The Dunlop Report and the Future of Labor Law Reform

Samuel Estreicher

America's labor laws are based on an outdated view of the employment relationship that emphasizes the conflict of interest between labor and capital. The advancement of labor's welfare in this distributional struggle was thought to require institutional guarantees of autonomous worker organizations capable of forming alliances across firms and pressing disagreements through sustained work stoppages. At one time the model of the National Labor Relations Act of 1935 (NLRA) and the Railway Labor Act of 1926 (a measure applicable only to the railroad and airline industries) approximated the preferences of workers in traditional crafts and mass production industries who saw no common interest with their employers. The unions' objectives also could accommodate the needs of companies for clear lines of authority between supervision and production and assurances that hikes in labor costs would be imposed on all competitor firms.

The model no longer works. From a high point in the mid-1950s—when unions represented over 35 percent of workers in private firms, influenced the terms of employment for nonunion workers, and effectively imposed their "master" agreements across entire product markets—the unionization rate has plummeted to under 12 percent of the private sector workforce. It is likely to fall even further.

Reasons for Unions' Decline

Many factors have contributed to the deunionization process. American workers born after World War II are less inclined to favor collective and statist solutions. Surveys consistently show that 70 percent of nonunion workers do not desire conventional forms of union representation. Also, unions increasingly operate in less friendly terrain because of shrinking manufacturing employment, growing service industries, and the movement of plants and jobs from "rustbelt" to "sunbelt" states. Further, large companies like Eastman Kodak, IBM, Motorola, and Texas Instruments have dampened any nascent

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demand for union representation by paying their employees well by regional standards, implementing internal procedures for curbing arbitrary supervisors, and, until recently, offering lifetime job security.

The principal cause of labor's decline, however, lies elsewhere: the model of employee organization promoted by the labor laws has failed to keep pace with the unleashing of competitive forces in product markets as a result of deregulation, technological advances, and global competition. Unions can no longer take wages out of competition by imposing like terms on all competitors operating in the same market. Nevertheless, they continue (and are to some extent steered by the system) to see traditional cost-adding wage and job control objectives as their primary "product" and institutional *raison d'être*.

The erosion of "pattern" bargaining structures due to competition is at the heart of current disputes like the United Auto Workers' (UAW) strike against Caterpillar Inc. The company claims that it cannot afford to pattern its agreement on the one reached with the John Deere Corp. because, unlike Deere, it competes in a global market for earth-moving equipment with Komatsu Ltd. of Japan. Yet the union has staked its future—and the jobs of thousands of workers—on Caterpillar's submission to the pattern because, otherwise, the union invites an unravelling of its agreement with Deere and other domestic producers and a diminution of its power over industry terms and conditions. So too, the United Rubber Workers of America are locked in a life-and-death struggle with Japanese-owned Bridgestone/Firestone Inc. in order to preserve the integrity of their pattern agreement with the Goodyear Tire and Rubber Co.

Competitive product markets not only make life difficult for conventional unions but also require a new vision of the employment relationship that emphasizes common interests to promote the success of the firm in an uncertain world. Many companies have responded to the new competition by shedding layers of middle managers and supervisors, implementing skill- and performance-based pay, and empowering front-line workers to take an active role in reconfiguring equipment and dealing directly with customers and suppliers. These innovations have also taken root in some union-represented companies such as Xerox and Ford. And throughout the 1980s many unions have agreed to temper wage increases and ease work rules—sometimes in exchange for company stock—to fend off bankruptcies or major layoffs. But the engine of change, the areas most attractive to new capital investment, and the future of American industry appear to be in the nonunion sector.

If the fate of the AFL-CIO were all that was at stake, there would be no cause for public concern and no case for legal reform. However, the decline of unions has brought with it a mushrooming growth in federal and state employment laws—and attendant costly litigation—that attempt to set minimum standards for compensation and fair workplace decisions, tasks that once were thought to be the province of collective bargaining. Laws such as the Age Discrimination in Employment Act of 1967, the Americans with Disabilities Act of 1990, the Family and Medical Leave Act of 1993, and analogous laws in the states have established a worker protection regime that imposes greater costs on employers and employees than would a well-functioning grievance system capable of resolving disputes without resort to agencies or the courts. The existing labor laws also curtail opportunities for employee participation in a nonunion sector comprising 88 percent of the workforce. Moreover, for workers who desire independent representation, these laws provide a form of labor organization and pattern of labor-management relations ill-suited to the demands of a competitive world.

