EMERGING TRENDS IN EMPLOYMENT AND LABOR LAW: EXAMINING THE NEED FOR GREATER WORKPLACE SECURITY AND THE CONTROL OF WORKPLACE VIOLENCE

HEARING

BEFORE THE

SUBCOMMITTEE ON EMPLOYER-EMPLOYEE RELATIONS

OF THE

COMMITTEE ON EDUCATION AND THE WORKFORCE

HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

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HEARING ON EMERGING TRENDS IN EMPLOYMENT AND LABOR LAW: EXAMINING THE NEED FOR GREATER WORKPLACE SECURITY AND THE CONTROL OF WORKPLACE VIOLENCE

Thursday, September 26, 2002

Subcommittee on Employer-Employee Relations

Committee on Education and the Workforce

U.S. House of Representatives

Washington, D.C.

The Subcommittee met, pursuant to notice, at 10:35 a.m., in room 2175, Rayburn House Office Building, Hon. Sam Johnson, Chairman of the Subcommittee, presiding.

Present: Representatives Johnson, Boehner, McKeon, Tancredo, Tiberi, Wilson, Andrews, Payne, Kildee, McCarthy, and Tierney.

Staff present: Stephen Settle, Professional Staff Member; Loren Sweatt, Professional Staff Member; Dave Thomas, Senior Legislative Assistant; Ed Gilroy, Director of Workforce Policy; Jo-Marie St. Martin, General Counsel; Greg Maurer, Coalitions Director for Workforce Policy; Heather Valentine, Press Secretary; Patrick Lyden, Professional Staff Member; Allison Dembeck, Executive Assistant; and, Deborah L. Samantar, Committee Clerk/Intern Coordinator.

Camille Donald, Minority Counsel, Employer-Employee Relations; Peter Rutledge, Minority Senior Legislative Associate/Labor; and, Dan Rawlins, Minority Staff Assistant/Labor.

Chairman Johnson. The Subcommittee on Employer-Employee Relations will come to order.

The Subcommittee is meeting today to hear testimony on workplace security. I am eager to get to our witnesses, so I am going to limit the opening statements to the Chairman and Ranking Minority Member of the Subcommittee, Mr. Payne, sitting in today. Therefore, if other Members have statements, they will be included in the hearing record.

With that, I ask unanimous consent for the hearing record to remain open for 14 days to allow Member statements and other extraneous material referenced during the hearing to be submitted for the official record. Hearing no objections, so ordered.

OPENING STATEMENT OF CHAIRMAN SAM JOHNSON, SUBCOMMITTEE ON EMPLOYER-EMPLOYEE RELATIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE

I want to welcome all of you here. Thank you for coming today, some of you from far away.

It is estimated that Americans spend more time in the workplace than in any other industrialized nation. It makes sense that people should feel safe at work. Sadly, not everyone enjoys the luxury that we often take for granted.

It is unconscionable that people trying to get to work get pulled from their cars and beaten, or even worse. For those people who want to work during a strike to pay the bills, keep food on the table and a roof overhead, violence in the workplace has been a sad reality; and sadly, more and more people are becoming victims of union violence when all they want to do is earn enough money to make ends meet.

The real issue is: What steps can employers take to assure the safety of employees, customers, and the neighborhoods around them? Also, how can policy-makers help employers and employees, as well, enjoy safety in the workplace during day-to-day operations and whether new laws may be needed or whether existing laws may need to be improved. We're not here today pushing any specific legislation. However, we are here today to begin a public dialogue on the importance of workplace security, protecting employees and preventing violence and sabotage.

What we are really here for is to assess potential security problems inside the workplace, whether they are union or otherwise. And yes, part of that is discussing union issues. Employees are an essential part of the workforce security whether they are organized or not. Regardless of one's affiliation, workplace violence cannot be tolerated. We need to ensure that all Americans can perform their jobs in a safe environment.

This is the first in a series of hearings this Subcommittee will conduct on emerging trends in employment and labor law. What we learn in these hearings, I hope, can provide useful

information to future Congresses about updating our antiquated laws and securing the workplace for all Americans.

I look forward to hearing from our witnesses to learn of their personal stories and ideas on how to prevent workplace violence, which is, as I understand it, on the increase. I appreciate all of you taking the time to participate in today's hearing.

WRITTEN OPENING STATEMENT OF CHAIRMAN SAM JOHNSON, SUBCOMMITTEE ON EMPLOYER-EMPLOYEE RELATIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE – SEE APPENDIX A

Chairman Johnson. Now I turn to my colleague, Mr. Payne, for any comments that he might wish to make.

OPENING STATEMENT OF CONGRESSMAN DONALD PAYNE, SUBCOMMITTEE ON EMPLOYER-EMPLOYEE RELATIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE

Thank you very much, Mr. Chairman. Let me also welcome all of you, and I appreciate you taking time from your busy schedules to participate in this hearing. Today's hearing is intended to look at workplace violence and the extent to which federal laws and policies assist or inhibit employees from taking steps to prevent workplace violence and to promote greater security in the workplace.

I believe that there is no coincidence that this hearing comes at time when the National Taxpayers' Union is running ads attacking unions for so-called “union violence.” Violence of any kind is reprehensible. But there is no evidence to support the insinuation that violence by union members accounts for any significant portion of the problem of workplace violence.

Let the numbers speak for themselves. Between 1993 and 1999, violent crime in the workplace has declined by 44 percent, compared to a 40 percent decline in the overall rate of violent crime. The data from the Department of Justice show that only 7 percent of workplace homicides are committed by workers of any kind, whether union or non-union. Total strangers commit a whopping 84 percent of workplace homicides.

So as corporation after corporation continues to loot and pilfer millions of dollars of employees' contributed pension assets, I believe that the Committee's focus today is off-center. The victimization of workers in the workplace is an extremely serious problem, but the answer is not to restrict the rights of workers; to make it easier to fire people; to invade the privacy of workers; or much less, to restrict their collective bargaining rights. The answer is to protect and empower workers, including their right to exercise their federally protected organizing rights.

Also, Mr. Chairman, I would make a request. I was looking at the order in which the witnesses were testifying, and I would like to ask if Mr. Horn would appear before Mr. Whitehead so that Mr. Whitehead can hear the allegations that will be made. Perhaps it would make more sense to be able to respond. I think, as you mentioned, this is a hearing to gather information. We don't have any predetermined program, as you said. It is just to start to gather information, the first of many hearings. So, since that is the purpose, I don't see why there would be any opposition for reversing the order, and with that, I would just ask if you would grant that.

Chairman Johnson. In this instance, as you indicated, it is a hearing. I don't see any difference in what order the witnesses testify, and I am going to leave it the way it is for right now. You can rectify that in your question series.

Our first witness today is Mr. Eugene Rugala. He is a Supervisory Special Agent with the Critical Incident Response Group at the FBI Academy in Quantico, Virginia. The second witness will be Ms. Rebecca Speer. She is a Principal at Speer Associates in San Francisco, California. Ms. Speer is testifying on behalf of the Society for Human Resource Management. Mr. Carl Donaway is our next witness. He is Chairman and Chief Executive Officer of Airborne Express in Seattle, Washington. I would like to personally welcome Mr. Donaway because Airborne Express has a regional distribution station in my hometown of Dallas, Texas. Our fourth witness is Mr. Lewis Maltby. He is president of the National Workrights Institute in Princeton, New Jersey. Mr. Paul Whitehead is our fifth witness. He is General Counsel for the United Steelworkers of America in Pittsburgh, Pennsylvania.

I will now yield to the Chairman of the Committee, Mr. Boehner, for the purpose of introducing our final witness.

Mr. Boehner. Mr. Chairman, thank you for yielding. Our last witness today is a constituent of mine, Mr. David Horn. I want to thank him for testifying today. Mr. Horn is Vice President and general counsel for AK Steel, which is headquartered in my district. AK produces flat rolled carbon steel, stainless steel, and electrical steels. Their Middletown works is probably the most productive integrated steel-making facility in the country. I want to welcome you, Mr. Horn, today.

