Currents

First Steps toward Labor Law Reform

American labor law, largely a product of the conditions and perspectives of the 1930s, should be changed. Many employees know this. Labor Secretary Robert Reich knows this. The report of the National Performance Review, Vice President Albert Gore's task force on reinventing government, endorses major changes in federal labor relations. The recent report of the Commission on the Future of Worker-Management Relations, more commonly known as the Dunlop Commission, documents the major changes in the private labor market and endorses several cautious changes in labor law. The new Republican majority in Congress will probably approve several focused changes in labor law.

A Different Environment

Labor market conditions and perspectives on labor-management relations have both changed substantially since our major labor laws were first approved. Over the years since 1948, workers in the goods-producing industries, transportation, and utilities have declined from 51.2 percent of private nonagricultural employment to 25.9 percent, only partly explaining the decline in union membership from 35 percent to 11 percent over roughly this same period. Female workers have increased from 25.5 percent of paid employees to 46 percent, increasing the demands for flexible hours and working conditions. International trade (exports plus imports) has increased from 9.5 percent of GDP to 22.8 percent, sharply increasing both the potential markets for and competition with American-based firms. Labor relations are also far less adversarial than is implicit in our major labor laws. Workdays lost to strikes declined from 0.26 percent of total workdays in 1950 to 0.02 percent in 1990. A recent poll of employees in private firms with 25 or more workers indicates that only 20 percent preferred unions to cooperation committees as a way of gaining a voice in workplace decisionmaking. Unions will continue to serve as collective bargaining agents with many firms but are no longer the model for labor-management relations.

In this case, unfortunately, President Clinton and Vice President Gore have sided with the dinosaurs. In the face of an unemployment rate of nearly 40 percent for teenage black males, President Clinton would make it harder for them to find a legal job by increasing the minimum wage from $4.25 to $5.15 an hour. In a closed meeting with the executive council of the AFL-CIO on February 20, Vice President Gore made a commitment on behalf of the Clinton administration to an executive order that would ban the use of striker replacements by federal contractors. Gore also promised that the president would veto any bills that would repeal the Davis-Bacon Act, the Service Contracting Act, or section 8(a)2 of the National Labor Relations (Wagner) Act.

One wonders whether the administration listens to its own advisers. The Gore report recommended exempting federal contracts up to $100,000 from the Davis-Bacon Act and the Service Contracting Act. The Dunlop Commission recommended "clarifying" section 8(a)2 to allow employer-organized quality circles without authorizing company unions. Even the politics of the administration position does not make obvious sense. Union leaders no longer speak for union members on many issues, and union members are now only a small and declining share of private employees.

Slaying the Dinosaurs

The administration has drawn a line in the sand that should be washed away by the next tide, for it is wrong on each of these issues:

• The proposed increase in the minimum wage would help some low-skilled workers at the expense of even less-skilled workers. (See the article by Deere, Murphy, and Welch in this issue.) Congress should end its usual practice of debating whether the proposed increase is "reasonable" and repudiate the new nonsense that the minimum wage can be increased by some amount without adverse effects on employment.

• The administration plan to prevent federal contractors from hiring striker replacements is an end run around both the Supreme Court and Congress. In a 1938 case, *NLRB v. MacKay Radio and Telegraph*, the Supreme Court ruled that the Wagner Act permits employers to hire permanent replacement workers in economic strikes. The *MacKay* ruling has survived the test of time—including the failure of several congressional attempts to overturn the ruling, most recently in 1994—and is now even more essential to maintaining competitiveness in the global economy. At a minimum, Congress should stop the exemption of federal contractors from this ruling. Moreover, at some time, it would be valuable to codify the *MacKay* rule in our basic labor law.

• The Davis-Bacon Act requires that workers on construction projects financed in whole or in part by federal funds be paid the "prevailing wage" in the local labor market. As interpreted by the Department of Labor, the prevailing wage is always the local union wage. One effect of this act is to increase federal expenditures by over one billion dollars a year. Another effect is to restrict the potential for minority-owned firms to compete for federal construction contracts. The Service Contracting Act has similar provisions and effects on federal service contracts. The Gore report acknowledged these effects and recommended that federal contracts up to $100,000 be exempt from these two acts. The case for economy in government and fairness in the workplace, however, should not be limited only to small federal contracts.

• The issues affecting section 8(a)2 of the Wagner Act are more complicated. The original purpose of this section was to ban employer-organized "sham" unions. In several cases beginning in 1992, however, the National Labor Relations Board (NLRB) has interpreted this section to ban labor-management cooperation committees not organized by unions, severely restricting the potential for discussing and resolving issues of product quality, productivity, and working conditions. Following the first of these cases, one major company was forced to disband labor-management committees that had operated productively for 40 years. The Dunlop Commission acknowledged these effects and recommended that section 8(a)2 be clarified to allow such committees to the extent that any discussion of compensation issues is only "incidental" to their broader objectives. (See the articles by Estreicher and Troy in this issue.) The commission recommendation, however, is not likely to be sufficient because these committees would still be subject to a determination by the NLRB about the balance of their purposes. A more effective, focused response to this problem would be to amend the Wagner Act to permit employer-sponsored labor organizations to deal with management on any issue other than collective bargaining on the terms and conditions of employment.

Other Targets

Several other issues should also be on the near-term agenda for labor law reform:

• For years, workers covered by union contracts were forced to pay union dues for expenditures not directly related to collective bargaining. In a 1986 case, *Chicago Teachers Union v. Hudson*, government workers were exempted from this requirement, and in a 1988 case, *Communication Workers of America v. Beck*, private workers were also relieved of this requirement. The issue here is to assure that union activities other than collective bargaining more fully reflect the interests of the covered workers. Congress would do well to codify both of these rulings in our basic labor law.

• For various historical reasons, railroads have been subject to somewhat different labor laws that should now be changed. Most important, railroads and airlines are not protected against secondary boycotts. (See the article by Frank Wilner in this issue.) This increases the prospect that a strike against one carrier could close down other carriers not involved in the dispute, greatly increasing the cost of a strike to the economy. Congress should extend the same protection against secondary boycotts that other industries have enjoyed since the 1947 Taft-Hartley amendments to the Wagner Act.

• Railroad workers are not covered by the no-

fault state workers' compensation laws, but rather by the fault-based Federal Employers Liability Act of 1908. This has led to highly variable compensation for injuries to railroad workers and rapidly increasing litigation costs. Congress should also act to provide the same no-fault workers' compensation to railroad workers as that which has long covered workers in other industries.

That is enough of a labor law agenda for the 104th Congress. Later, at more leisure, we should rethink the basic premises of the Wagner Act and the Fair Labor Standards Act, but that is another story for another day.

William A. Niskanen

What Works

Discussions of labor policy usually begin in the middle of the issue, focusing on union-management relations, "fair" pay, job security, or retraining. Premises and principles are often left unquestioned.

In a free society, the basic principle should be that transactions between individuals should be voluntary. Workers should be free to sell their services on any terms they can negotiate voluntarily with an employer, and employers should be free to hire whomever they wish, on any terms that meet their needs. But these principles are often ignored, leading to errors both in understanding and policy.

Industrialization gave rise to the questionable belief that workers were at a natural disadvantage vis-à-vis owners of capital and factories, who easily could replace any worker demanding more than subsistence wages with another from the mass of willing, unskilled unemployed. This belief gave rise to measures such as the National Labor Relations Act of 1935 that placed the government "on the side of the workers," supporting their right to vote for a closed shop and in some cases mandating union-management settlements. By the mid-1950s over one-third of private sector workers belonged to unions, mainly concentrated in manufacturing.

Producing Purchasing Power

But rising real wages, that is, purchasing power, does not come principally from unions. It comes only when the market value of a worker's labor rises. In other words, an increase in purchasing power can only be brought about by an increase in productivity. Enterprises must produce more efficiently the goods and services desired by consumers if workers are to trade their labor for such goods and services. Higher productivity is best ensured in a market system in which entrepreneurs quickly and cheaply can redistribute the factors of production, such as capital, raw materials, land, and, of course, labor, from less valuable to more valuable productive activities.

For much of this century highly capitalized American factories could pay semiskilled workers good wages because they produced high-valued goods consumed by Americans, and because they faced little foreign competition. This situation has not prevailed for several decades.

Manufacturing has accounted for a little over 20 percent of America's GDP during most of the postwar era. But the percentage of the labor force working in manufacturing has dropped. That is to say, manufacturing is more efficient. And union members now constitute only about 11 percent of the private sector labor force, with the biggest losses coming in manufacturing.