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The Promise of the Dunlop Commission

A fundamental reexamination of American labor law seemed possible when, in March 1993, Secretary of Labor Robert B. Reich and Secretary of Commerce Ronald H. Brown announced the formation of the Commission on the Future of Worker-Management Relations.

The commission—which was to be chaired by John T. Dunlop, professor emeritus at Harvard and former labor secretary in the Ford administration—would evaluate what changes, if any, should be made in the legal framework and bargaining procedures to enhance productivity, employee participation, cooperative behavior, and resolution of workplace problems by the parties themselves without resort to the courts or regulators. Admittedly, the Clinton administration owed a considerable political debt to organized labor, which harbored hopes that, along with the pending bills to ban the hiring of permanent replacements during strikes, our labor laws would come to resemble those of Canada in enabling unions to secure bargaining rights without elections and authorizing arbitrators to impose agreements where the parties were at an impasse. Yet several members of the Dunlop Commission, notably Thomas A. Kochan of MIT, Richard B. Freeman of Harvard, and Paul C. Weiler of Harvard, the Commission's chief counsel, were thoughtful observers of the labor scene who understood the larger forces contributing to organized labor's decline. Expectations for change were further fueled early on when the commission signaled a receptiveness to employer concerns about legal obstacles to employee involvement programs and agreements for binding arbitration of employment disputes in place of lawsuits.

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The sea change brought about by the November elections has profoundly altered the picture. With Republican control of Congress, organized labor's focus has shifted from legal reform to damage control—urging the Dunlop Commission to avoid clear endorsements of proposals that employers favor and Republicans would readily enact. Politics also precluded Chairman Dunlop's strategy to structure a deal in which management would accede to lower barriers to labor organizing in nonunion shops in exchange for the changes it sought. As Jeffrey McGuinness of the Labor Policy Association, a lobbying group for large employers, put it, "Whatever deals there might have been are now off."

The Commission's Recommendations

On its own terms, the Dunlop report is unsatisfying. Four major areas of reform are addressed: (1) employee involvement, (2) worker representation and collective bargaining, (3) employment litigation and dispute resolution, and (4) contingent workers. Despite some good ideas, the commission was hamstrung by political considerations, and its recommendations fall considerably short of the thoroughgoing reassessment of the legal regime that was called for.

Employee Involvement. The key problem in the area of employee involvement is section 8(a)2 of the original NLRA, the so-called company union prohibition. This provision was broadly written to reflect Sen. Robert F. Wagner's belief that employers should not be able to institute a form of collaborative representation that might compete with independent, multiemployer labor organizations. Section 8(a)2's proponents wanted not only to eliminate employer-installed "sham," or "sweetheart," unions, but also to bar any forum developed and controlled by management for bilateral dealings with employees.

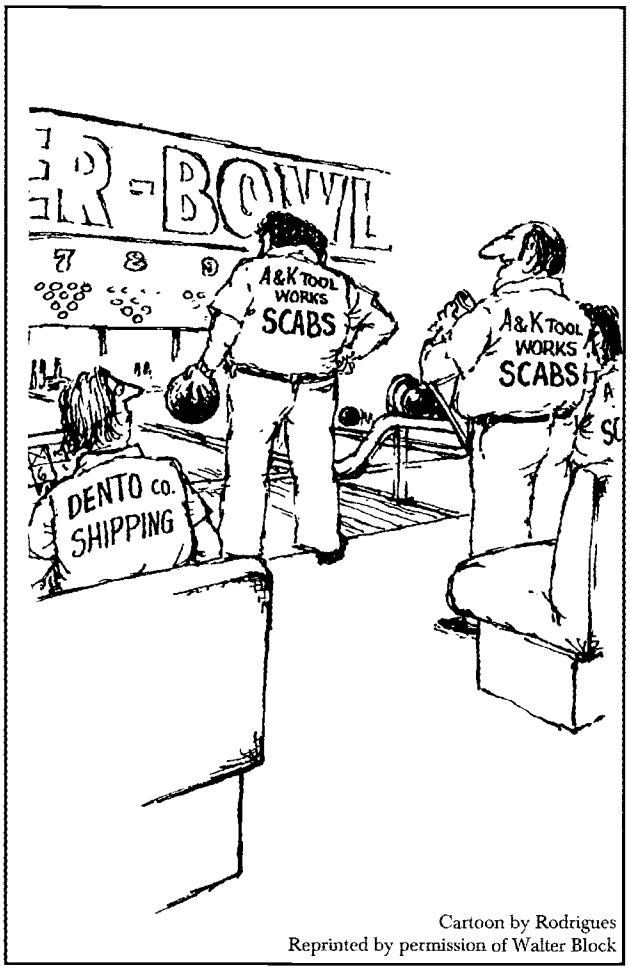
A December 1992 ruling by the National Labor Relations Board (NLRB), the agency that enforces the NLRA, found that Electromation Inc., an Indiana manufacturer of electrical parts, violated the law by forming voluntary employee "action committees" to meet with the company to discuss changes in absenteeism, pay progression, attendance bonuses, and no-smoking policies. In May 1993 the NLRB invalidated DuPont's employee safety and fitness committees at its union-represented Deepwater, New Jersey plant because the committees developed safety proposals and decided on safety incentive awards. A disgruntled employee's complaint to the Labor Department caused Polaroid in June 1992 to disband an employee committee system that had been in place since 1949 and was lauded by *Harvard Business Review* editor David Ewing as a vehicle allowing employees "to speak their minds on company policy without fear of recrimination." Polaroid counsel Anne Leibowitz reports that the company now uses leaderless employee