Chairman Johnson. Thank you, Mr. Boehner.

Having said all the introductions, I would like to explain to you that there is a series of lights in front of you that you may or may not be familiar with. We are going to allow you five minutes each for your oral testimony, and try to stay within that timing, if you would. You will see a green light that gives you four minutes; a yellow light that gives you one more minute, and then the red light comes at the end of five minutes. Once that is done, we also allow our Members five minutes to ask questions.

Special Agent Rugala, you may begin your testimony now.

STATEMENT OF EUGENE RUGALA, SUPERVISORY SPECIAL AGENT, FEDERAL BUREAU OF INVESTIGATION ACADEMY, QUANTICO, VA

Good morning, Mr. Chairman and distinguished Members of the Subcommittee. It's an honor to testify today on this important matter about the problem of workplace violence and the scope of this problem in America's workplaces.

Before I speak to you this morning, I'd like to talk to you just a little bit about our unit and how we're involved with this particular issue. As you mentioned, I'm with the National Center for the Analysis of Violent Crime, which is assigned to the Critical Incident Response Group at the FBI Academy at Quantico, Virginia.

Basically, the NCAVC is comprised of FBI special agents and professional support staff that look at violent crime issues from a law enforcement and behavioral perspective. We get involved in many types of cases, from serial murder to serial sexual assault. We've often been characterized as the profilers, if you will, in many of the media and certainly movies that have been out there. But one of the areas we have been involved in quite heavily is taking a look at many issues from a threat assessment perspective. Again, looking at behavior that may manifest itself in the workplace in this particular hearing.

We get involved at the request of local law enforcement. Once a company that may believe that they have a potentially dangerous employee has contacted us, they ask for our assistance in developing a threat assessment and maybe recommending intervention strategies to lower the level of threat within that organization. But we typically get involved in these cases, again, from contacts with local law enforcement and not by the CEO of the company reaching out and asking for our assistance. In this particular case, the company would have contacted law enforcement and maybe they'd be part of this multi-disciplinary team that might take a look at this potentially violent situation.

The NCAVC itself reviews crimes from a behavioral and investigative perspective. We also conduct research in violent crime, looking at it from a law enforcement perspective in order to gain insight into criminal thought processes, motivations and behavior as to who the offenders might be in the commission of some of these types of crimes.

In June of this year, as it relates specifically to workplace violence, our group held a workplace violence symposium in Leesburg, Virginia, where we invited approximately 150 experts in the field of workplace violence and violent behavior to come together for a week to look at this issue from a threat assessment, threat management, prevention and crisis management and crisis response perspective. This multi-disciplinary group consisted of mental health professionals, law enforcement, prosecutors, victim witness advocates, union officials, CEO's of companies, and government agencies, as well as the military. As a result of this particular conference, we're hoping to produce a monograph that will certainly be made available to the public or anybody who needs it, as well as for review by the Committee.

For purposes of today's hearing, to specifically discuss the workplace violence issue, we define workplace violence as any action that may threaten the safety of an employee, impact the

employee's physical or psychological well-being and/or cause damage to company property. Workplace violence is now recognized as a specific category of violent crime that calls for distinct and specific responses from employers, law enforcement, and the community.

However, this has been a relatively recent event in the sense that, while workplace violence is not new, the recognition of this fact has really just taken hold since the mid-1980s. And in that time period there has been specific focus on particular issues, maybe looking at the issue of violence in the retail trade as far as killings that might have occurred at a 7-Eleven or some type of convenience store, as well as patient assaults on health care workers. However, the focus has certainly become wider spread with some of the mass shootings that have occurred in the workplace as a result of disgruntled employees that retaliate against some perceived wrong by a supervisor.

When we look at these issues and some of the statistics that have already been quoted, we see that homicides are just a very small part of the issue. It takes a multi-disciplinary approach when looking at workplace violence issues, and specifically it does not fall into a one-size-fits-all category. First, employers have a legal and ethical obligation to provide a safe working environment for workers. Second, employees have a right to expect to work in a safe environment. Third, law enforcement has to become more pro-active in dealing with this particular issue. Fourth, unions should regard workplace safety from violence as an employee's right, just as worthy of union defense as wages or any other contractual right. And five, occupational safety and criminal justice agencies have to pull together to take a look at this particular issue and certainly there's additional room for legislative recommendations as well as research into some of the causes and effects of this particular type of activity.

With that, I thank you.

WRITTEN STATEMENT OF EUGENE RUGALA, SUPERVISORY SPECIAL AGENT, FEDERAL BUREAU OF INVESTIGATION ACADEMY, QUANTICO, VA – SEE APPENDIX B

Chairman Johnson. Thank you, sir. I appreciate your testimony.

Ms. Speer, you may begin your testimony now.

STATEMENT OF REBECCA A. SPEER, ESQ., PRINCIPAL, SPEER ASSOCIATES, SAN FRANCISCO, CA, TESTIFYING ON BEHALF OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT

Thank you. Good morning, Chairman Johnson and Members of the Subcommittee. I feel extremely honored to be here today to talk about this very important issue.

By way of background, I'm an attorney and the principal of Speer Associates/ Workplace Counsel, located in San Francisco. And among other services, my firm helps employers implement a proactive approach to workplace violence, for reasons that I'd like to explain here today. I'm also a member of the Society for Human Resources Management, on whose behalf I am testifying.

The terrorist attacks last year have riveted corporate America's attention to the issue of workplace safety and security, primarily because the attacks targeted Americans at work. But I'd like to emphasize today that while September 11th has refocused even more so our attention on workplace safety, corporate America has struggled with the issue of safety from violence at work for a very long time. Especially since the mid-1980s we have been faced with increasing headlines about disturbing events in the workplace. We hear about multiple workplace slayings in such diverse settings as manufacturing plants, state lottery offices, and even law firms. In 1993 I spent several hours hidden in an office while a madman, gunman armed with an arsenal of weapons killed eight people on the floors directly above me before taking his own life in a stairwell near my office.

Because of these and other incidents, and as Agent Rugala mentioned, workplace violence increasingly is seen as a specific category of crime. And as a specific category I think a workplace issue that calls for a special response, or a specific response not only by law enforcement but also by the community at large, and especially by employers.

Today, I'd like to focus my brief comments on the impact of workplace violence on American businesses, the current responses to this complex problem, and on the opportunity that now exists for Congress to really help raise public awareness around this issue, and also to facilitate employers' response to this complex problem.

As already has been mentioned, workplace violence exacts a clear human price. We know that homicide is the third leading cause of workplace deaths among American businesses. Nearly a third of employees who die at work in California, do so as victims of homicide. And that's only the beginning of the problem because we know that the crux of the workplace violence problem, beyond homicides, is really millions of incidences of non-fatal workplace violence. And these include non-fatal assaults, threats, aggressive harassment, stalking, and a whole variety of problematic behaviors that create fear at work.

In addition to this human cost, workplace violence comes at a fairly steep financial price. While there are no formal studies regarding the economic cost of workplace violence, some studies suggest that it costs American businesses not millions, but billions of dollars a year. And part of that price, predictably, comes in the form of legal liability. Employers struggle to balance an array of laws that compel them on one hand, to promote a safe workplace, and on the other, to respect, understandably so, the rights of an alleged wrongdoer. So they are struggling with exposure from all sides of the equation.

Cases litigated throughout the country have spelled out liability in a number of different forms. Some of the theories of liability include premises liability, vicarious liability, negligent hiring, supervision and retention, and also sexual harassment to the extent that an incident might involve gender-based violence. Collectively these theories, in my view, have spelled out a societal judgment that employers cannot take a back seat to workplace violence, but instead, must responsibly manage incidents and also must take, or should take more of a pro-active or preventive approach.

Now, in terms of a corporate response to the problem, many companies are implementing comprehensive workplace violence prevention programs that I'm happy to explain in more detail during the question and answer to the extent that there is some interest. On the legislative level, state lawmakers have responded by considering various measures that help facilitate companies' responses to workplace violence.