Further, steel, textiles, apparel, low-end computer chips, and other products are being produced efficiently in less-developed countries. This is not to say that developed countries will give up all production of these goods. It does indicate that these goods do not have the importance to the economy as a whole that they did in the past.

Productive Thoughts

So where will higher wages come from in the future? In a fundamental sense, from the same source as in the past. Free-market philosopher and novelist Ayn Rand wrote that "the machine, the frozen form of a living intelligence, is the power that expands the potential of your life by raising the productivity of your time." This observation concerning new goods and services applies even more today with the high-tech revolution up and running and gaining momentum.

Over the past decade and a half, entrepreneurs have employed capital, labor, and, most importantly, brains to produce microprocessors, personal computers, software, and a variety of information systems and applications, new high-

value-added goods and services. Future applications of these technologies to everything from product and systems design to medical devices and manufacturing likely will keep American firms on the cutting edge in the world economy. In other words, it is likely that, increasingly, prosperity will come from working smarter.

Transatlantic Contrast

Western Europe and the U.S. exemplify two contrasting approaches to economic and, thus, labor policies. European governments actively promoted investments in steel, shipbuilding, a supersonic transport plane, and analog high-definition television, to name but a few. These investments now lose money and, as important, did not produce marketable personal computers, software, or other cutting-edge products.

Labor markets in Europe are rigid; state policies mandate high wages and benefits. But real purchasing power for European workers is lower than for their American counterparts. It is difficult in Western Europe to dismiss unneeded workers. The German government mandates that most enterprises allow employees to form so-called works councils that have review powers over employee dismissals. And 40 percent of the workforce of that country is unionized.

Yet the benefits of America's more flexible labor market are seen in contrast with Western Europe. Despite the fact that business turnover in the U.S. is the highest in the industrialized world, the American unemployment rate is only half that of Europe. During the 1980s, 18 million net new jobs were created in the U.S., most well-paying and in the private sector, compared to only about 4 million in Europe, many of which were in the public sector.

Current Policies

What then can be said about current American labor policy issues? Regarding principles, productivity, and flexibility, a few things.

- The federal and state governments mandate the minimum wages paid to employees; the Clinton administration wants to hike the rate again. But such mandates produce no new goods or services; they merely lower output and interfere in voluntary agreements between employers and employees.
- State right-to-work laws, much beloved by the Right, prohibit employers from hiring only members of a union. But this should be a matter between the employer and the workers. Some might argue that these laws are necessary to offset the prounion aspects of federal labor law; but why counteract one bad policy with another? Is it not time to repeal both types of laws?
- A secondary boycott occurs when workers not only strike against their employer but against other, presumably innocent parties as well—for example, against the suppliers of an employer. With the Taft-Hartley Act of 1947 the federal government prohibited such boycotts, again to counteract other union advantages. The exemption for rail workers does put that industry at a disadvantage, yet in the long term even the basis of this ban should be questioned. If workers want to withhold their patronage or services from certain enterprises or engage in other nonviolent acts of protest, where does Washington get the moral—to say nothing of the constitutional—authority to limit their freedom? And if an enterprise finds itself subject to a secondary strike and decides to replace the striking workers, why should this be a concern of the federal government?
- In the recovery from the 1990-91 recession, real purchasing power has not risen with employment, but the use by enterprises of part-time workers, not covered by many mandates that currently burden full-time workers, has. Further, more individuals work at home, out of the reach of regulators. This has led Clinton administration officials and friends of organized labor in Congress to contemplate extending federal regulations to part-time workers or those who work at home. But moving America's labor laws more in the direction of Europe's would only produce the same disastrous results on this side of the Atlantic.

The Worker as Entrepreneur

The most important issues for American workers are occurring outside of labor law. To the extent that regulations that make it difficult to start or maintain enterprises are reduced, and to the extent that lower taxes free capital for productive investments, workers will find more employment opportunities. It is smaller, mostly nonunion enterprises that create most new jobs and that would benefit most from these reforms.

Some critics might protest that not everyone

can be a Steve Jobs or Bill Gates, starting high-tech companies and employing design or program wizards. What of the less-skilled or less-educated in the labor force? First, only if such entrepreneurs and firms do exist will the country be productive enough for these workers to trade their labor for more goods and services. Second, many American firms face a kind of labor shortage for these types of workers. Many firms literally find themselves forced to employ college graduates today on the factory floor to obtain the quality found in high school graduates two decades ago.

This fact suggests two things. First, market arrangements of private suppliers and consumer choice that have produced inexpensive, high-quality personal computers should be tried in education. And second, it suggests that workers should take a different attitude towards themselves. Ludwig von Mises observed that economic roles, such as consumer and producer, or capitalist and worker, are all in fact manifest to some degree in each flesh-and-blood individual. In *Human Action* Mises says of the worker, "If he has acquired the skill needed for the performance of certain kinds of labor, he is an investor. . . . The laborer is an entrepreneur in so far as his wages are determined by the price the market allows for the kind of work he can perform."

The sooner more workers think of themselves as active agents whose minds, not just brute force, make their work of value, and not as mere passive instruments to be used by employers, the sooner most labor problems will take care of themselves.

Edward L. Hudgins

Guidelines for Employee Participation Committees

In a lean and mean global marketplace, American businesses are constantly seeking new ways to ensure their economic survival by improving worker morale, productivity, and profitability. That is why the traditional form of labor-management relations, with its adversarial impasses, is coming under increasing scrutiny.

A variety of employee participation mechanisms has evolved from this managerial revolution, including quality circles, safety and health committees, incentive devices, training programs, job enrichment and redesign plans, project-oriented task forces, semi-autonomous work teams, and customer satisfaction groups. Sophisticated employers also realize that if their nonunion workers begin to believe they cannot solve their workplace problems directly with management, an outside labor organization may be substituted as the workers' spokesman.

One or both of these factors motivate many companies to establish formal employer-employee committees for dealing with working conditions, as well as rank-and-file peer review panels to adjudicate employee grievances. A few firms have even allowed nonunion workers to take their complaints to a neutral arbitrator for a final and binding decision, in a manner similar to the procedure used in labor union contracts. Front-line supervisors sometimes object, claiming that their managerial prerogatives are being usurped. Senior management, on the other hand, typically views this method of dispute resolution as a viable alternative to lengthy and costly court litigation.

A recent study indicates that 80 percent of the *Fortune* 1,000 companies now have some sort of employee involvement program for their nonunion workers, and many smaller firms have followed suit. Productivity gains are being documented. But what the business community does not always realize is that, popular and successful as these "democratic" empowerment groups can be, many of them are considered illegal under a half-century-old labor law. This unsettling fact, in turn, makes employee committees vulnerable to a disestablishment order by the National Labor Relations Board (NLRB) if challenged by either a hostile employee or an AFL-CIO union affiliate. Since many businesses have unknowingly placed themselves in this Catch-22 situation, a brief refresher course in labor law history may be in order.

The Wagner Act

The primary purpose of section 8(a)2 of the original National Labor Relations Act of 1935, also known as the Wagner Act, was to eradicate so-called company unions. Before the Wagner Act, employers sometimes created in-house "sham" or "sweetheart" unions to usurp the collective bargaining process and fend off organizing drives by

bona fide labor organizations. In the 1935 congressional debates over adoption of this landmark law, Sen. Robert F. Wagner argued that "collective bargaining becomes a mockery when the spokesman of the employees is the marionette of the employer."

The Taft-Hartley Act

As a consequence, the original statute made it unlawful for an employer to "dominate" a labor organization. But section 8(a)2 of the Labor-Management Relations Act, also known as the Taft-Hartley Act of 1947, expanded this unfair labor practice by forbidding an employer to "interfere with the formation or administration of any labor organization or contribute financial or other support to it." Before the NLRB will find a violation of section 8(a)2, however, the entity the employer is found to be unlawfully "interfering with" or "contributing support to" must be a labor organization.

What is unfortunate for management is that the statutory definition in section 2(5) of the Taft-Hartley Act does not require a "labor organization" to have any formal structure. Small groups of employees may fulfill the definition, even though they have no constitution or bylaws and no elected officials, formal meetings, membership dues, or collective bargaining agreement. That is why a careful reading of section 2(5) should cause employers to reevaluate the structure, purpose, and activities of their employee participation programs. This section states as follows: "The term *labor organization* means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

The statute is cast in such broad language that if given its literal meaning, almost any form of employer civility to workers might be deemed unlawful domination, interference, or support. As a result, from their earliest decisions until today, many courts and the NLRB have ruled that this nebulous "dealing-with-employers" definition encompasses every type of employee par-

ticipation committee that is formed to discuss "conditions of work," even though the committee never engages in formal collective bargaining.