"focus groups" that react to management proposals and are forbidden to discuss topics of general concern to the workforce. This too has prompted the NLRB general counsel to issue a complaint.

Section 8(a)2 is an anachronism that denies employees a say in workplace decisionmaking. It imposes a unilateral management style that poorly serves American companies in need of empowered front-line workers capable of assuming traditional supervisory tasks and responding directly to customer and supplier requirements. If the Dunlop Commission had decided to urge repeal of this provision, it had ample support in its May 1994 fact-finding report, which discussed the widespread diffusion and largely beneficial effects of employee involvement programs. Indeed, the special survey of American workers conducted by commission member Richard B. Freeman and Wisconsin law professor Joel Rogers reported: "By an overwhelming 86 percent to 9 percent margin, workers want an organization run jointly by employees and management, rather than an independent, employee-run organization. By a smaller, but still sizable margin of 52 percent to 34 percent, workers want an organization to be staffed and funded by the company, rather than independently through employee contributions."

By contrast, the commission recommended retention of section 8(a)2 with the added "clarification" that employee participation programs should not be considered unlawful as long as (1) the discussion of pay and working conditions is "incidental to the broad purposes of these programs"; (2) the employer's purpose in establishing such programs is not to "frustrat[e] employee efforts to obtain independent representation"; and (3) employees are protected from retaliation for "communicat[ing] their views to employers or co-workers" and seeking "outside expertise on issues, if they so desire."

The commission's recommendation does little to lift the cloud of legal uncertainty from employee involvement initiatives in the American workplace. The incidental purpose test is unworkable because employee contributions to productivity and quality are likely to involve suggestions for altering wages, hours, and other terms and conditions of employment. Safety issues, for example, will invariably involve work conditions; similarly, a work group focusing on ways to utilize existing personnel more effectively will almost certainly address subjects such as shift schedules and job assignments. Moreover, only a substantial modification of section 8(a)2—confining the ban to truly deceptive practices—promises meaningful employee participation in the development of compensation and profitsharing policies that keenly concern employees and motivate performance.



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The Dunlop Commission's halting effort in this area was an unfortunate response to the labor movement's anxiety that a broad endorsement of employee involvement initiatives might

frustrate union organizing drives. But public policy should not be concerned with preserving the position of organized labor as such, and unions may well have to change their "product" to maintain their role in the modern workplace. This is not to gainsay the fact, as developed below, that, too often, fear of retaliatory discharge for union activity is reasonably grounded. But this concern should be separately addressed by reexamining statutory remedies, rather than curtailing employee involvement programs that have the potential to improve worker skills, enhance job satisfaction, and better align incentives to promote the firm's welfare.

Worker Representation. The Dunlop Commission offers a number of recommendations in the area of worker representation and collective bargaining, some of which are plainly in the public interest. First, the commission rightly urges that workers should not be classified as managers or supervisors and then excluded from the statutory right to seek independent representation simply because they have a say in workplace decisions either as a result of participation in work teams and joint committees or because as professionals they have authority to direct the work of less-skilled coworkers. Supreme Court rulings expanding the scope of the NLRA's exclusions for managerial and supervisory employees are out of step with the basic premise of employee involvement: that front-line workers should be more than passive, unthinking implementers of managerial directives.