The Society of Human Resources Management has spearheaded two initiatives in particular. One is the Workplace Violence Safety Act, which has the ultimate effect of permitting a company, as an organization, to obtain a restraining order against somebody who has threatened the workplace. I'm very familiar with that type of dynamic in California.

In addition, there's an initiative related to reference checking. As we'll probably hear more about today, companies increasingly are focused on screening out people with a relevant history of past violent crime. Yet, what a lot of companies have is a “no-comment policy” in terms of references to prospective employers because of fear of litigation, and particular claims of defamation. Through this legislation, however, it affords employers an additional immunity that protects them if they're offering information to a prospective employer in good faith.

So those are what ultimately give employers a tool in which they could help promote workplace safety. And, in terms of the reference checking legislation, 35 states have enacted that legislation, so it's really gained in popularity.

To close my comments, I would like to mention that given the breadth of the workplace violence problem, I think that after today it'll be very clear that it's a multi-dimensional and complex problem. There really does exist a significant opportunity for Congress to consider ways to facilitate a response from all sides to this problem.

Mr. Chairman, this concludes my testimony, and I thank you very much for giving me this opportunity to offer my thoughts on the issue.

WRITTEN STATEMENT OF REBECCA A. SPEER, ESQ., PRINCIPAL, SPEER ASSOCIATES, SAN FRANCISCO, CA, TESTIFYING ON BEHALF OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT – SEE APPENDIX C

Chairman Johnson. Thank you for being with us, and thank you for your testimony.

Mr. Donaway, you may begin your testimony now.

STATEMENT OF CARL DONAWAY, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, AIRBORNE EXPRESS, SEATTLE, WA

Thank you Chairman Johnson, Chairman Boehner, Congressman Payne, and Members of the Committee. My name is Carl Donaway. I am the Chairman and Chief Executive Officer of Airborne Express, the third-largest overnight package delivery company in the United States.

As an employer, I take both the moral and legal obligations of ensuring the safety and physical security of all of our employees with the utmost seriousness. I believe that every employee expects to be able to work within a safe environment.

Airborne Express directs significant resources towards workplace safety. The company operates a strict zero-tolerance policy with regard to any act or threat of violence. An employee found in violation of Airborne's workplace safety guidelines is immediately subject to discipline up to and including termination regardless of position within the company and regardless of their seniority.

At the time of hire, every applicant we consider for employment must agree to a rigorous background check designed to detect any history or tendency of violence. This process includes: criminal background, previous employment, previous residency, credit history, and motor vehicle record checks. Additionally, applicants for all positions must pass a drug test at the time we hire, while drug and alcohol tests are administered to those in safety-sensitive positions throughout the course of their employment with our company.

Airborne has established a comprehensive safety communications program, a strict weapons policy, a consistent termination policy and a crisis management program specifically designed to respond to any incident or threat of violence made by or against any of our employees. And despite all of this, what we, and thousands of other companies do to reduce this likelihood of workplace violence; it remains one of the greatest issues facing employers today.

Those who survive workplace attacks often suffer a severe toll in terms of physical injury and posttraumatic stress. Work performance after an attack can deteriorate significantly, causing the victim additional anxiety and stress. Victims of families and the government seek to hold the employer accountable for any injuries or loss of lives resulting from such incidences. As a result, employers must navigate through a complex maze of regulations, privacy rule, case law and arbitration proceedings to protect themselves, their customers, and most importantly, their employees from threats of violence from others.

A unionized employee is no more immune from violence than any other worker. Most collective bargaining agreements provide that fighting is a dischargeable offense. Others specify that guns, knives or other dangerous items be prohibited on the premises. These agreements reflect the fact that both employers and their unionized workforces and union leadership, in particular,

share a paramount goal, namely, a violence-free workplace.

Despite this commonality of goals, arbitrators are routinely called upon to resolve disputes between unions and employers over discipline applied for workplace safety violations. Arbitrators retain tremendous political discretion in determining whether or not an employer has imposed discipline proportional to the infraction. Often, suspensions and terminations are set aside on procedural or political grounds, rather than out of any concern that the arbitrator may share with the employer regarding the safety of the victims or of their co-workers. Unfortunately for all parties involved, opportunities for appellate review of flawed arbitration decisions are essentially non-existent.

Consider one of the more recent cases that faced our company. Not long ago, an Airborne Express employee threatened to kill a co-worker, his family, and other Airborne employees with a rifle after he learned that management suspected him of stealing. The victims, in genuine fear for their own safety, complained to company management. Airborne conducted a thorough examination and terminated the employee for outrageous conduct and notified the police.

Afterward, a grievance panel reinstated the employee with a significant back pay penalty, indicating that the incidents appeared to be merely shoptalk and not sufficiently outrageous to support a discharge. Later, that same individual sued Airborne alleging defamation, wrongful termination, intentional infliction of emotional distress, and conspiracy, among other charges. While conducting further investigation, in light of this lawsuit, we belatedly discovered that the employee had actually been terminated by a previous employer for involvement in a knife fight at the work site. We also learned of additional complaints of domestic violence: intimidating a witness; discharging a gun; and other acts of dangerous behavior. To remove what we considered to be an obvious threat to workplace safety, Airborne promptly terminated the employee again, this time for dishonesty on his job application.

During discussion with several prominent labor law firms, we were told that no matter what the merits of our termination were, the grievance panel handling the case would likely return this employee back to the workplace, for both procedural and political reasons. Upon receiving this news I personally instructed our legal department to immediately secure a global settlement for both the litigation and the grievance, which resulted in a substantial payment to secure the employee's resignation.

Although the settlement cost was significant, it was obvious that the company could not afford to honor an unfavorable arbitration decision that would compel us to reinstate a clearly dangerous person into the workplace.

Yet rewarding dangerous individuals is not a viable solution to this type of problem. I believe this example, and dozens of others like it, point to a special set of problems associated with the absence of appellate review of flawed arbitration decisions arising from an ever-growing number of workplace violence incidents. An act of violence can change an employee's life forever. If the workplace violence policies we administer to help protect our workers mean nothing, an even-handed resolution of disputes cannot be accomplished. In the absence of appellate review, employers are too often put in the impossible situation of having to reinstate dangerous people into

our workplace they have pledged to keep violence free.

It seems to me that Congress has both an opportunity and a responsibility to victims of workplace violence to address this contradiction of workplace safety as soon as possible. I thank the Committee for its attention to this important aspect of worker safety.

WRITTEN STATEMENT OF CARL DONAWAY, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, AIRBORNE EXPRESS, SEATTLE, WA – SEE APPENDIX D

Chairman Johnson. Thank you for your testimony. I was amazed when you said the number of violent acts in the workplace has increased 300 percent. That is an amazing statistic, and we can discuss that in the question period.

Mr. Maltby, you may begin your testimony.

STATEMENT OF LEWIS L. MALTBY, PRESIDENT, NATIONAL WORKRIGHTS INSTITUTE, PRINCETON, NJ

Good morning, Mr. Chairman and Members of the Subcommittee. Thank you for inviting me here today. While I'm here officially as the President of the National Workrights Institute, I'm also speaking from the perspective of a former senior manager in the private sector who has lived through the kind of situations we're talking about today and I hope I've learned enough from that experience to be more useful this morning.

Willie Sutton used to say that he robbed banks because “that's where the money is.” Now, Mr. Sutton may have been a crook, but he has an important lesson for us. If we're going to attack any problem, including workplace safety, we have to look at where the greatest harm is being done and focus our attention on the greatest harm. And there is no question that the greatest harm today comes to workers, not from other workers, but from outside the workplace.

The Department of Justice statistics show, beyond any doubt, that the problem isn't violence committed by workers, it's violence done to workers. As Agent Rugala said, it's taxicab drivers, police officers, or convenience store clerks getting robbed or shot by criminals. That is the biggest part of the problem. The second-biggest part of the problem is mental health workers being assaulted by their patients. I don't mean to suggest that these are easy problems to address, but, if we're going to be serious about this, let's start with the biggest problem. There are many good ideas in this area.

