitoba did provide for use of arbitration to resolve disputes over renewal as well as initial agreements. Although the other provinces have not followed suit, the rate of renewal of arbitrated first contracts does not suggest that the groundwork is being laid for enduring relationships. Sabrina Sills's study of Ontario's experience from 1986 to 1990 finds that of applications for arbitration, 13 relationships were operating under their first agreement, 14 bargaining units were decertified, and "collective bargaining relationships persist[ed]" in 17 of the cases. Similarly, Jean Sexton's study of 72 first-contract awards in Quebec finds that 16 awards were still in place; 16 certifications were cancelled or in the process of cancellation; 10 plants had closed, and in four cases bargaining was underway. The other awards presumably resulted in renewal pacts. In Manitoba, researchers Errol Black and Craig Hosea report that "the risk of decertification is higher in those situations where the Board imposes a first contract": 12 of 39 cases where a first contract was imposed as contrasted with 7 of 47 cases where a first contract was voluntarily agreed to.

It is therefore not surprising that after reviewing the Canadian experience with imposing contracts on unwilling parties, then-Professor (now NLRB Chair) William B. Gould cautioned that "there ought not to be anything sacrosanct about limiting intervention to the first contract. Indeed, such limitations may well invite conduct designed to stifle the collective bargaining process in its incipient stages, with the knowledge that the parties will be left to their own devices the second or third time around, thus exposing the weaker party to the same behavior that prompted first-contract arbitration." This is, as stated in my article, a path to a very different system than collective bargaining.

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Minimum Benefits?

TO THE EDITOR:

Central to the debate surrounding the minimum wage is whether increasing its level will cause significant employment losses. Recent research by Princeton economists David Card and Alan Krueger indicating that raising the minimum wage will not cause employment losses, and may even result in employment gains, has been challenged by several studies. In their article "Sense and Nonsense on the Minimum Wage," (*Regulation*, 1995 Number 1) Deere, Murphy, and Welch (DMW) write, "Both economic common sense and past research contradict the Princeton studies." This is not quite true.

In a review of the first wave of minimum wage studies that used time-series data that ended in the late 1960s or early 1970s, Brown, Gilroy, and Kohen (BGK) concluded that a 10 percent increase in the minimum wage resulted in a 1 to 3

percent decline in teenage employment. This finding must have seemed reasonable, because no one questioned the methodology or the results. Although a later BGK study including data through 1979 concluded that a 1 percent decline was most accurate, people still tended to quote the larger range. My own research updated the analysis through 1986; it included the longest period up until that time when the minimum wage had not been raised. This time period provided a natural experiment, much like the one examined by DMW.

If raising the minimum wage causes employment losses, then letting it fall (in real terms) should cause employment gains. However, simple comparisons of teen employment rates through the 1980s (similar to the comparisons DMW make) do not support this hypothesis. For example, the male unemployment rate was lower in 1986 than in 1981, as was the ratio of the minimum wage to average hourly earnings (38.2 percent vs. 46.2 percent), but the employment rate for teens was the same (44.6 percent) in both years.

But we should not be satisfied with these comparisons. As DMW note, other things may affect employment. Unfortunately, DMW do not rigorously control for these other factors in their analysis. Instead, they mention a few factors and then rely on simple comparisons to prove their point.

In my own work, after controlling for other factors that may affect teen employment (such as the state of the economy and the percentage of teens in the armed forces) and incorporating a longer time period than any of the previous time-series studies, I estimated that teen employment would decrease by less than 1 percent given a 10 percent increase in the minimum wage, and this estimate was typically not statistically significant. Does this mean that no one will be hurt by an increase in the minimum wage? I would not go that far. At the national level, there is unlikely to be a significant decrease in employment if the minimum wage is increased. But as some recent studies have illustrated, depending on how the data are stratified, you may find employment losses for certain groups.

Unfortunately, many people seem to want to stop there. If anyone is hurt by an increase, they argue, then it should not be done. We seem to be forgetting to take the next step. Do the costs outweigh the benefits? The debate seems to be stuck at whether there are employment losses or not, instead of looking at the overall costs and benefits.

This leads me to a more fundamental criticism of the debate over raising the minimum wage. While I believe that raising the minimum wage will not cause significant employment losses, I cannot include myself among those who advocate increasing it. Why? Because I think it is a poorly targeted policy.

Proponents of raising the minimum wage argue that it will help the working poor. However, the connection between earning a minimum wage and living in poverty has grown weaker and weaker since the Fair Labor Standards Act was passed in 1938. According to a study by Burkhauser, Couch, and Glenn, in 1939, 85 percent of low-wage workers lived below the poverty line, and 31 percent of low-wage workers were heads of poor households. By 1989 only 22 percent of low-wage workers lived below the poverty line, and only 8 percent were heads of poor households. By 1989 a low-wage worker was 36 percent more likely to live in a household earning at least three times the poverty level than he or she was to live in a household at or below the poverty line. Furthermore, in 1989 more than 80 percent of working-poor households earned more than the proposed new minimum wage levels. These figures beg the question, exactly whom are we helping when we raise the minimum wage?