Current rules seek an uncontaminated expression of worker preferences for union representation, but they do so at the cost of locking employers and unions into an adversarial posture before bargaining relationships can begin.

Second, the Dunlop report recommends greater latitude for employers to reach pre-hire agreements with unions before workers are hired in new plants, as long as majority support is demonstrated by card check or representation election by the end of the first year of operation. Under current law, only construction firms can bargain with a union before the workers are in place. Initial bargaining would be useful in other industries as well. The UAW's innovative agreement with General Motors Corp.'s (GM) Saturn division was negotiated before any of the employees was hired for the new Spring Hill, Tennessee facility. By stipulating the union's bargaining authority in advance, the Saturn management was able to encourage the union to experiment with broadened job classifications and a participative "team structure" at variance with the national UAW-GM agreement. The Saturn arrangement barely survived challenge as an unlawful pre-hire pact. Rosemary Collyer, then NLRB general counsel, declined to issue a complaint only because the agreement contemplated that the initial workforce would be drawn from UAW-represented workers laid off at other GM plants. Even this approach could not be used for foreign firms establishing plants in this country. Thus, companies like Mercedes and BMW have no mechanism for testing the union's receptivity to doing things differently; neither do American firms deciding whether to invest in new plants here rather than abroad.

Current rules seek an uncontaminated expression of worker preferences for union representation, but they do so at the cost of locking employers and unions into an adversarial posture before bargaining relationships can begin. Typically, a union appears on the scene solely as an agent of worker discontent. Simply to get its foot in the door, the union must either find an already unhappy workforce or help stoke worker unhappiness in the ensuing organizing campaign. Once the union obtains cards from a majority of the workers and demands recognition, the employer must decide whether or not to extend recognition against a backdrop of uncertainty, without any means of exploring with the union what demands it will press and what role it will play on the shop floor. Any conduct resembling bargaining will be treated as recognition. Most employers resolve the uncertainty by requiring the union to seek an NLRB election and opposing the union bid during the campaign.

Greater flexibility is needed in the rules governing how unions, both existing and perhaps new organizations, obtain bargaining authority. The affected employees must ultimately authorize their bargaining agencies. But current law mistakenly assumes that the preferences of employees are best determined on the basis of the union's promises and the employer's

response, rather than after working under the agreement negotiated by the union and experiencing firsthand the caliber of the union's personnel and its compatibility with the culture of the firm. On the whole, the commission's recommendation here merits congressional action. However, any statutory change should also insist on a secret-ballot authorization election at year's end and make clear that pre-hire pacts must be entirely voluntary, rather than effectively coerced by recognitional picketing.

Third, the Dunlop Commission also recommends explicit authorization of preliminary injunctions to reinstate employee supporters of unions who have been unjustly discharged by their employers as a means of defeating the organizing drive. Estimates of the incidence of retaliatory discharge vary. But even conservative scholars like Bernard Meltzer of the University of Chicago acknowledge that the percentage of union supporters illegally fired has been on the rise since the mid-1970s. Meltzer estimates the risk of retaliatory discharge at one in 60, which in his view "represents a potentially significant disregard by employers of the Act's statutory protections." The tepid remedies of the NLRA—obtained only after years of litigation—offer too appealing an incentive for unscrupulous employers to frustrate employee free choice by the simple expedient of firing union activists. If the NLRB were given clear authority to obtain interim reinstatement orders from the federal courts pending the outcome of administrative hearings, the incentive to flout the law would largely disappear. Care should be taken, however, in the drafting of the standard for interim orders, so that employees do not enjoy a practical immunity from legitimate disciplinary decisions simply because they are union supporters.

Unfortunately, the Dunlop Commission's other proposals in this area would move the law in the wrong direction. The commission recommends that (1) representation elections "should be conducted as promptly as administratively feasible, typically within two weeks"; and (2) disputes between employers and newly certified unions should be reviewed by a tripartite "First Contract Advisory Board" that would have the authority to order "binding arbitration for the relatively few disputes that warrant it."