OSHA has some recommendations that are at least a positive step in the right direction. At a minimum we should try to develop those OSHA regulations more comprehensively and actually

turn them into regulations rather than merely advisory recommendations. The second-biggest problem we have is industrial accidents. Most people don't think about industrial accidents when they're thinking about workplace violence. But from the standpoint of the worker, it's just as violent to be chewed up and spat out fatally by an industrial machine as it is to be killed by a co-worker. And in the end, you're certainly just as dead.

If we want to prevent violence in the workplace, the second most important thing we could do is give OSHA the resources and the authority they need to do their job, because that's where two-thirds of the people get hurt. For every person who's killed in the workplace by traditional violence, there are two who die from the accident that probably could have been prevented.

Now, I don't mean to suggest, by any means, that violence committed by workers doesn't happen. It does. And there are two things we could do about that. One is we could try, to the extent that it's possible, to reduce the amount of stress in the workplace. I'm not talking about the impossible here. Jobs are stressful, we all know it, and nothing in the world can change that. God couldn't change it, and Congress couldn't change it, either. But the U.S. workplace does not have to be as stressful as it is.

We could have less surveillance, we could have more respect for workers' rights, and we could have more economic security for workers. It's possible if we really wanted to do it. It wouldn't solve the problem, but it would certainly help. Unions might be very advantageous here because unions give people some kind of voice in the workplace that keeps them from perhaps reaching the level of desperation that results in violence all too often.

Another thing we could do, and maybe we could actually get some agreement on, is we could help train managers to deal with this kind of problem. I've lived through these myself. I know how excruciatingly difficult these situations can be to handle, and I can tell you that managers can't deal with potentially violent situations alone. They need training, they need help, and they need access to outside experts. Managers can't do this alone. And there is a precedent for the United States government helping employers, particularly small employers who don't have all the resources in the world to get the training and the tools they need to deal with problems in the workplace. This would be a very good place to try that approach.

The one thing we don't need is more electronic surveillance. We've already got more surveillance than we need. There's very little sense of privacy left in the private sector workplace and more to the point, extreme levels of electronic surveillance have been documented by the University of Wisconsin to increase stress in the workplace. I don't mean headaches. I mean medical stress. We all know and all the experts know, that more stress means more violence.

So the last thing in the world we need is more stress producing electronic surveillance. Employers already have that message. They are trying to find less intrusive ways to meet their legitimate needs. We're trying to work with them and that process needs to be encouraged not squelched.

Thank you for your attention. I'll be happy to answer any questions anyone might have.

WRITTEN STATEMENT OF LEWIS L. MALTBY, PRESIDENT, NATIONAL WORKRIGHTS INSTITUTE, PRINCETON, NJ – SEE APPENDIX E

Chairman Johnson. Thank you. We have three votes to make and we will recess for, I'm guessing, about 20 minutes until those are over.

Mr. Donaway, I understand you have to leave. Can you wait until we get back from the votes?

Mr. Donaway. Yes.

Chairman Johnson. Thank you, sir. I appreciate it. The Committee stands in recess.

[Recess.]

Chairman Johnson. We'll continue with our witness testimony.

Mr. Whitehead, thank you for being here. The loyal opposition is asking if we could wait until one of their Members shows up, and I'll do that if that's okay with you. Would you suspend for a moment?

Mr. Whitehead. Of course.

Chairman Johnson. Thank you, sir. The gentleman from Michigan, Mr. Kildee, has arrived, so you may continue. And we'll restart the timer light.

STATEMENT OF PAUL WHITEHEAD, GENERAL COUNSEL, UNITED STEELWORKERS OF AMERICA, PITTSBURGH, PA

Thank you, Mr. Chairman. My name is Paul Whitehead and I'm the General Counsel of the United Steelworkers of America. And I'm happy to be able to talk to you, today.

As the Chairman knows, the collective bargaining process in our country works very well. It produces agreements in the vast majority of cases. Labor disputes, strikes and lockouts, remain at historically low levels; the collective bargaining process works that well. And among the tiny percentage of cases that do go to dispute, either strike or lockout, the occurrence of violence in such situations is even more rare, wrong, but rare. And that's because of several reasons.

I think the main reason is that 99.99 percent of union members, like most Americans, are law-abiding, patriotic, God-fearing, tax-paying people, and they don't countenance that sort of

thing. The second reason is that unions and companies discourage and try to avoid violence of any kind because they know it's so counter-productive to their cause, to their side of the dispute. And a third point, and of particular importance to policy- makers, is that there is a very serious regime of federal and state criminal and civil law to prohibit and redress incidents of violence.

I can go into that in the question period. I can simply summarize it this way: if a person acts out in a labor dispute, there's a very good chance the person will either be jailed, fined, enjoined or fired, or some combination thereof.

Turning to the particulars of my union, in part one of the reasons we're here is because of the next witness you'll be hearing from. To be perfectly honest, if you see steelworkers' leaders leading a march or a demonstration, and raising a little ruckus in this country, it's probably against unfair imports, or to save jobs. It's probably with our companies and with our managers to save basic manufacturing. That has been a main focus of our attention.

We have had one labor dispute. We have been pushed out of work for over three years at one particular company, AK Steel. And I understand you'll be hearing from its representative in a few moments. He'll show a brief video that does show clear disorder, most of it occurring a little over three years ago, on the morning of September 10, 1999. I haven't seen what they're going to show. I may have comments in the question and answer period.

I would like you to know one or two things. This is an extremely rare event. It is wrong, what happened. I think AK is frustrated. For the last three years they have been unable to show any local union or international union endorsement of this. This was a member event that occurred on a morning, and it is the subject of no less than five judicial proceedings: an action to enjoin, action by victims of property and personal injury, and two actions by AK itself.

It brought a federal RICO action with the outrageous allegation that the steelworkers union was, in effect, a 20-year criminal enterprise over the last 20 years. Judge Susan Deloitte threw that out. A second lawsuit outrageously alleged that that morning the steelworkers and city and county authorities were in a conspiracy to deprive AK of its rights. That, too, has recently been thrown out by Judge Manos. So, tough as this video presentation may be, I urge you to all look carefully behind the representations of the company and scrutinize them closely.

My last point goes to some of the written testimony before the Committee. It's suggested that when labor leaders speak out against companies that do the kinds of things that AK is doing, that they are implicitly, or with a wink of the eye calling for member violence. I want to reject this as soundly as anything.

If you look at what happened in Mansfield, it's still going on. Three years and a month ago, the company locked out 600 employees. It did not let them work. They wanted to work, they've wanted to work every day. They have been kept from their livelihoods; they've refused to arbitrate the dispute. We got Congressmen from this Committee and from the House to generally plead with the company to submit the dispute to arbitration. They refused to do that.

There have been divorces and bankruptcies. Imagine losing your livelihood for three years, plus countless hardships. Some of the wives and children of the locked-out AK workers, behind me, join me today. They have lived through a nightmare, something that Mansfield, Ohio, should not have had to go through.

In short, whether AK's conduct has been legal or illegal, and there's a lot of debate about whichever it is, it's oppressive. It has been oppressive. And the president of our union, and the secretary-treasurer of the AFL-CIO, have come to Mansfield, in the first case more than once, and spoken out against that, and decried that, and criticized it very much. Taking their quotes out of context, AK tries to imply that that has been a call for some kind of member violence. And that is simply wrong.

In one of the quotes, Mr. Becker, our president, said "I'm going to stretch the legalities by pointing out that even though the law says that the company owns that steel mill, really, I think you people own that steel mill because you put your lives in it." They call that a call for violence because he referred to stretching the legalities. That's just a completely unfair interpretation. Another quote from a magazine interview that was conducted hundreds of miles away from the site, a lengthy discussion about the topic of another strike, is pulled out of context.

I want to make sure that the Committee does not seek to attribute the wrong acts of individuals, desperate individuals in many cases, which are handled by state law enforcement authorities, and try to lay them at the doorstep of labor leaders.

I have more to say, but I see the light is on.