The *Cabot Carbon* Case

In the leading judicial decision on this sensitive subject, *NLRB v. Cabot Carbon Co.* (1959), the U.S. Supreme Court upheld an NLRB order to disestablish employee committees at several of the Cabot Carbon Company's nonunion plants. The committees were judged to be section 2(5) labor organizations that the company dominated, interfered with, and supported in violation of section 8(a)2 of Taft-Hartley.

These employee committees had no membership requirements, collected no dues, and had no funds. Plant clerks assisted the committees in conducting their elections and performed their office work. Cabot Carbon paid all necessary expenses. Each committee consisted of two or three employees, elected by the rank-and-file workers for a one-year term. Retiring members nominated their successors. The committees held regular monthly meetings that were scheduled by local plant management, on paid work time. Cabot Carbon's corporate director of industrial relations frequently served as the final authority in determining whether to accept, modify, or reject committee recommendations. The jointly drafted purpose of these committees was "to provide a procedure for considering employees' ideas and problems of mutual interest to employees and management . . . [including but] not limited to safety; increased efficiency and production; conservation of supplies, materials and equipment; encouragement of ingenuity and initiative; and grievances at nonunion plants or departments."

Other unstated aspects of the employment relationship discussed by the committee members with the Cabot Carbon management included seniority, job classifications, job bidding, overtime records, time cards, a merit system, wage corrections, work schedules, holidays, vacations, sick leave, and improvement of working facilities and conditions.

In reaching its decision to order disestablishment of these committees, the Supreme Court emphasized that lower federal courts have "uniformly held that employee committees or plans, under whatever name called, that functioned similarly to those here, were 'labor organizations' as defined in that statute." The Court added that since the committees existed in part for the purpose "of dealing with employees concerning grievances . . . this alone brings these committees squarely within the statutory definition of 'labor organizations.'"

In addition, observed the Supreme Court, the committee meetings consisted of a series of "proposals and requests with respect to matters covering nearly the whole scope of the employment relationship." After reviewing the legislative history of section 2(5), the Supreme Court stressed that the broad term "dealing with employers" was not intended by Congress to be synonymous with the more limited statutory term "bargaining with employers," which relates to traditional negotiations between organized labor and management.

In the aftermath of the *Cabot Carbon* case, the NLRB and the courts have generally continued to give a broad interpretation to section 2(5). It is immaterial that the employee plan had not engendered or obviated labor disputes in the past, or that any company participation in the administration of the plan had been incidental and with good motives. Illegal interference with the formation or administration of a "labor organization" exists whenever management establishes an employee representation committee or plan to "deal" with "conditions of work," selects the employee representatives, requires that committee membership be on a formal and continuing basis, determines when meetings will be held, presides over them, and controls their decisions.

The *Scott & Fetzer* Case

It is important to understand, however, that the Supreme Court's interpretation of this venerable labor statute has been tempered by some of the lower federal courts in varying factual situations. For example, in *NLRB v. Streamway Division of Scott & Fetzer Co.* (1982), which denied enforcement of an NLRB disestablishment order, a federal circuit court of appeals held that an employee committee created by the employer to develop "more readily accessible channels of communications . . . between plant personnel and management" was not a statutory labor organization.

The court in *Scott & Fetzer* distinguished *Cabot Carbon* on the facts and reached its conclusion because the Supreme Court "did not indicate the limitations, if any, upon the meaning of

'dealing' [with employers] under the statute." Therefore, decided the court of appeals, "The question of how much interaction is necessary before 'dealing' is found is unresolved." The court then quoted a previous appellate court decision to the effect that "an inflexible attitude of hostility toward employee committees defeats the Act. It erects an iron curtain between employer and employees, penetrable only by the bargaining agent of a certified union, if there is one, preventing the development of a decent, honest, constructive relationship between management and labor . . . . [O]ur circuit is willing to reject a rigid interpretation of the statute and instead consider whether the employer's behavior fosters employee free expression and choice as the Act requires."

Guidelines

A review of the *Scott & Fetzer* case, as well as other federal court and NLRB decisions, including *Cabot Carbon*, *Electromation*, and *DuPont*, discloses a pattern of characteristics that an employer should consider as guidelines on the creation and operation of any employee participation committee or plan in order to increase its prospects for validity under federal law.

First: ensure that employees are involved in the creation of the committee, and keep the committee's structure as informal and flexible as possible. Avoid a charter, bylaws, elected officers, membership dues, rigid rules of procedure, written minutes of meetings, designated spokespersons, or any other formality that suggests that the committee has the capacity to be an organization or agent of any kind. Availability of company time and property are not illegal per se, but the employer should make limited use of the company's financial and physical resources in allowing the committee to function.

Second: grant a substantial degree of autonomy to the committee, keeping its activities individualized in nature and unfettered by the employer's supervision and control. Management personnel should limit its role to that of observers or facilitators of the exchange of information. Rank-and-file employee membership should be voluntary and rotated every few months so that a maximum number of workers can give direct input. Committee members should understand that they are participating in informal information exchanges—"rap sessions" or "brainstorming" meetings—and that their individual opinions and attitudes are being solicited for management's own enlightenment, rather than the presentation of a collective viewpoint or a bilateral course of dealings with the employer.

Third: refrain from formal decisionmaking. If, however, some action on an issue becomes unavoidable, it should be decided by majority rule, with employer representatives abstaining from any vote and passing the committee's recommendation along to senior management for its discretionary consideration.

Fourth: make certain that rank-and-file committee representatives refrain from union-style "give and take" negotiations with employer representatives over topics discussed at the meetings in a concerted effort to influence management to comply with the workers' "demands."

Fifth: avoid any activity which could be construed as illegal antiunion motivation for the committee's creation and administration, or an attempt by management to undermine the employees' statutory freedom to choose outside labor representation.

Sixth: avoid or minimize committee discussions of "grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work" as stated in section 2(5) of the Taft-Hartley Act and amplified by NLRB and court decisions. It is safer to focus on subjects such as job enrichment, workplace morale and productivity, improved communications, training programs, customer or product service and quality, or company-sponsored civic, athletic, and social events.

Risks and Opportunities

The more any type of employee empowerment committee or group adheres to these six standards, the better its chance of surviving a challenge that it is an illegal employer-dominated, interfered-with, or supported "labor organization." Simply put, the NLRB and the courts review the totality of the employer's conduct on a case-by-case basis and distinguish between prohibited "interference or support" and permissible "cooperation," as well as between excessive "dealing" with employees and legitimate informal "interaction" or "brainstorming."

As a practical matter, nonunion employers should never be timid or reluctant about positive

and direct communications with their rank-and-file workers. On the contrary, this is an essential element of good management. Some 90 percent of American businesses operate on an open shop basis, and about the only time one of their employee empowerment committees comes under legal scrutiny is the rare occasion when the committee's activities are called to the NLRB's attention by an AFL-CIO-affiliated union during its campaign to organize the employer's workers.

In 1993, moreover, a panel session sponsored by the American Bar Association's Section of Labor and Employment Law reported that, out of more than 10,000 charges of unfair labor practices issued by the NLRB since October 1, 1989, only 37 were issued against employee committees. Since the *Electromation* decision was issued in December 1992, the NLRB has found only 17 instances of such violations out of a total of 2,000 charges. As a matter of fact, these section 8(a)2 challenges to employee involvement programs have dropped from 19.5 percent of all unfair labor practice charges in 1938 to less than 3.5 percent today.

An Entry Point for Unions?

Although the legal risk of an NLRB complaint challenging an employee participation plan of a nonunion employer is minimal, there is also a potential psychological risk to be considered. Any employer who creates one of these committees may suddenly discover that the employees involved are beginning to relish their newfound influence and embrace a collective bargaining mentality. In other words, when a select committee of rank-and-file employees deals with management on working conditions, this entity provides a ready-made structure for entry by a traditional AFL-CIO labor organization for all potential bargaining unit workers. The raiding union's goal will be the use of NLRB procedures to disestablish and replace the in-house committee at such time as management's negative response to employee proposals for more empowerment or improved working conditions becomes unacceptable to the hostile or frustrated workers, and they seek outside labor representation to attain their objectives.