The early-vote recommendation is not principally a response to administrative delay; the report acknowledges that it takes an average of seven weeks for workers to secure a vote from the time their petition is filed. Indeed, the commission's fact-finding report notes that "median time from petitioning for an election to a vote has been roughly 50 days for the last two decades (down considerably from the time taken in the 1940s and 1950s)." Rather, the stated objective here is to shorten the period of a "heated campaign" in the hope of "set[ting] the stage for a more cooperative employer-union relationship if the employees voted in favor of collective representation."

The cooperation-inducing benefits of the proposal are largely chimerical. The proposal does not encourage any change in union program or appeal; it simply increases the probability of a successful union drive. As a practical matter, the union will be able to control the timing of the election because it determines when the election petition will be filed. Large employers with well-staffed personnel departments will be able, with some difficulty, to mount an opposition campaign during the two-week period. Smaller firms will not.

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Ultimately, this proposal is based on skepticism that employees learn anything of value during contested campaigns. And yet the commission does not prove that there is cause for such skepticism. It would have difficulty doing so, because the authorization cards union organizers ask employees to sign are unreliable indicators of the workers' real preferences and reflect at best a one-sided presentation of the merits of unionization. Union representation is not always the right choice for workers; if it were, the law would simply mandate a union for every plant. Where an employer is unwilling voluntarily to extend recognition and has no independent basis to believe that the union is a majority representative, employees should be given a chance to hear opposing views and decide in a secret-ballot election whether they want union representation.

The commission's binding-arbitration propos-

al is an attempt to deal with the fact that roughly one-third of certification elections do not result in a first contract. The commission did not attempt to link these failures to reach agreement to bad-faith bargaining by employers (despite some inconclusive evidence on this point), or to limit the availability of arbitration to employers who flout the law. The commission concedes that administrative difficulties would bedevil any such requirement, and that "it is often difficult to determine whether a violation of good faith bargaining law has occurred, as opposed to permissible hard bargaining about the issues." Apparently, the standard that would govern the availability of arbitration is whether "in the judgment of experienced and respected professionals this is the best way to assure that an initial agreement will be achieved."

The concept of introducing mediation into first-contract negotiations is an attractive one that merits further study. But the use of arbitrators to impose an agreement on parties—even if the commission's prediction that such referrals will occur rarely proves true—cuts against the grain of the labor laws. Collective bargaining is supposed to be a private, consensual process, rather than a form of government stipulation of the terms and conditions of employment. We know from the experience of the public sector that when so-called interest arbitration is mandated by law, contracts are largely shaped by what arbitrators believe are appropriate awards or what the parties anticipate will be the arbitrators' preferred outcomes. This may be unavoidable in the government sector, where strikes and lockouts are outlawed, and hence some neutral dispute-resolution mechanism is necessary to take the place of self-help. Public employers also enjoy a monopoly position: costly awards do not threaten their survival, even if they result in tax increases and public dissatisfaction. In the private sector, however, the parties can test their bargaining positions in the marketplace; and awards that fail to reflect the market forces operating on firms do threaten the firms' survival.

Regulation will also hurt many workers who prefer part-time or part-year work or lack the requisite skills or work history to gain full-time employment. Any policy response must be finely calibrated to reflect the tradeoff between regulatory goals and worker autonomy.

Here, too, the Dunlop Commission sounds the note that "worker-management cooperation" will be increased by "facilitating agreement wherever possible." But an agreement produced by government dictate would not reflect a change in union objectives or a joint undertaking to make a success of collective bargaining. At bottom, the commission hopes to increase the demand for union representation by providing some limited assurance that when employees vote for a union a first contract will be achieved. Of course, a contract that has been compelled by law offers no guarantee of the ongoing viability of the bargaining relationship. Further resort to the law is likely, as occurred in Canada where what started out as first contract arbitration legislation has been extended in several of the provinces to renewal agreements as well. This is a path to a very different system than collective bargaining.

Employment Litigation. The commission's recommendation in the area of employment litigation and dispute resolution consists of a set of otherwise desirable "quality standards" to ensure that binding arbitration of public law disputes is fairly conducted and does not diminish the substantive protections of the employment laws. The standards would require

- a competent arbitrator who knows the laws in question;
- a "fair and simple" method for exchange of information;
- a "fair method of cost sharing" to ensure "affordable access" to the system for all employees;
- the right to independent representation if sought by the employee;
- a range of remedies equal to those available through litigation;
- a written award explaining the arbiter's rationale for the result; and
- limited judicial review sufficient to ensure that the arbitral award is consistent with applicable law.