WRITTEN STATEMENT OF PAUL WHITEHEAD, GENERAL COUNSEL, UNITED STEELWORKERS OF AMERICA, PITTSBURGH, PA – SEE APPENDIX F

Chairman Johnson. Thank you, sir. I appreciate that.

Mr. Horn, you may begin your testimony.

STATEMENT OF DAVID C. HORN, VICE PRESIDENT AND GENERAL COUNSEL, AK STEEL CORPORATION, MIDDLETOWN, OH

Mr. Chairman and distinguished Members, thank you and good morning. My name is David Horn, and I'm Vice President and General Counsel for AK Steel Corporation in Middletown, Ohio. We appreciate this opportunity to present testimony concerning the union member violence that our employees, their families, and our contractors and suppliers have endured for more than three years.

By way of background, AK Steel employs more than 10,000 men and women in the production of steel and related products. We have 12 facilities that are located in eight states. Various international, national, and independent unions represent about 70 percent of our workforce. Historically, our company has maintained a good working relationship with these unions and their members.

One notable and disturbing exception is in Mansfield, Ohio, where a labor dispute involving about 550 members of the United Steelworkers of America has now entered its fourth year. The beginning of this labor dispute was marked by a mob riot. On the morning of September 10, 1999, as the company attempted to bring lawful replacement workers into the plant, they were brutally attacked by a mob of hundreds of union members and their supporters. When it was over, 14 guards and replacement workers were injured, eight so severely as to require hospital treatment. We are not aware of a single rioter being treated for injuries.

I have a brief videotape of that riot which will give you a sense of the terror that employees face from violent union members. If it's all right with the Committee, I'd like to play the tape.

***

Chairman Johnson. I would like to warn the audience that the material on that tape is not suitable for children. If anybody is squeamish about language or violence they are welcome to leave the room while the tape is being shown. You may proceed.

[Videotape is played.]

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This labor dispute has continued to be punctuated by violent acts. Beyond a few incidents that have led to arrests, there have been scores of unsolved crimes in the Mansfield area since the labor dispute began. A tractor-trailer was bombed, with a sleeping passenger narrowly escaping death. A bomb destroyed a restaurant. “Jack rocks” have punctured hundreds of tires. I brought with me a small sample of these criminal tools for you to see. I think they've been distributed, Mr. Chairman, to your Committee, or to you at least. Mailboxes have been blown up. Family pets have been mutilated and beheaded. The word “scab” has been spray-painted on houses and keyed into the paint of vehicles.

While these crimes remain unsolved, there is a single common factor. They have all happened to people who have worked for, or with, our company during the labor dispute. A few union members, including those of other employers, have been arrested and prosecuted for their violent acts against our company and employees.

But if anything, recent events have posed an even more serious threat to the safety, not just of our employees, but also to the citizens of Mansfield. The latest incident could very well have led to the destruction of our plant and the death of many employees and citizens. In March, agents from the Bureau of Alcohol, Tobacco, and Firearms arrested Fred Frigo on a federal warrant. At the time of his arrest, Frigo was a member of the United Auto Workers Union who was working in

an assembly plant near our Mansfield works.

According to the ATF, Frigo was planning to launch rockets into our plant as an act of solidarity with the United Steelworker members. This was apparently no idle threat, since it had been reported that he was distilling rocket fuel in a barn and had already test-fired two grenades. Ironically, the threat of sabotage to our employees was one factor that led to the lockout of union employees in our plant in 1999.

While Frigo remains in prison without bond, and has not yet been brought to trial, a number of disturbing facets of his alleged plot have been reported. For example, he apparently had no remorse at all about the possibility that some union members, such as those serving picket duty at the time, might be hurt or even killed by his act of union solidarity. Just yesterday, a Mansfield newspaper reported that possession of an unregulated machine gun was added in July to the list of charges Frigo now faces. In fact, by some accounts, Frigo believed he would be a union hero, a warlord in his terms, for eradicating what he and many union members term “scabs,” but what we and the Federal Government call lawful replacement workers. Even more chilling, Frigo allegedly believed he would not be caught because law enforcement officials would suspect terrorists after the 9/11 attacks on our nation.

It is unthinkable that hard-working Americans face terrorism and violence from union members and their supporters who believe that their misconception of union justice supersedes this nation's laws. Unfortunately, the unthinkable is today a reality. While we believe that most union members deplore this seamy underbelly, even one act of union member violence is too many.

We applaud the Subcommittee's efforts to focus Congressional attention on the need to maintain workforce security and end violence in the workplace. We urge you to address this issue through legislation that establishes laws that allow for swift prosecution and punishment for those guilty of violence in the name of collective bargaining. We urge you to do this for the safety and well being of all working Americans. Thank you.

WRITTEN STATEMENT OF DAVID C. HORN, VICE PRESIDENT AND GENERAL COUNSEL, AK STEEL CORPORATION, MIDDLETOWN, OH – SEE APPENDIX G

Chairman Johnson. Thank you for your testimony. I appreciate that. I believe that we do need to focus on the prevention of workplace violence.

Agent Rugula, how many of these kinds of incidents have you been involved in and how many people have you arrested and put in jail because of that?

Agent Rugala. In the work that I do, Mr. Chairman, we basically serve as a consultant to law enforcement. So with behaviorally related issues, a law enforcement agency is basically called to an industry plant or other organization for example, when it is believed that there is a potentially dangerous employee. So while we do get involved in these types of cases, we're not involved in

investigating in the sense that we actually go out and make arrests. That is not our particular role in this matter.

Chairman Johnson. Well, you have statistics on it, probably. Are there a lot, a few, or none?

Agent Rugala. I can't speak to those issues; I don't have those types of statistics, if there are any.

Ms. Speer. If you are asking about general statistics regarding incidents of violence in the workplace, we get a lot of information from the Bureau of Labor Statistics. First of all, there is one category of statistics that go to homicides, which you've already heard some about today.

And in terms of non-fatal workplace violence, the Department of Justice has through its studies confirmed that there are at least 1.7 million incidents of reported violent crime on the job each year. There's also a consensus that a lot of those incidents go unreported. So at a minimum we know there's 1.7 million incidents, but anecdotally we could all tell you that due to the breadth of behavior that falls into the category of workplace violence the incidence is actually much higher than that.

Chairman Johnson. Do you want to comment, any of you, on that issue?

Mr. Horn. Mr. Chairman, can I comment on that?

Chairman Johnson. Certainly.

Mr. Horn. We certainly have had dozens of incidents of violence in connection with the labor dispute we've had in Mansfield. And in my written testimony we set out a number of those. But I think another point that it would be useful to make here is that we've had some difficulty getting some of those individuals prosecuted by the state authorities. And that's one of the reasons why the federal legislation is important to us.

Chairman Johnson. Thank you for that comment.

Mr. Whitehead. Mr. Chairman, may I add one thing?

Chairman Johnson. Certainly.

Mr. Whitehead. I hope that the record-keepers will keep track of the statistics, if they ever do get to statistics on labor disputes, of the two-way nature of misconduct. In the AK example, for instance, replacement employees have been convicted of improper conduct. Security guards have very checkered pasts at the company.

In the case that Mr. Horn detailed involving Mr. Frigo, it should be noted that he was apprehended through the citizenship of a fellow UAW member who agreed with authorities to wear a wire and get evidence on this very disturbed person, who is now in prison.

Chairman Johnson. One of you, I forget who it was, mentioned that surveillance cameras bother people. You know, I don't know how that can cause somebody to create violence. We have a guy out there videoing everything we're doing right now, probably your person, and that doesn't strike me as a reason for me to come out there and get violent with you. It is not causing me stress either, so I don't understand what you mean when you say that.

Mr. Maltby. Let me clarify that, Mr. Chairman, because there are two very distinct types of video cameras for two very different purposes. There is such a thing as a legitimate security camera. When my wife works late in New York or Newark, and she's going to a dark parking lot at 11 o'clock at night, I will be the first person to thank whoever put that camera in for keeping her a little safer. Nobody, excluding privacy advocates, has any problem with security cameras.