The good news for management is that if the employee committee is structured and administered fairly and in general compliance with the previously recommended guidelines, it should encourage individualism, improve morale, and defuse any issues that would motivate employees to seek the committee's legal disestablishment and summon AFL-CIO union representation. Under all the circumstances, therefore, it is wise to consider the practical effects, both pro and con, of well-intentioned employee involvement groups on workplace *esprit de corps* and productivity, as well as on a legitimate long-range union avoidance program.

On the other hand, when dealing with a unionized workforce, management's unilateral bypass of the workers' statutorily protected exclusive bargaining representative regarding any matter related to the employees' wages, hours, and other terms and conditions of employment is destined to cause a legitimate protest from the incumbent labor union, and presumably will be construed by the NLRB and the courts as illegal employer activity.

Legislative Reform

To address this dilemma, on March 30, 1993 Rep. Steve Gunderson (R-Wis.) and Sen. Nancy Landon Kassebaum (R-Kans.) simultaneously introduced the Teamwork for Employees and Management Act in the House of Representatives and the Senate. This legislation would amend section 8(a)2 and legalize labor-management programs that deal with such issues as quality, productivity, and efficiency. Twenty cosponsors signed onto the bill.

With the landslide Republican victory in the mid-term elections of 1994, Sen. Kassebaum became chair of the Senate Labor Committee, and her committee will surely revisit this employee participation quandary. Even the prounion "Report and Recommendations of the [Dunlop] Commission on the Future of Worker-Management Relations," issued January 9, 1995 on behalf of the Clinton administration, recommends that so long as employee participation plans do not allow for a rebirth of the company-dominated unions that section 8(a)2 was designed to outlaw, such programs "should not be unlawful simply because they involve discussions of terms and conditions of work or compensation where such discussion is incidental to the broad purposes of these programs."

In any event, whether dealing with unionized or nonunion workers, the inescapable fact

remains that until Congress or the courts uniformly modify the legal restrictions on worker empowerment committees, employers who fail to follow the guidelines enumerated herein should calculate the degree of business risk they are willing to take.

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Loopholes in the Secondary Boycott Ban

A mid-1994 strike by the United Transportation Union (UTU) against a single regional railroad, Soo Line, which operates in nine upper midwestern states, threatened to envelop other railroads and their customers. UTU warned that it would spread pickets to railroads where labor relations with UTU are harmonious—a tactic known as "secondary boycotts." Secondary boycotts involve neutral parties in a labor dispute and impose unprovoked, unjustified, and unreasonable economic harm on innocent economic "civilians."

Soo Line and UTU settled their dispute without UTU carrying out its threat. But the dispute demonstrates that railroad unions consider both the threat and use of secondary boycotts legitimate weapons in pursuit of contract objectives. Indeed, with a new round of contract negotiations now in progress among a dozen major railroads and more than a dozen rail labor unions, secondary boycotts could become a reality.

Secondary boycotts were not a problem in the past because railroads generally engaged in coordinated bargaining—national handling—with their unions. Recently, a number of major railroads have chosen to bargain individually with their unions, raising the possibility of single-railroad strikes, rather than a nationwide work stoppage. In fact, many unions are demanding an end to national handling, seeking to force every railroad into local handling, an issue currently before the courts. It is during such instances of railroad-by-railroad bargaining and during breakdowns in the negotiating process that rail unions threaten to engage in secondary boycotts.

When Congress banned secondary boycotts in 1947 by amending the National Labor Relations Act of 1935 (NLRA), it excluded airlines and railroads from the ban. This was because airline and railroad labor relations are covered by a separate law, the Railway Labor Act of 1926 (RLA), and because secondary boycotts had not previously been used against airlines and railroads.

Understanding Secondary Boycotts

The most familiar result of a breakdown in labor relations is the withdrawal of services by unionized workers and the posting of pickets outside the facilities of the "struck" firm. This is a *primary* strike.

Less familiar is so-called *secondary* activity by labor unions—commonly called secondary boycotts. Secondary activity occurs when labor unions attempt to influence company "A," a primary employer, by exerting some sort of economic or social pressure against firms that deal with "A" (secondary employers with which the unions have no dispute). The unions attempt to have these secondary parties exert pressure on the primary employer to accede to union demands. Where railroads are bargaining individually with their unions, secondary boycotts can be used to "whipsaw" the carriers. Highly disruptive "rolling" strikes move from one neutral railroad to another—but never shut down at one time, or for very long, large segments of the industry. This strategy minimizes the threat of congressional intervention.

In all industries except interstate airlines and interstate railroads, most forms of secondary boycotts are unlawful. They are considered unfair labor practices and may be enjoined by federal district courts. But airlines and railroads, as mentioned, are governed by the RLA and the Norris-LaGuardia Anti-Injunction Act of 1932, not the NLRA and certain amendments of the Taft-Hartley Act. By a curious omission of law, secondary boycotts against airlines and railroads normally may not be enjoined by the federal courts, leaving these important transportation entities and the public subject to immediate business disruption and personal inconvenience, even though there is no labor dispute among the targeted carriers and their employees.

A Brief History of Secondary Boycotts

Prior to 1932 secondary boycotts subjected

unions to costly damage suits because the U.S. Supreme Court consistently upheld lower court rulings that secondary boycotts violated the Sherman Antitrust Act of 1890. The most often cited examples are the *Danbury Hatters* and *Duplex* cases. *Danbury Hatters* involved the United Hatters of North America, which in 1902 failed in an attempt to organize workers of the nonunion Loewe and Company, a Danbury, Connecticut hat maker. The union instituted both a primary boycott against Loewe and Company and a secondary boycott against wholesalers and retailers handling Loewe's products. Loewe brought suit, and the Supreme Court eventually held that the union's actions constituted a conspiracy to restrain trade in violation of the Sherman Act.

Seeking to overrule the Court's decision, organized labor lobbied for relief in the form of the 1914 Clayton Act. Section 20 of the Clayton Act seemed to take secondary boycotts out of the reach of the Sherman Act: "No restraining order or injunction shall prohibit any person or persons, whether singly or in concert . . . from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do." The Clayton Act's section 6 also stated that unions could not be held to be illegal combinations or conspiracies in restraint of trade.

Ultimately, the Clayton Act fell short of its desired effect as a result of a Supreme Court ruling. In 1921 the International Association of Machinists (IAM) was unsuccessful in organizing Duplex Printing Press Company. Using actions similar to those of the United Hatters against Loewe and Company 19 years earlier, the IAM instituted a secondary boycott against the products of Duplex. The IAM prohibited its members from installing or repairing Duplex presses, encouraged Teamster drivers not to deliver Duplex merchandise, and warned customers not to purchase or install Duplex products. Duplex brought suit and the Supreme Court eventually found the actions of the IAM to be in violation of the Sherman Act, notwithstanding the Clayton Act's sections 6 and 20. The Court found that nothing in the Clayton Act exempted unions from antitrust accountability where they departed from what the Court termed "normal and legitimate objects" and engaged in combinations or conspiracies in restraint of trade against businesses other than the primary employer. Accordingly, the activity could be enjoined.

Norris-LaGuardia's Effect on the Railway Labor Act

The Norris-LaGuardia Anti-Injunction Act of 1932 was union-inspired. It overruled *Danbury* and *Duplex* and legitimized secondary boycotts. Section 4 of the act prohibits courts from issuing injunctions against union actions involving or growing out of *any* labor dispute. The intent of Norris-LaGuardia was to eliminate any distinction between primary and secondary activity.

Meanwhile, during debate on Norris-LaGuardia, the House of Representatives rejected an amendment that specifically would have permitted railroads to seek injunctions against strikes. Thus, every industry in America was subject to the Norris-LaGuardia Anti-Injunction Act, extending secondary boycotts beyond the reach of the law.

When the RLA was passed in 1926, it was (and remains) silent as to secondary boycotts. But judge-made law at the time—*Danbury Hatters* and *Duplex*, for example—was clear: secondary boycotts were unlawful. The 1932 Norris-LaGuardia Act changed that.

Indeed, the Supreme Court ruled as recently as 1987 that the RLA's silence on secondary boycotts indicated a congressional intent to permit them. The Court rejected the argument that its prior *Danbury Hatters* and *Duplex* decisions would have made any specific prohibition on secondary boycotts in the RLA superfluous. As evidence, the Court pointed to Congress' 1932 rejection, *supra*, of an amendment to Norris-LaGuardia that would have permitted injunctions against railroad strikes.