I support helping the working poor, but increases in the minimum wage seem to help the working nonpoor disproportionately. I think it is time we stopped arguing about the potential employment effects of an increase in the minimum wage, and got back to asking what we are really trying to achieve. Perhaps then we can focus on other programs, such as the earned income tax credit, that have a better chance of actually helping the working poor.

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Real-World Relevance

DEERE, MURPHY, AND WELCH reply:

We are encouraged by Alison Wellington's agreement that common sense implies minimum wages reduce employment. She does, however, raise a couple of points about what the data have to say.

First, she says that if increases in minimum wages reduce teenage employment, then there should be an increase in teenage employment when inflation and productivity growth erode a constant minimum wage. There is. During the longest period over which the minimum wage remained constant—it was $3.35 from 1981 through 1989—the teenage employment rate rose more than 6.5 percent.

Second, she claims that we do not control for other things that affect employment in calculating effects of the 1990-91 minimum wage hike. But as we explained in our article, we went to some lengths to control for the most obvious and largest alternative influence on low-wage employment—the recession that started in 1990. The recession-adjusted effects are reported in Table 3, on page 51 of the last issue of *Regulation*; a 10 percent increase in the minimum wage reduces teenage employment by 2.7 percent, 4.2 percent, and 3.7 percent, respectively, for men, women, and blacks (both men and women).

We disagree with Wellington that the larger issue in the minimum wage debate is how to help the working poor. The issue is the extent to which basic economic principles inform us about the way things really work. While some of our colleagues appear to believe that real-world complexity makes economics irrelevant, we disagree.

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Good Riddance to Employment-at-Will

TO THE EDITOR:

In the last issue of *Regulation* (1995 Number 1), Cameron and Morgan Reynolds commented on my February 1994 *Labor Law Journal* article on the erosion of at-will employment. Specifically, they alleged that I did not adequately support my contention that "the employment-at-will doctrine favor[s] employers more than employees." Supporting their notion of equality in bargaining power in the employer-employee relationship, they stated, "Workers have 5 million alternative employers available to them on any given day; and the set changes daily in an entrepreneurial economy." A closer examination of this statement reveals a critical flaw in reasoning. It relies on the functioning of a perfect labor market wherein fully informed workers move freely between jobs.

William B. Gould, chairperson of the National Labor Relations Board, succinctly undermines both the perfect labor market and equal power positions taken by Reynolds and Reynolds. I fully subscribe to the following remarks: "Economists advise us that there is no inherent inequality between employer and employee, because if either party fails to adhere to their part of the bargain, express or implicit, the other party can go elsewhere. . . . But the difficulty with the model is that it holds true only where there is completely free competition. When this does not exist, choice is considerably reduced. Moreover, a relatively steep age-earning curve in non-union establishments suggests a bonding between employer and employee, which creates an implicit contract and acts as an incentive for an employer to renege on it as wages increase. In addition, the unorganized lack protection such as that provided by grievance arbitration machinery. Another impediment to equality is to be found in transaction costs. In many situations, it may be simply impossible or impracticable for workers to have the information which is important to intelligent bargaining and to know about the alternative opportunities. Accordingly, lack of information as well as inherent inequality and steep age-earning curves may contribute to the need for regulation of the employment relationship in the interest of shaping a balance."

Reynolds and Reynolds state that I lament the fact that employers, despite the protection afforded by the NLRA, OSHA, the 1964 Civil Rights Act, and the Americans with Disabilities Act, are still free to fire workers for other causes. Evidently they are unaware that these federal laws only prohibit specified terminations and do not cover discharges generally, such as where an employer suddenly and arbitrarily fires an employee with little or no justification. The December 1993 issue of the *Cornell Hotel & Restaurant Administration Quarterly* noted that an estimated 2 million nonprobationary, nonunion, non-civil-service employees are discharged annually, and an estimated 150,000 to 200,000 of those individuals—as many as 10 percent—would have legitimate claims if a "good cause" requirement for termination were in place.

Reynolds and Reynolds also disagree with my conclusion that the employment-at-will doctrine is anachronistic, archaic, and unfair to workers. My basis for this position is that in the United States there is voluminous case law and literature documenting that the days of at-will employment are over. As worker protections expand, the perception of greater job security follows. Employee expectations in the modern workforce are different than they were during the days when at-will was strictly followed. Reynolds and Reynolds's love affair with 19th-century jurisprudence, where judges "had a presumption in favor of personal freedom," unfortunately is accepted by employers, who have ended up spending vast amounts of money trying to figure out how to circumvent the at-will exceptions 20th-century jurists have created. This would seem inefficient even to a novice economist. If employers would really analyze the situation, they might conclude that comprehensive legislation, rather than the predilections of individual judges, would be in their best interests.

Unfortunately, Reynolds and Reynolds are transfixed by notions of "cost-shifting," "inelastic labor supply," and "employer financial liability." It would appear that they appreciate the cost of everything but the value of nothing. American workers should be accorded respect and dignity, not treated as interchangeable cost items to be summarily discarded, as many are presently. The fact of the matter is that the most productive workers are those with the greatest job security. Franklin Delano Roosevelt's words in his 1944 economic message to Congress were prophetic: "True individual freedom cannot exist without economic security."

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