But when you talk about cameras above someone's desk, watching them every minute of the day when they're on the job, keeping records of when they go to the bathroom and how long they stay and when they come back, or did they call their wife and how long did they talk to their wife on the phone, and then posting it on the bulletin board or calling them in for reprimands after the fact, living under that kind of a microscope is extremely stressful. I doubt that anyone in this room could live under that kind of regimen.

Chairman Johnson. Is it widespread or is it a single instance you are talking about?

Mr. Maltby. No Mr. Chairman, I'm sorry to say that fully 80 percent of the corporations in America practice some form of electronic surveillance. And security cameras, legitimate as they are, are only a very small piece of that. In fact, corporate America itself is beginning to realize they've gone a little too far with electronic monitoring. They are trying to find ways to be less intrusive without giving up their legitimate interests.

So even the corporate community now agrees with us that we need less monitoring of employees, not more. But that's not talking about monitoring criminals who might be harming employees. That's a good thing. I hope we would all agree on that.

Chairman Johnson. Well, another instance was mentioned about it being difficult to do background checks. So that's probably the reason the cameras got in there in the first place. Do you object to changing the law in that regard?

Mr. Maltby. Well, actually, Mr. Chairman, when I was in the corporate world, one of my responsibilities was HR. And we conducted very careful checks into the background of people that we hired. We didn't do criminal record checks, but I wouldn't quarrel with anyone who does. The only concern that we have about criminal record checks by employers is the way they are all too often used.

I don't want anyone who has a conviction for child abuse or child molestation working in my daughter's kindergarten. I don't want anybody who has been convicted of embezzlement doing my taxes. But I think there's something seriously wrong when you have good workers who've been on the job five or ten years losing their jobs because 20 years before they were caught shoplifting a CD at K-Mart. The idea that anyone who has ever been convicted of anything in their lives ought

never to get a job again is a very bad idea. It's bad for workers, it's bad for employers, and it's bad for America.

Chairman Johnson. I don't think that is what we're talking about. We are talking about more serious incidents.

Mr. Andrews, do you care to question?

Mr. Andrews. Mr. Chairman, I'm going to defer to my colleagues who were here throughout the hearing so they have their turns first. Mr. Payne was here first. I thank him for his indulgence in being here until I could get here.

Chairman Johnson. Mr. Payne, you are recognized for five minutes.

Mr. Payne. Thank you very much, and I thank the Ranking Member for yielding. I know you were at a very important meeting at the White House, so I felt privileged to take over temporarily.

With the question in regard to Ms. Speer, you mentioned that most adults spend about 30 percent of their time at work, but according to statistics, only 18 percent of violent crimes are committed at work. I'm just wondering whether or not it is fair that as a general matter. People are most likely to experience violent crime outside the workplace rather than in the workplace.

Also, I think Mr. Donaway talked about a 300 percent increase in crime during the past decade where the Department of Justice has some statistics that say there has been an overall drop in workplace violence. So, I'm wondering how we can reconcile this? I mean there was a 300 percent increase, according to Mr. Donaway, where the Department of Justice said that, as a matter of fact, there has been a relative increase in the overall comparison to outside of the workplace.

One of you can take the question.

Ms. Speer. Well, if I could speak briefly to that, the Department of Justice, as you read in my written testimony, has determined that 18 percent of all violent crimes occur in some way related to work. And I believe that is limited to assault, robbery, and sexual assault and rape. At a minimum we know that nearly a fifth of all crimes occur at the workplace.

But a point that I would like to emphasize is that workplace violence encompasses much more than simply these violent crimes that are reported to law enforcement. In fact, employers as a general matter are faced with a lot of lesser behaviors, assaults and so forth that never are reported formally. In fact, right now there is an effort, or at least a consensus that there needs to be a more formal effort to accurately measure the incidence of workplace violence affecting organizations throughout the country.

In terms of statistics that suggest a decline in workplace violence, I believe those speak simply to homicides and I believe there has been a slight dip in homicides affecting the workplace in, I believe, recent years, year to year, not overall trends. But in terms of other statistics, they

show a different picture.

Agent Rugala. Mr. Payne, can I make some comments?

Mr. Payne. Yes.

Agent Rugala. In regard to those statistics, 1.7 million is averaged over a six-year period, 1993 to 1999. So in some years you may have a little bit higher number and in some years you may have a little bit lower number. But that average, 1.7 million, reflects non-fatal victimizations, with simple assaults being the most common type of non-violent crime.

As Miss Speer said, when you look at the issue of violent criminal behavior in the workplace or the potential for that, you have to look at violence in the workplace on a continuum, with homicides being the worst-case scenario. Then you have threats, inappropriate behavior, simple assaults, other types of assault and behavior, sexual assaults, all running along that continuum.

While the focus in many years has been looking at the homicides, and there has been a decline in homicides since 1993, as well as a general trend downward in non-fatal assaults, many of these homicides, as you mentioned yourself, are as a result of robbery. In fact, about 77 percent of all homicides in the workplace are as a result of robberies.

So the focus should be on some of these other issues such as domestic violence and threatening behavior that impact the potential for violence along with the idea of looking at some type of proactive strategy to lower the level of threats at an early enough stage; that's what managers, supervisors, and co-workers deal with on a daily basis. They don't reach that homicidal level, but they certainly could at some point.

Mr. Payne. Let me just interrupt, because the red light is going to come on, and I'm sure the Chairman is going to cut me right off.

According to data I have in front of me, it says that in the six-year period between 1993 and 1999, while violent crime dropped by 40 percent generally, it dropped by 44 percent in the workplace. I'd just like to add this into the record.

Let me ask a quick question, Agent Rugala, since you did come in. You define workplace violence as an action that may impact on the employee's physical and psychological well being. Using that definition, would a supervisor who severely berates an employee be engaged in violence? Or does violence occur only if the employee reacts by threatening or attacking his supervisor? In other words, do you ever take into consideration the behavior of the supervisor to the employee?

Agent Rugala. Absolutely. You have to look at the work environment. You have to look at the actions of management and the supervisor. It's not just focused entirely on the employee.

Mr. Payne. Well my time has expired. Thank you.

Chairman Johnson. Thank you, Mr. Payne.

The Chair recognizes Mr. Wilson for questions.

Mr. Wilson. Thank you, Mr. Chairman. Agent Rugala, could you tell me what you mean by conducting a "threat assessment?"

Agent Rugala. Basically, when we get involved in a case where a company is involved with law enforcement, law enforcement contacts our unit and we assess the potential for violence. We would want to know as much as we could about the particular individual in question, the personality, if you will, of the individual.

We'd also like to know what is going on in the workplace: what kinds of incidents have occurred there in the past and what's happening within that environment. Then we also take a look at other issues that may impact not only the workplace but also the individual himself, such as family issues, financial problems. We focus on behavior and things that are occurring within the workplace to ultimately render an opinion as to what the potential threat might be. If we do ascertain that there is a threat, we would recommend strategies to potentially lower the level of threat.

Mr. Wilson. Is the study that you do after an incident or before an incident? What would be the grounds for which you'd become involved?

Agent Rugala. We would become involved once a threat has already been made. Law enforcement, depending on the situation, is called in and they make a request for us to provide consulting services to them. This is something that we routinely do, not only with these issues but in the many other violent crime issues that we are involved with as well.

Mr. Wilson. Thank you very much.

Mr. Donaway, it is an honor to have you here. I have another role aside from being a new Member of Congress; I am also a longtime customer of Airborne. I'm interested in learning about Airborne's crisis management program to address workplace violence. Could you tell me how it is designed to respond to threats of violence?

Mr. Donaway. The first thing we do is we assess the seriousness of the potential for violence by working with psychologists, our human resource people, local law enforcement and in many cases with the FBI also.

Once we have had an incident where violence has actually occurred, we work with outside representatives from psychological groups. Mental health professionals will come in and work with our employees and with the company to deal with the event.

So there is a comprehensive approach to the best of our ability to prevent violence. But on the rare occasion where it does occur then we want to make sure that we have adequate resources there to help our employees through that very difficult time period.