Similarly, the Supreme Court has refused to accept language in the RLA's section 2 as indicative of a congressional ban on secondary boycotts: "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to . . . settle all disputes . . . [and] avoid any interruption to commerce."

When the NLRA, which covers all industries except railroads and airlines, was passed in 1935, it also was made subject to the anti-injunction provisions of Norris-LaGuardia.

Congress Partially Closes the Secondary Boycott Loophole

In 1947, believing the pendulum had swung too far in the direction of organized labor, Congress

amended the NLRA by passage of the Taft-Hartley Labor-Management Relations Act. Section 8(b)4 of Taft-Hartley made secondary boycotts an "unfair labor practice." Taft-Hartley is not a sweeping prohibition of secondary boycotts, but it describes and condemns specific union conduct directed towards specific objectives. The National Labor Relations Board (NLRB) is required to give investigative priority to charges of secondary boycotts; and if it finds that the statute is being violated, the NLRB is required immediately to petition a federal district court for a temporary injunction. The NLRB has exclusive authority to petition for an injunction.

Certain loopholes in Taft-Hartley subsequently were plugged by provisions of the 1959 Labor-Management Reporting and Disclosure (Landrum-Griffin) Act. Announced Sen. John F. Kennedy: "[Our intent is to] plug loopholes in the secondary activity provisions . . . . There has never been any dispute about the desirability of plugging these artificial loopholes."

Taft-Hartley and Landrum-Griffin did not amend the RLA, and the Supreme Court has refused to extend provisions of Taft-Hartley to the RLA. There are many theories advanced as to why Congress did not extend the Taft-Hartley ban on secondary boycotts to industries governed by the RLA. One is that railroad labor unions never engaged in secondary boycotts between passage of Norris-LaGuardia in 1932 and passage of Taft-Hartley in 1947. This is not as surprising as it may seem. The railroad industry has been extensively organized by labor unions since World War I, it has a long history of coordinated bargaining, and the industry's many labor agreements historically have shared simultaneous reopening dates. Incentives and opportunities for secondary boycotts have been limited until recently. In fact, rail labor unions did not engage in secondary boycotts until 1969, during a prolonged strike against the Florida East Coast Railway. The Supreme Court made it clear even then that until Congress acts, peaceful picketing in both primary and secondary situations by the RLA-covered unions is conduct that may not be proscribed.

The *Burlington Northern* Case

Since that first use in 1969 of secondary pickets, secondary boycotts against railroads have surfaced from time to time and with varying degrees of success. A more recent use of secondary boycotts occurred in the spring of 1986, when the Brotherhood of Maintenance of Way Employees (BMWE) was engaged in a primary strike against a regional New England railroad, Maine Central. During the course of that work stoppage, BMWE extended its picketing to secondary sites—rail yards of other, neutral railroads that handled freight destined to or received from the struck railroad. The tracks of some of those carriers did not even connect directly with Maine Central.

One of those railroads was a primarily western carrier, Burlington Northern, that successfully petitioned the District Court for the Northern District of Illinois for an injunction. But the Seventh Circuit Court of Appeals overturned the district court's decision on the grounds that the RLA does not prohibit secondary boycotts.

Although Congress subsequently enacted legislation ending the primary dispute between Maine Central and its employees, the secondary boycott dispute reached the Supreme Court. In a unanimous decision, the Court affirmed that under the RLA there is no prohibition against secondary boycotts.

The Court, in its *Burlington Northern* decision, even threw open to question a so-called substantial alignment test that had been devised by a district court and sustained by the Eighth Circuit Court of Appeals. The test would permit injunctions in industries covered by the RLA upon a showing that the picketed neutral has not aided, supported, or aligned itself with the railroad involved in the primary dispute with the union.

Recent Developments

Two other decisions also are worth noting, even though the first preceded the Supreme Court ruling in the *Burlington Northern* case. In 1986 the IAM struck Eastern Airlines and threatened to spread pickets to neutral commuter railroads. The secondary boycott was frustrated before it began. Although the courts ruled that the striking union could picket railroads, employees of those commuter railroads were enjoined from honoring picket lines because of "no-strike" or "no-sympathy action" clauses in their work contracts.

More recently, a new twist on secondary boycotts was attempted against neutral railroads. In 1990 a Teamsters local had a labor dispute with

an independent contractor of the Atchison, Topeka & Santa Fe Railway at Richmond, California. Even though Santa Fe established separate gates for use by the struck contractor and Santa Fe employees, Teamster pickets appeared at the Santa Fe employee gate and caused a two-day shutdown of the railroad. The Ninth Circuit Court of Appeals ruled against the Teamsters in April 1994, under provisions of common *situs* picketing procedures that go beyond the scope of this article.

As of this writing, there are only two relevant Supreme Court decisions that deal with secondary boycotts against railroads: *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Company* (1969), and *Burlington Northern Railroad v. Brotherhood of Maintenance of Way Employees* (1987). Both hold that Norris-LaGuardia's prohibitions of injunctions against secondary boycotts continue to apply to industries and firms subject to the RLA.

Prospects for Reform

Following the initiation of a secondary boycott by BMWE against Burlington Northern in 1986, then-Transportation Secretary Elizabeth Dole sent to Congress draft legislation to subject railroad and airline employees and their unions to section 8(b)4 of Taft-Hartley and thus make secondary boycotts against neutral airlines and railroads unlawful. The legislation failed to attract a sponsor. In March 1989 Rep. Christopher Cox (R-Calif.) introduced a proposal substantially similar to the Dole draft legislation, H.R. 1424. The bill did not receive House committee consideration.

It is believed by many close to the congressional process that any serious consideration of legislation barring secondary boycotts in the airline and railroad industries can be triggered only by an actual use of the weapon that leads to serious regional or nationwide economic disruption. Obviously, railroads, their shippers, and passengers would prefer to avoid such unnecessary economic chaos in favor of a more orderly legislative solution.

There also are doubts as to whether an appropriate remedy is the simple extension of the Taft-Hartley prohibition to the RLA. For example, under Taft-Hartley secondary boycotts are not banned outright, but are considered an unfair labor practice. The NLRB (presumably the National Mediation Board if the extension to the RLA is made) is required to investigate such an unfair labor practice and petition a federal district court for an injunction. The obligation is exclusive, and employers have no standing to bring the petition.

In the Teamsters-Santa Fe dispute discussed above, the regional office of the NLRB initially refused to seek an injunction. As railroad work stoppages have an immediate adverse impact upon the public, any delay in seeking and obtaining an injunction is unacceptable to a variety of interests.

Also, the Taft-Hartley ban on secondary boycotts contains ambiguities, and federal courts have carved out a number of exceptions based upon a theory of permissible primary conduct. For example, a nonprimary employer can even lose its neutrality and protection against secondary boycotts by unintentionally allying itself with a primary employer.

The "ally doctrine," also known as the "substantial alignment test" and adopted by the courts under the NLRA, permits a union to follow the work of the primary employer when it involves other employers. But the substantial alignment test does not work in the railroad context because railroads are interconnected. Railroads are common carriers and must accept freight and passenger cars tendered to them. In fact, over half of all freight revenue and more than one-third of all freight traffic involves two or more railroad connections.

A broad definition of "ally" that includes accepting or delivering freight to connections, as required by law, would essentially create a loophole through which most secondary boycotts would pass. In fact, the Fourth Circuit Court of Appeals in 1986 dismissed an injunction against secondary boycotts involving Richmond, Fredericksburg & Potomac Railroad. According to the circuit court, although the railroad appeared to be neutral, "it's not completely disinterested in the underlying labor dispute in that it has an association and does some business with [the struck carrier]." Indeed, as Sen. Robert A. Taft explained, "[The act] is not intended to apply to a case where the third party is, in effect, in cahoots with or acting as a part of the primary employer."

The appropriate remedy, then, is new legislative language. Until then, America's two most important forms of transportation and their cus-

tomers are at risk of being unwillingly, unnecessarily, and unjustly embroiled in the labor controversies of others.

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MSHA: Undermining Progress in Occupational Safety and Health

In the public's mind, mines have a reputation of being less than safe places to work. However, mine safety has actually improved significantly over the years. What is now truly unsettling is federal enforcement policy that prevents the industry from achieving further improvements in safety and health.