However, what role these standards will play is left unclear because the commission pointedly states that "binding arbitration agreements should not be enforceable as a condition of employment."

This was a missed opportunity for the Dunlop

Commission to design a proposal that could reduce the costs of proliferating employment laws and attendant litigation without diluting worker protections. If properly structured, arbitration provides a quicker, less fractious, and nonpublic resolution of employment disputes. Claimants as a class benefit because of the lower-access barriers of an arbitration system, even if a few would be better off if they could afford private counsel and submit their claims to a jury. In light of Supreme Court decisions endorsing the use of binding arbitration of statutory claims, a number of companies have implemented arbitration procedures offering many of the commission's safeguards; the policies of Brown & Root Inc. and Philip Morris Inc. also provide for limited reimbursement of attorney's fees. Other companies have been hesitant to follow suit because of substantial legal uncertainty as to whether arbitration under any procedures will be effective to preclude court litigation.

Contingent Workers. The Dunlop Commission's concern regarding contingent workers appears to be that employers may be using part-time and temporary workers in lieu of full-time staff to reduce compensation costs or to avoid employment regulations altogether. Its proposals include an expanded definition of "employee" that would deny independent contractor treatment under the labor and tax laws to workers who are not "truly independent entrepreneurs performing services for clients." The commission also recommends expanding the definition of "single employer" so that it would treat "a grouping of parent, subsidiary, sibling, and spin-off entities [as] a single employer of their respective employees."

These recommendations are, paradoxically, both technical and amorphous. The commission fails to demonstrate that contingent work is in fact a growing phenomenon; indeed, its fact-finding report acknowledges that part-time workers "have been a relatively constant share at about 18 percent of the workforce in the 1980s to early 1990s." Emphasis is placed on the fact that the proportion of workers who would prefer full-time work has "trended upwards," although no evidence is offered as to why they have been unable to obtain full-time positions or why employers use part-time and temporary workers. The report also fails to explain why, aside from the problem of bogus independent contractors, the employment laws cannot be applied in full measure to suppliers of part-time and temporary work.

The basic failure of the Dunlop Commission here is that it uses the generic label "contingent workers" to address a number of different concerns. The commission's first concern is that many part-time workers do not qualify for their company's health insurance and other benefits. A second, quite different problem is that some workers are dependent on a single employer and yet are mislabelled as independent contractors and effectively excluded from Social Security and unemployment insurance coverage. A third concern is that people who work at home, many of whom spend long hours at computer keyboards or sewing machines, face oppressive conditions. The Dunlop report seems to suggest that regulation discouraging contingent work would be good policy because these jobs are undesirable and employers should be deprived of any incentive to avoid hiring full-time workers. But regulation will also hurt many workers who prefer part-time or part-year work or lack the requisite skills or work history to gain full-time employment. Any policy response must be finely calibrated to reflect the tradeoff between regulatory goals and worker autonomy.

The collective bargaining system is not working. If, as a society, we think it is beneficial to promote an independent voice for workers in workplace decisions, we must confront squarely the reasons why unions are in decline in private firms.

Beyond the Dunlop Report

An underlying theme of the Dunlop report appears to be that the collective bargaining system has worked fairly well, and what is needed, essentially, are new rules that would lower the costs of organization for unions, such as expedited NLRB elections, interest arbitration in first-contract situations, and "single employer" treatment of a company and its related entities. As a prescription for substantial improvement in union density figures, the proposals are not likely to satisfy the AFL-CIO, which was hoping for

something like bargaining rights on the basis of authorization cards rather than elections.

More to the point, the commission's basic premise is mistaken: the collective bargaining system is not working. If, as a society, we think it is beneficial to promote an independent voice for workers in workplace decisions, we must confront squarely the reasons why unions are in decline in private firms. We must develop strategies that would either enable existing unions to transform themselves or allow new organizations to emerge that can provide the kind of worker-representation services that make sense in a competitive world.

Much of the work of institutional transformation has to be undertaken by the unions themselves, but the law also has a role to play. To the extent that the law restricts alternative forms of worker representation or creates incentives for unions and managers to adopt adversarial roles, those rules need to be reexamined. Space does not permit a detailed set of proposals, but let me offer a few suggestions for a future path for labor law reform.