Mr. Wilson. The company, in the field of endeavor that you are in, has to be stressful in terms of customers such as myself, expecting delivery instantaneously. With the concern for security that we all have now, has there been a rise in stress, particularly since September 11th of last year? Has there been any indication of additional concern?

Mr. Donaway. I would say that we've always had a high level of security because we own our own airport and we take that very seriously. We also take access to our aircraft and the screening of our flight crews extremely seriously in post-9/11. I would say that our overall program has been in place for many years and we have not changed it dramatically as a result of those events. But I think everyone in the country is somewhat stressed as a result of the 9/11 events and I think that that's natural.

Mr. Wilson. Thank you, Mr. Chairman.

Chairman Johnson. Thank you, Mr. Wilson.

Mr. Donaway, I understand you need to catch a plane. I thank you for your testimony, and you are welcome to depart now if you like.

Mr. Donaway. Thank you very much.

Chairman Johnson. Thank you for being here with us.

The Chair recognizes Mr. Kildee.

Mr. Kildee. Thank you, Mr. Chairman.

Picking up on what Mr. Payne was talking about, in the Department of Justice Statistics we read that violent crime from '93 to '99 has decreased 40 percent, where violent crime in the workplace has decreased 44 percent. Do those figures push us or urge us to federalize these crimes? And Agent Rugala, you give assistance to local law enforcement officers. Generally, are the people who are engaged in any type of violence tried under state and local laws?

Agent Rugala. I would say most often they are. We certainly could have violent incidents that occur in federal workplaces in any area where we do have federal jurisdiction such as national parks, government reservations, and possibly military bases. The FBI would be involved in investigating those particular cases. But generally speaking, most of these fall under local and state jurisdictions.

Mr. Kildee. With the heavy burden being placed upon the FBI, particularly since September 11 a year ago, I'm just concerned about putting greater responsibility by federalizing criminal acts or

violence. And you are probably pressed right now to carry out your responsibilities. Is it wise that we federalize every crime?

We do have state laws in Michigan. I lived through the sit-down strike in Flint, Michigan. My father participated in that, and people were arrested and were tried. The sheriff's department is out there, the local police, the state police. I'd never been on a picket line but I've marched at many a picket line with some of the people who are on strike, and if they violate the law, generally it is the local police or that state police who arrest them. It's the state courts that try them.

Is there any urgent need to push the federalization of these violent acts?

Agent Rugala. Well, again, I'll leave that up to the distinguished Members here to decide whether that's the case or not. But certainly in the work that we do, we assist the state and local agencies, which as we've all seen from the 9/11 attacks, certainly allows us to work together more effectively in dealing with these potentially violent crime issues as well as dealing with other issues that are the topic of the day.

Mr. Kildee. I recognize your important role. I work closely with the FBI and the ATF. The ATF is in the same building that I am in back in Flint. I know the local police do welcome your expertise but I question whether you want to federalize these acts when we have state and local laws in place that are against violence upon other people. I do appreciate the candor of your answer.

Mr. Whitehead, in your written comments you suggest that the Freedom from Union Violence Act could be retro-applied to union conduct that induces a fear in an employer that he could suffer economic harm from the union.

That reminds me, when I was in high school I read John Steinbeck's, *The Grapes of Wrath*. And of course, many of the employers were frightened by what was going on in the '30s, and that could be looked upon as a threat. I can recall when some of the labor organizers and do-gooders were around, one person referred to them as communists.

One of Steinbeck's characters said, "well, what is a communist, how do you define a communist?" And he said, "A communist is someone who is asking for $.35 cents an hour when we're paying $.25 cents an hour." That does sometimes create a little fear of threat. And you suggest that perhaps this law could be interpreted for an economic demand that could be covered under this bill?

Mr. Whitehead. Yes, that is correct, Mr. Kildee. I not only suggest it, but it's a straightforward reading of the proposed language of what I refer to as S.902 that I understand may have a House counterpart soon.

According to that reading, which is a very plain reading of the face of the statute, it would criminalize collective bargaining. Collective bargaining, after all, is about getting wage increases, in part, and if the employer were possessed of a fear of economic loss, it literally applies to that

circumstance.

Mr. Kildee. I have great respect for Ford Motor Company, UAW, and the CW in Canada. Right now there are negotiations in Canada and I'm sure Ford is very nervous and feels very threatened by the fact that if they close down one plant in Canada they may close down the whole engine plant in Canada. So I very much share your concerns that this law could be interpreted as being a threat to the employer.

Mr. Maltby. Mr. Kildee, if I might add one very brief point to that. One point that hasn't been mentioned is that by federalizing these routine criminal assault cases, the penalty goes from, maybe one year or two years in local prison to 20 years in state prison.

Now, I'm not going to defend for one minute, anyone, including a union member, who punches someone else in the face and breaks their nose. It's wrong. It's wrong if he does it in a bar room; it's wrong if it happens on a picket line. But if the appropriate penalty for punching someone and breaking their nose is, let us say, one year in prison, it doesn't become worth 20 years in prison just because it happens on a picket line. It's the same violence, and it deserves the same punishment.

Mr. Kildee. And I think my friends on the other side of the aisle have always expressed some concerns about federalizing what ordinarily would be a state or local criminal act; and I think they should look at some of their own statements on this federalization. Thank you very much.

Chairman Johnson. Thank you, Mr. Kildee.

The Chair recognizes Mr. Boehner for questions.

Mr. Boehner. Thank you, Mr. Chairman. I'm glad to see my friend from Michigan is opposed to federalizing many laws. If I recall sitting in the room with him over the last 12 years that we've served here together, the gentleman's probably voted on a pretty regular basis to federalize a lot of things.

Mr. Kildee. We've both had a smorgasbord approach to that.

Mr. Boehner. Yes.

Mr. Horn, let me follow up on this whole issue of federalization and ask you what kind of cooperation you have had from local and state law enforcement officials with regard to the problems at Mansfield?

Mr. Horn. We've had significant cooperation there. Those officials are by and large elected, and that has created a problem for us. Let me give you an example of what occurred right before the violence that you saw on the video, which occurred on September 10th of 1999.

On September 6th of 1999, a number of local elected officials met with the local elected judge and informed him that they felt that if ARMCO brought in replacement workers that there

would be violence and that he should issue an injunction preventing that. Now, keep in mind that we were not a party to that. There was a pending case before him, and they had this meeting without us being a party.

They then invited the representative of the USW to attend, and he made the motion to have the temporary restraining order (TRO) issued. And it was issued. Only after that decision was made were we contacted and our counsel permitted to object to it; and the objection was ignored, even though there was a federal right to bring in replacement workers. It took us three days to convince that judge that he was violating federal law.

Ultimately we were able to do that, and the TRO was dissolved. And the judge, in one of his orders, acknowledged that he understood, at the time the TRO was issued, that he did not have authority to do that, that we had a federal right to bring in replacement workers, and he issued it anyway. That is an illustration of the type of difficulty we have had with the state elected officials in this kind of situation.

Mr. Boehner. Has there been cooperation with regard to these problems in terms of the local police and state police?

Mr. Horn. Sometimes. We've had difficulties in getting them to prosecute some of the people. We've shown videotapes, shown other evidence, and they have indicated less than a strong desire to prosecute. There have been other cases where they have prosecuted.

Mr. Boehner. In all of the activities that have gone on, have the local police requested the help of the FBI?

Mr. Horn. Yes, in fact, the FBI or the ATF have come in at least in connection with the bomb threats that have occurred. I don't know how often they have requested help beyond the bomb threats. I don't know the answer to that.

Mr. Boehner. This violence occurred in September of 1999. Did AK own the plant at that particular time?

Mr. Horn. No. At that time it was owned by ARMCO. The decision to lock out the workers was made by ARMCO sometime shortly before the contract expired, presumably on August 31st of 1999. At that time we were in discussions to merge with ARMCO. Our merger was effective September 30th of 1999, so the lockout had actually been going on for 30 days when we acquired the Mansfield facility.