Occupational safety and health in all U.S. mines is regulated by the Mine Safety and Health Administration (MSHA) under the authority of the 1977 Mine Safety and Health Act, more commonly known as the Mine Act. The Mine Act covers all coal, metal, and nonmetal mines and is based on an earlier federal statute, the 1969 Coal Mine Health and Safety Act. Unlike the more familiar Occupational Safety and Health Administration (OSHA) structure, there is no provision under the Mine Act for states to assume primacy in enforcing the act; MSHA enforces the act nationwide. Nevertheless, a large number of states administer their own mine safety and health laws in tandem with the federal law.

Under the Mine Act, MSHA sets all safety and health standards and then enforces them through mandatory mine-wide inspections: a minimum of four per year at each underground mine and two per year at each surface mine. MSHA also conducts numerous special or "spot" inspections, including those undertaken in response to miners' complaints, which can be made anonymously through a 24-hour toll-free "hot line."

Whenever a MSHA inspector believes that a violation has occurred, he must issue a citation that carries a mandatory penalty of up to $50,000. If the violation in question exhibits a relatively high degree of seriousness or negligence on the part of the mine operator, the inspector is authorized, under specified circumstances, to issue a mine closure order, which may require the operator to withdraw all miners from the affected area until the cited conditions have been abated. The operator has no right to a hearing before such an order can be issued; indeed, unlike under the OSHA structure, an operator generally cannot get a hearing on any citation unless and until the alleged violation has been corrected to the satisfaction of the issuing inspector. The secretary of labor can also seek injunctive relief and can recommend that criminal charges be brought against operators or individual agents of corporate operators.

In addition to the secretary of labor's rulemaking and enforcement powers, the Mine Act grants miners and their representatives numerous rights: to file safety complaints; to accompany MSHA inspectors on their rounds with no loss of pay; to receive initial and refresher training; to be compensated for time lost due to mine closure orders; to participate in enforcement proceedings; and to be protected against any retaliatory actions by operators after having exercised their statutory rights.

Other than a series of oversight hearings held in the early 1980s, the current MSHA statute has largely been ignored, even while Congress has entertained various proposals relating to OSHA reform. Now, after 25 years of experience under the Mine Act and its predecessor, the 1969 Coal Mine Health and Safety Act, serious questions are being raised with respect to the act's structure and the regulatory philosophy it represents.

Deficiencies in the Mine Act and its administration can best be illustrated by a few examples of abuses that demonstrate how the talents and resources of both industry and the regulators have been diverted from the statute's explicit goals: the reduction of accidents, injuries, and illnesses in the nation's mines.

Wherever Two or More Are Gathered

MSHA provides that miners or their representatives may accompany MSHA inspectors during their inspections of mines. In implementing this so-called walkaround provision, MSHA defined a representative of miners as "any person or organization which represents two or more miners at a coal or other mine for purposes of the Act." The United Mine Workers of America (UMWA) have utilized this definition to secure the desig-

nation of miner representatives at facilities in which workers are not represented by the UMWA, including mines where the union had previously lost representation elections under the National Labor Relations Act.

By securing status as miners' representatives, nonemployee union organizers not only gain access to mine property as walkarounds, they also get access to mine records and to the mine owners' operating plans regarding ventilation, roof control, and other operations that must be approved by MSHA. Additionally, miners' representatives have the right to object to the granting of a petition for modification, whereby a mine operator can seek approval from MSHA of an alternative means of complying with a mandatory safety standard.

Nonunion mine operators who have objected to granting such broad access to union organizers have been cited by MSHA and threatened with mine closure orders. These enforcement actions have been upheld by the federal Mine Safety and Health Review Commission and the D.C. Circuit Court of Appeals on the grounds that the secretary of labor's policy is a "reasonable" interpretation of the act.

Turf Expansion

"Coal or other mine" is broadly defined in the act to include facilities used in the milling of minerals and the work of preparing coal. The assumption is that Congress intended that coal preparation plants that are integral to mining operations would also be subject to inspection by MSHA.

In a series of cases dating back to 1989, however, MSHA has taken the position that it has jurisdiction over coal-handling facilities, including coal-carrying conveyor belts at electricity-generating power plants. These power plants often custom mix coal to achieve higher Btu per ton levels or to control sulfur content for clean air compliance. In order to expand its jurisdiction to power plants, MSHA has characterized the custom mixing of coal as "coal preparation," even though those power plants are also subject to OSHA inspections. In other words, facilities that purchase coal for their own uses suddenly find themselves declared to be coal mines.

Similarly, in states like Pennsylvania, small entrepreneurs have entered into contracts with the state to reclaim abandoned coal refuse piles by setting up cogeneration facilities to burn the refuse. No coal extraction is involved; the coal was mined and then rejected years ago and sits in unsightly piles that are now being reclaimed. The only processing that occurs is the removal of rock and other noncombustible debris and the sizing of the waste coal to make it compatible with the cogeneration facility. MSHA nevertheless asserts that such operations are "mines" for purposes of the act and subject to mandatory inspections. The agency's policy is not uniformly applied across the country. Indeed, the mining industry strongly suspects that the number of power plants and cogeneration facilities inspected in the various MSHA districts increases as the number of operating mines in those same districts decreases.

Double Fault

The act has been construed as a strict liability statute, so that a mine operator is liable without regard to fault for any violation occurring on mine property, regardless of the circumstances surrounding that violation.

In one case, a leaseholder, Island Creek Coal, contracted with a mining company, Monument Mining, to produce coal on Island Creek's property. Monument was cited for a violation by MSHA, and an order was issued withdrawing its employees from the mine. Those employees subsequently sued Monument for compensation for lost salary, as provided for under the Mine Act. At this point Monument went bankrupt, and the employees refiled their claim against Island Creek. In a decision ultimately issued by the D.C. Circuit Court, Island Creek, the leaseholder, was deemed to be an operator under the act and therefore liable for compensation to Monument's employees, even though Island Creek had nothing to do with the violation or the withdrawal order.

In another case, a foreman and a miner were operating a machine that installs steel bolts into the mine roof to prevent it from collapsing. The foreman went to the back of the machine for supplies and warned the miner not to go beyond the bolted area. The miner began walking into the unsupported area, and the foreman shouted at him three times, ordering him to return to the supported area. The miner, for reasons known only to himself, ignored the warning and proceeded further into the unsupported area, where he was killed by a sudden collapse of the unbolted roof. The operator established that the miner's

conduct was intentional, inexplicable, and contrary to company policy and training. It further established that the foreman had done everything but physically restrain the miner. Yet the D.C. Circuit Court of Appeals held that the operator was liable for the miner's death.

What Administrative Procedure Act?

MSHA habitually issues what it calls Program Policy Letters; these decrees serve as amendments to the mandatory standards already in place. The noncoal sector of the industry recently challenged three such letters which substantially expanded mine operators' compliance responsibilities without so much as a nod to the Administrative Procedure Act (APA)—this despite the fact that the APA requires a comment period for all federal regulation and allows court challenges to regulation. In response, the agency announced that it would retrieve the policy letters and would in the future allow a 45-day comment period, but it would not agree to court review of the letters.

That institutional disregard for appropriate procedure often filters down to the MSHA district level, where agency managers are inclined to expand mine operators' compliance responsibilities through various directives. A coal district manager in West Virginia recently decided it was time to impose a "hazard communication standard" on operators within his district, even though MSHA is still in the process of rulemaking in this area. OSHA currently enforces such a standard, which requires extensive records, training, and labeling to inform employees of any potential hazards associated with chemicals used in the workplace. But the OSHA standard was enacted with due deliberation and proper procedure. The coal district manager's action was nothing less than the imposition by fiat of a hazard communication standard without the procedural requirements of public notice and a comment period. For instance, the district manager recommended that miners be provided with "a notebook or binder which contains a material safety data sheet and hazardous chemical inventory of each chemical in use at a particular facility," even though MSHA has not issued a final decision as to what the standard will require.

Protection from Improvements

Sometimes MSHA itself has steadfastly refused to act when improved safety and health standards were achievable. In November 1992 a duly constituted advisory committee appointed by MSHA issued a report supporting the use of air from ventilated conveyor-belt haulageways as supplemental ventilation at the working faces where coal is extracted. Under the explicit provisions of the Mine Act, the secretary of labor is required to respond to an advisory committee recommendation within 60 days, either by proposing a standard to implement the committee's recommendation or publishing his reasons for not doing so. To date, more than three years after the statutory deadline, the secretary of labor still has not proposed a rule, despite having approved numerous petitions for modification filed by mine operators whereby they are allowed to use belt air to ventilate face areas as the advisory committee's recommendations provided.