Unions at their best are only bargaining agents reflecting the preferences of their principals; the horizons of the workers themselves need to be brought more in line with the economic objectives of the firm.

Collaborative Representation. As developed above, the current labor laws confine workers to the choice of independent representation or no representation at all. A substantial modification of section 8(a)2 would create opportunities for alternative forms of workplace representation. These might include a plant-wide grouping of safety representatives, a committee system similar to Polaroid's, or a plant-wide council of representatives from work teams. The union option would continue to provide an important systemic safety valve, as employees would retain the right to petition for independent representation at any time. Unions might also provide legal services for in-house grievance and arbitration systems or training centers for leadership skills.

Career-Based Unionism. Borrowing a page from their past as suppliers of trained craft labor, unions need to develop new institutions designed to meet the career needs of workers in particular industries. These institutions would provide training and referral services and, in some contexts, encourage employers to establish collective bargaining relationships. The existing legal restrictions on pre-hire agreements and certification of unions outside of the construction industry inhibit without justification the development of career-based unionism. Concerns over employee free choice can be more effectively addressed by requiring post-contract authorization elections than by the law's insistence that only a single form of labor organization merits NLRB certification.

Resolution of Employment Claims. Unions can no longer offer firms a comprehensive resolution of employment disputes. Under current law, employees are permitted a multiplicity of fora for pursuing their employment claims. Even where an employee invokes his remedies under a collective bargaining contract, is ably represented by union lawyers, and secures a hearing before an impartial arbitrator, the arbitral resolution does not bar the filing of statutory claims with administrative agencies and the courts. Many of these laws were developed to address problems that unions did not adequately handle in the past, such as race discrimination. But without diluting the substantive protections of these laws, there is a potentially beneficial role for collective bargaining and union-administered grievance systems to develop procedures for fairly addressing statutory employment claims in a manner that conclusively resolves the dispute.

Releasing the Creative Potential of Collective Bargaining

Existing law distinguishes between "permissive" and "mandatory" subjects, sharply curtailing the potential of collective bargaining. Employers may propose, but not insist on, discussions of subjects like interest arbitration, discretionary merit pay, bond requirements, and submission of their final offers to employee votes. Similarly, unions may not go to impasse on subjects like guarantees from nonsignatory parent companies, seats on the board, and plant closings. If collective bargaining is to succeed, the parties should be able to shape an agreement that meets their needs without the government deciding which

issues can be deal-breakers. Creative solutions should not have to await the firm's imminent demise, when concessions sought from unions allow agreements on matters like employee stock ownership, union directors, and joint processes to improve product safety and design.

Union Horizons. Labor laws should narrow, rather than widen, the divergence of perspectives between the union and the firm. Long-term contracts should be encouraged by allowing employers to waive their, not the employees', right to challenge the union's authority for any agreed-upon period. Inclusive, broad-based representational structures should be encouraged by allowing extension of labor agreements throughout a plant and nearby facilities, subject to an eventual secret-ballot authorization vote by the additional units. Regular sharing of financial information with unions should also be encouraged by rules preserving confidentiality and preventing unions from using disputes over information to draw out the bargaining process.

To minimize the divergence of interest between employees of the firm and multiemployer labor organizations, employees should be given a statutory right to vote in secret ballot on the employer's final bargaining offer and strike authorization. Such reform will prompt unions to internalize the perspective of the employees of the particular firm, rather than pursue industry-wide policies that may conflict with the firm's welfare.

Employee Horizons. Unions at their best are only bargaining agents reflecting the preferences of their principals; the horizons of the workers themselves need to be brought more in line with the economic objectives of the firm. Management should induce an atmosphere of trust and willingness to make sacrifices for the good of the firm by sharing reliable financial information with its employees and their representatives. Tax laws should promote gainsharing, profitsharing, and other forms of performance-based pay in compensation packages. To encourage greater receptivity to changes that will improve the health of the firm, public policy must also address the problem of job security. Government should make transitions easier by making benefits portable, offering relocation assistance, and retraining workers in growing sectors of the economy.

These proposals suggest a future course for labor law reform. The current legal regime is based on a model of the employment relationship that poorly reflects modern conditions. Aside from some bolstering of legal remedies for retaliatory discharge, the focus of legislative efforts should be on lifting existing restrictions that limit representational options and encourage adversarial contests.

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