It should be stressed that petitions for modification are arduous processes that can take several years to resolve, and even then they only apply to the individual mines for which they are filed. In that regard, dozens of petitions for modification have been granted to mine operators seeking to expand the use of high voltage electricity in underground coal mines. Yet the agency refuses to initiate rulemaking to set across-the-board standards governing the use of high voltage electricity in such circumstances.

The New Federalism

On November 2, 1994 MSHA proposed a sweeping rule providing procedures for decertifying numerous persons certified or qualified to perform various functions on mine property, such as foremen, electricians, and mine examiners. For decades the responsibility for certifying and decertifying such persons has rested with the states. Indeed, the 1969 and 1977 mine acts provide for MSHA recognition of state certification, which the agency historically has followed.

MSHA is authorized to set standards for certification or qualification in those states that do not have their own certification standards, and the agency has set some minimum qualifications in that regard. It is fair to say, however, that the majority of certified or qualified persons working in the mining industry has been certified or qualified according to state-administered programs. In fact, many states certify every person

working at a mine, which MSHA does not do.

The November 1994 proposal would inject MSHA into the certification programs of the various states by allowing the agency on its own initiative to decertify anyone charged with conduct that "leads to, or contributes to, the violation of any training, safety or health standard." The proposal also allows MSHA to decertify someone if he "no longer meets the requirements to retain his . . . certification or qualification." The former basis for decertification is so vague and ambiguous that abuse of agency discretion appears inevitable. The latter basis for decertification is one that until now has been the exclusive province of those states that administer certification programs.

There is no need for such duplicative and overlapping standards, particularly when MSHA is free to refer any problems it may have with a certified individual to the state certification authority for appropriate review. At a time when both Congress and the Clinton administration are looking for ways to reduce the federal budget and return many governmental functions to the local level, MSHA is going against the tide.

Dust Trust

A major *cause célèbre* over the past several years has been the abnormal white center (AWC) controversy, wherein MSHA has accused the coal industry of widespread tampering with the sampling devices used to measure miners' exposures to respirable coal dust. The AWC controversy gets its name from anomalies that showed up on the filter paper in sampling cassettes used to collect respirable dust.

In a complex and extensive trial before the federal Mine Safety and Health Review Commission, an administrative law judge rejected MSHA's contention that the only way AWCs could be produced was through deliberate tampering by the operators. He found that other accidental causes could also produce AWCs. In a subsequent trial dealing with tampering allegations against a specific operator, the judge concluded that MSHA had not proven a violation of the antitampering standard.

In response to its overwhelming losses in the AWC litigation, MSHA has instituted rulemaking whereby it seeks to revise the inspector-run sampling program to allow compliance to be determined on the basis of a single-shift sample, as opposed to the average of five shifts currently used. Doing so would require the secretary of labor to overturn a finding made 25 years ago that a single-shift sample does not accurately represent the atmospheric conditions with regard to respirable dust to which each miner is exposed.

The rulemaking proceeding surrounding this initiative has not been exemplary. It has been administered by MSHA enforcement personnel, as opposed to MSHA's Office of Standards. Additionally, 10 days before the close of the rulemaking period, after all testimony had been taken, the agency salted the record with nearly a thousand pages of material intended to rebut the industry's testimony up to that point. In short, rather than appearing as an honest broker in the rulemaking proceeding, the agency has become blatantly adversarial. Only after a vehement protest was lodged by the National Coal Association and the American Mining Congress was the comment period extended to allow the industry to respond to MSHA's over-the-transom additions to the record.

The coal industry has consistently advocated a top-to-bottom review of the respirable coal dust standards in order to establish a sampling system that is reliable and credible to all parties. In early February of this year MSHA announced that it would undertake a review of its dust program, but the agency has not abandoned its single-sample initiative, the scientific basis of which is questionable, and the motive for which is viewed by the coal industry as compensation for the agency's abject losses in the AWC litigation.

Unto Dust We Shall Return

Industrial hygiene principles set forth three means of controlling airborne contaminants: (1) engineering controls for the general atmosphere; (2) administrative controls that limit the time during which workers are exposed to the contaminants by rotating them out of the exposure area; and (3) personal protective equipment that filters out the contaminant in the worker's immediate breathing zone. Under the Mine Act, engineering controls are required as a first level of compliance. If they fail, then administrative controls can be utilized. Failing that, personal protection equipment can be utilized. With respect to respirable coal dust, however, the act explicitly states that personal protection equipment cannot

be substituted for engineering controls in order to reach compliance with the standard, which is set at a maximum of 2 milligrams of respirable dust per cubic meter of air.

Since the passage of the Coal Mine Health and Safety Act in 1969, extensive research has been conducted on an air supply helmet that can be comfortably worn by miners and that provides a wholly independent source of fresh air. Unlike a respirator, the helmet does not restrict the breathing of the wearer, nor does it require special fitting. Miners who have been issued the helmets have broadly endorsed them.

The mining industry has taken the position that these helmets fall more appropriately into the category of engineering controls—much like air-conditioned cabs of mobile equipment—rather than personal protection equipment; however, MSHA has consistently rejected that view. A working section of miners, all of whom are wearing air supply helmets, will still be cited for a violation of the dust standard, even though the general atmosphere is not what the miners are actually breathing.

The restriction on personal protection equipment imposed by Congress 25 years ago was passed before the invention of the air supply helmet and subsequent refinement of the technology. MSHA's stubbornness in not allowing such technology to serve as compliance defers the day when miners can work within a fresh air zone that will always be superior to the general mine atmosphere.

Conclusion

Many mine operators report that, due to the pervasive presence of MSHA and state inspectors at their properties, they have bifurcated their safety and health departments into two distinct groups: those that administer the mines' own safety and health programs and those that deal with the paperwork burdens and inspection activities that arise from the federal and state enforcement programs.

The mining industry acknowledges that the production of coal and other minerals is a difficult job and one that is not without its risks. Yet it should not go unnoticed that since 1950 fatalities in the coal industry have dropped from 550 per year to 44 in 1994. Meanwhile, during that same period the production of coal has increased nearly sixfold to 4.3 tons of coal per miner per hour.

The American mining industry has made great strides forward in both safety and productivity in the face of extraordinary competition from abroad. To further improve the safety and productivity balance sheets, it is time to review the regulation of occupational safety and health in the nation's mines. Such a review can strengthen those measures that actually reduce accidents, injuries, and illnesses; it can also eliminate those regulations that retard innovation and impede progress.

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Coming Home to Kafka

The day of decision had come: I was going home. After living and working in Canada for some 18 years, I had decided to take early retirement from the Canadian Public Service and move back to the United States. My British-born, Canadianized wife and our Canadian-born Amazon parrot wanted to go with me, and we needed to move our furniture and car. On December 16, 1993 my wife Karen and I, *sans* parrot, took the first step by visiting the American Consulate in Ottawa to find out what Karen needed to do to be admitted to the U.S. and how to import our parrot, the furniture, and the car. Although we didn't realize it at the time, we had entered a Kafkaesque world of bewildering and absurd government regulation.

Our first visit to the American Consulate in Ottawa began promisingly. An elderly lady behind the counter gave us an information sheet describing the process that my wife and I would have to follow to allow her to be admitted as a legal resident. We were also handed an imposing amount of personal information forms to complete.

Unfortunately, the lady at the consulate in Ottawa had scant information on the procedures for importing the parrot, our personal effects, and the car. She told us to contact the U.S. Customs Service about our personal effects and gave us the Washington, D.C. addresses of the Department of Transportation (DOT) and the Environmental Protection Agency (EPA) so that

we could find out about importing our car. In order to import the parrot, she told us, we needed the approval of the Fish and Wildlife Service. She also suggested, rather ominously, that I might wish to contact the Internal Revenue Service (IRS), since my tax records needed to be in order when I started work in the United States.

The Odyssey Begins

And so we began. Most of the information requested was of a fairly simple nature, once we had deciphered the forms. But this was no easy task, as the language used on these forms is unintelligible "bureaucratese." We wondered how much time and money is wasted because people simply do not understand what information is required. Despite the fact that we are both lawyers, we were often uncertain of what was meant.

My wife discovered that appointments were difficult to schedule. In fact, because many appointments could not be arranged until others were completed, delays were inevitable and lengthy. Some preliminary medical tests had to be scheduled in Ottawa before we could proceed. These consisted of blood tests and X-ray exams. There were specified medical facilities which had to do these routine procedures, and, naturally, none were located together.

Besides these preliminary medical tests, we were required to obtain police clearances from every country in which my wife had lived. Upon being informed of this by the Ottawa Consulate, Karen wrote to the British Consulate to find out how she was supposed to go about getting clearance. To her consternation, she was informed that the British government did not issue police clearances. After several confusing and frustrating weeks, more forms arrived from Montreal; one of these forms explained that Britain was one of the countries from which police clearance could not be obtained.

Once the preliminary steps were completed and a seemingly endless amount of paper, official documents, and the like were assembled and checked by the consulate in Ottawa, we could finally schedule the medical examination and official interview, both of which would be in Montreal—120 miles away. It was not easy to schedule the interview and medical examination since each process was entirely independent of the other, but we had to combine these steps if we were to avoid two separate trips.

The exam turned out to be extremely cursory; it largely consisted of the doctor asking my wife if she suffered from any particularly nasty diseases. The "interview" was not an interview (were we surprised at this point?). It was merely a second check—the first had been in Ottawa—that all the documents were in order. Naturally, a mistake was found. One of the photos of my wife was inadequate because of an insufficient display of her left ear. The regulations apparently require the *entire* left ear to show. We had to dash out to get another photo.

The medical exam and "interview" only took up the morning, but the forms that had to be presented at the border would not be ready for pick-up until 3 P.M. Fortunately, Montreal has some fine restaurants, and so we happily passed the afternoon eating. But our troubles were not over. In order to obtain the final package, we had to produce the receipt showing we had paid the final fee. No receipt, no package—despite the fact that my wife's name was clearly printed everywhere on the package. The officials had neglected to tell us that we had to keep the receipt, which had disappeared during lunch. Fortunately, a clerk took pity on us and handed over the package.

But Karen had it easy. My job was to obtain clearance for our parrot and car. These tasks turned out to be considerably more complex than obtaining clearance for a human being.

The Parrot Predicament

Cato, our yellow-headed Amazon parrot, belongs to a designated endangered species under the CITES Treaty, which requires the United States and other signatory nations to control imports and exports of various endangered animals. Pet parrots raised in a country such as Canada are treated in the same way, for the purposes of the treaty, as birds caught in the wild. Never mind that all of little Cato's relatives for some five generations were Canadian born (most Canadians cannot make a similar claim) and that he had never been anywhere near the Amazon.

Because of the treaty, the American requirements for importing Amazon parrots are strict, though in this particular case, largely irrelevant to the goal of protecting endangered species. I would have to (1) obtain an export permit from the Canadian Wildlife Service; (2) apply for an

import permit from the U.S. Fish and Wildlife Service; (3) obtain a health certificate from our local veterinarian within two weeks of departure; and (4) have the bird inspected by both the U.S. Department of Agriculture and the U.S. Fish and Wildlife Service at the border. Happily, U.S. Customs treated Cato as a household effect, and he was imported without duty.

As it turned out, the export permit was easy to obtain because I knew the officials in the Canadian Wildlife Service who managed the CITES program. The import permit was a different matter. The form was written in the now-familiar, but still unintelligible, bureaucratese, and it warned of delays. Information that seemed to have little relevance to the importation of a pet was also required. Worse, when it did issue the form, the U.S. Fish and Wildlife Service sent it to our eventual American address, rather than to Canada, where we lived. This delayed matters for months; in fact, we received the import permit only two weeks before departure—and that only after desperate phone calls to Washington—though we began the procedures several months before.

Upon receiving the permits, we learned that if we were driving into the United States, the parrot had to be imported through Buffalo, New York or Blaine, Washington. These were the only entry points where Fish and Wildlife Service officials were stationed. Blaine, 3,000 miles out of the way of our route from Ottawa to Florida, was out; but Buffalo was by no means convenient, since it was 300 miles out of our way. Exasperated, I suggested selling the parrot in Canada and buying another in Florida, but my wife, foolishly in love with the little critter, would have none of it. I gathered my strength for another assault on the bureaucracy. I made appointments with officials from the U.S. Customs Service, the Department of Agriculture, and the Fish and Wildlife Service to import our one pound, Canadian-born ball of green feathers via Buffalo.

While making these appointments, yet another problem came up. A fee of $18 had to be paid to the veterinarian from the Department of Agriculture for inspecting our bird. This fee was unusual because it could not be paid in U.S. cash but had to be paid with a check drawn on an American bank. Since we had no bank account in the U.S. but did have the cash, I begged the officials to make an exception to this rule, but to no avail. Eventually, they agreed that I could draw a check in American dollars on a Canadian bank; I opened the requisite account and tendered a check when we crossed the border. Later, a friendly Customs official explained the rationale behind this policy. By requiring immigrants to pay by check, the Agriculture Department official could avoid a special trip to the post office to send his cash receipts to Washington, D.C.; checks could simply be placed in an envelope and posted without any difficulty.

Of course, hardly anyone actually looked at our parrot—only the forms received any attention. Cato would have been ignored completely, except that when an official said hello to us, the parrot replied in kind.

Complications with the Car

Importing our car was at least as difficult as importing our parrot—despite the fact that our 1988 Canadian Subaru is identical to the American version, except that the Canadian model's speedometer is denominated in kilometers. Because of this minor difference, DOT told us that our car violated American safety standards and denied us permission to import it. The DOT officials relented only after we pleaded desperately over the phone and submitted a photo showing that the speedometer was secondarily denominated in miles.

We were less lucky in getting an import permit from the EPA. In fact, when none showed up in the mail and we were about to leave (some three months after we applied), I was unable even to telephone them because their application said not to telephone and did not provide a number. We did not receive the permit to import the car until long after we moved, when it was forwarded to us by mail from Canada. The Customs officials at the border exercised sensible discretion and allowed us to import the car without the permit.

These same officials seemed less pleasant when they informed us that our car was not classified under household effects and we would need to pay duty on it. Since no mention of such a duty appeared anywhere on our information sheets, this amounted to a surprising and unwelcome expense.

The Taxman Cometh

We could have saved ourselves a lot of trouble by selling the parrot and car in Canada, but there

was no way to avoid the taxman. I did not owe any American taxes but had violated the tax laws by neglecting to file with the American authorities. Just when we decided to return home, the IRS began to run advertisements in Canadian papers offering "amnesty" to Americans living in Canada who, like me, had failed to file American tax returns. Elated, I asked my accountant immediately to file all my back tax returns. My mood soon changed when I was assessed hundreds of dollars in back taxes and even more in penalties. I had raised the white flag only to come under fire. "Amnesty" apparently means gentle treatment, rather than actual freedom from penalties. In any case, after a lengthy exchange of letters between my accountant and the IRS, all was settled and I was not going to jail. I was grateful both to the IRS and to my accountant, who now has rights on our first-born child.

Lessons from the Labyrinth

We did, of course, eventually make it across the border and settle in our new home in Florida. But even today, over a year since we began, our odyssey is not over; my wife cannot work because she is still awaiting her official green card and Social Security number.

This experience, horrendous at the time and funny in retrospect, is indicative of both what is wrong and right with American public services. On the positive side, all the officials we encountered were friendly and tried to be helpful, even when they were unable to supply accurate information or were enforcing clearly absurd, useless, or inappropriate regulations. We wonder, however, if we would have been accorded such gentle treatment had I not been an American. Because of my nationality, my wife and I were repeatedly separated from others waiting on ludicrously long lines.

On the negative side, the various departments and agencies followed what could only be described as a multi-window, find-out-for-yourself policy. No one agency or official was in charge or really understood what the other agencies were doing. Because of this, immigrants are faced with the maddening task of seeking out the "real rules." The difficulty of this search is compounded by the fact that the answers are written in bureaucratese, a language nearly incomprehensible even to a specialist in regulatory policy such as myself. Imagine the problems that those unfamiliar with the English language or bureaucratic terms might encounter.

Aside from the personal frustration caused by this procedural nightmare, it is unlikely that the objectives that lie behind the procedures are being fulfilled. There was, after all, no interview and minimal chance that the medical examination would detect anything that did not show up in the blood test or chest X-rays. Even if there had been a health problem, would the United States have refused to grant a visa to my wife of six years? And none of the procedures applied to our parrot would do anything whatsoever to protect endangered species in the wild. It seemed to us that virtually every policy or procedure we encountered was designed to meet some internal, Kafkaesque organizational logic, rather than to achieve a legislative purpose or serve the immigrant. Simple compassion towards immigrants should be reason enough to simplify and reduce these regulations; but if that will not suffice, we should reform the system anyway, because it is such an unconscionable waste of human resources.

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