Mr. Boehner. These replacement workers are being paid, if I remember what I've learned in this room about labor law, I'm not an attorney, at the last offer. Would they be paid at the last offer that was made to the steelworkers?

Mr. Horn. I honestly don't know the answer to that. I do not recall what the pay scale is for them.

Mr. Boehner. Mr. Chairman, I thank you for holding the hearing and thank my colleagues for their willingness to come today.

Chairman Johnson. Thank you, Mr. Boehner, thank you, Mr. Horn.

Ms. McCarthy, would you care to question?

Ms. McCarthy. Thank you, Mr. Chairman, for holding this hearing. I guess I want to touch on two areas.

Unfortunately, we're seeing more and more violence in nursing homes. So I have a great deal of concern about that. I heard part of the conversations, and I know we can do profiling but I'm stuck in between, because I happen to think that if people have done time and hopefully have been rehabilitated, they are going to be able to come into the workforce. Through your studies, did you find a way of working out how we hire people for these sensitive jobs when they're taking care of our weakest, I'll call them patients, because that's the way I know them?

Also, going back to what we are trying to do here at the federal level, I'm a great believer in not doing a lot of things at the federal level. I happen to believe in states' rights more than anything, I really do. And I happen to think that the laws that are on the books can cover what needs to be done at the state level.

Now, if there are loopholes in the laws, then we should try and find ways of doing this on the state level. But to have a blanket law whether it hurts our union members or anyone, I think is wrong. Because I happen to believe strongly that unfortunately we have people out there in all jobs, it doesn't matter what job you are in, that might be short-fused or frustrated and for those few minutes they might become violent. But to create a blanket law for everybody is totally, totally wrong. It really is.

I want to go back to the question of what we can do to make sure that the wrong people don't get into sensitive jobs in the workplace in general or in the nursing homes. How do we do that?

Agent Rugala. Could I speak to that issue? One of the things that have been recommended certainly, is conducting thorough background investigations. That is sometimes problematic. But in looking at this issue, certainly finding out about criminal backgrounds specifically is one thing that can act as a pre-employment screening device.

But again, some issues develop. While background investigations are fine, and well and good, and many agencies do them, including my own, often issues do develop once an employee is hired and on the job already that may somehow circumvent this background screening. So if there are other issues, from a behavioral standpoint, for example, that might develop over time, a background investigation or pre-employment screening may not necessarily pick that up.

But certainly it's a good first step and something that should be considered but can be expensive. Many employers, because of the expense alone, may decide that is not the way to go.

But it's an individual decision.

Ms. Speer. If I may add a few brief comments, I do agree that some form of thorough screening of employees is important, no matter how an employer might go about doing that. But also, it is just as important to really keep an eye on people once they are hired, irrespective of their position. They could be the CEO, they could be support staff, whatever their position within the company.

It's very important for companies to monitor behavior, to receive training that makes them better able to discern inappropriate behavior and to act once those behaviors come to light in a way that's responsible and thoughtful. And, as a general rule, I believe there needs to be a lot of education for corporate America about what that task entails, because workplace violence is different.

As an attorney, I wasn't trained as a psychologist; a lot of human resource professionals, even security staff, aren't specifically trained on what to do with troublesome behavior, what it means and how it can best be addressed.

Mr. Maltby. Ms. McCarthy, if I might add one point to that. You mentioned loopholes before. There was one glaring loophole in the legal structure here that we have not mentioned before but needs to be addressed, and that's the lack of whistleblower protection laws.

If something illegal and dangerous or violent is going on in the workplace, it's not as if nobody knows. There are workers around. Workers know when something is going wrong, whether it's management doing it or a co-worker doing it. And many times what they want to do is stop the violence, stop the illegal behavior by calling the appropriate authorities or by calling upper management; and they don't do it. Most of the time they don't do anything.

The reason they don't do anything is because they know that if they do they're going to get fired. And given a choice between being a Good Samaritan and keeping their jobs and feeding their kids, they make the choice that they have to make.

The federal and state government has done, I'm sorry to say, an abysmal job of protecting workers who do exactly what we, as a society, want them to do. If we're looking for opportunities to make things better, then that's a great one.

Ms. McCarthy. Well, I agree with you on this, spending most of my life as a nurse, that's why we fought so hard to have whistleblower protection in the Patient's Bill of Rights. That's why many of us are still fighting for that on the Homeland Security Bill. Thank you.

Chairman Johnson. Thank you, Ms. McCarthy.

Mr. Andrews.

Mr. Andrews. Thank you, Mr. Chairman. I thank the witnesses for their preparation and testimony. I apologize for not being personally present. I have had a chance to read your

testimony. It's very valuable and very important.

It seems to me we have actually had two hearings today. One is about the general problem of violence in the workplace that affects anyone who happens to be in the workplace. And I think there is a success story to be told there. The data would indicate that in the six-year period between 1993 and 1999, while violent crime dropped by 40 percent generally, it dropped by 44 percent in the workplace. One crime is one too many, but it seems to me that American employers and employees and law enforcement and health care people are doing a pretty good job. And we ought to try to figure out what you're doing and create an environment in which you can do more of it. I'm fully aware of the fact that probably some of that diminution is because of the improvement in the economy during that period of time. I think crime rates generally during that time dropped in large part because the economy improved.

The second issue is about a particular labor dispute, which I assume is ongoing, in Ohio. Let me say from the outset that I think every Member of this Committee deplores any violence against any person for any unjustifiable reason. And we want to find the most effective way to curtail and prohibit that. The question, as Ms. McCarthy very well identified, is whether we already have the legal tools to accomplish that objective, and if so, are being used properly?

Mr. Horn, I read your testimony carefully. I want to ask you about a couple of specific incidents that you mention in your chronology of events. In the September 10, 1999 incident, you indicate that videotaped evidence helped to identify and charge 17 union members for their roles in the riot. Were criminal charges pressed by local enforcement authorities against those 17 people?

Mr. Horn. In that instance yes, they were, although there was, as I understand it, a diversion program that first offenders could go through.

Mr. Andrews. But the point is that there was a prosecution brought, and I assume there's a conviction.

Mr. Horn. I don't know if there was a conviction; I think, because of the diversion program, there may not have been, but I don't know the intricacies of how the program works.

Mr. Andrews. You make reference that on January 16, 2000, a locked out Local 169 member is apprehended by the police after allegedly firing a shotgun into the plant after serving picket duty. Did the local police arrest that person?

Mr. Horn. I believe that he was arrested.

Mr. Andrews. Was the individual charged?

Mr. Horn. I believe that he was charged.

Mr. Andrews. Was the individual tried and convicted?

Mr. Horn. I do not recall offhand the result of that one.

Mr. Andrews. You make reference that on March 28, 2002, the ATF, the cousins of the FBI, alleged that an autoworker was plotting to fire rockets into the Mansfield works to put the scabs out of work. Was the person accused of this crime arrested?

Mr. Horn. In that instance he was, by federal authorities, yes.

Mr. Andrews. Was he prosecuted?

Mr. Horn. He is in jail; he is being prosecuted, yes.

Mr. Andrews. Let me say this. Assuming the facts that you allege are true, which I don't know if they are or not, but if they're true, they're reprehensible, they're criminal, and people should be punished. In the course of my work in my district, I very often get complaints from people who feel that law enforcement hasn't done everything they could to properly enforce the criminal laws and protect them. And I sometimes agree with them and I sometimes don't.

But I do understand this, that the job of law enforcement in our form of government is given to the executive branch and to prosecutors, and eventually adjudication is given to the judicial system. And our role is not to rush into every situation to pass a new law to stop something for which there might already be laws, which leads me to a question for Mr. Whitehead.

It's my understanding that the employer filed a civil RICO suit against the union and other defendants in this instance. What was the disposition of the civil RICO suit?

Mr. Whitehead. It was dismissed on a motion to dismiss by the defendants; the Judge, Susan Deloitte, found that it contained lots and lots of allegations but very little hard fact, so little as to be dismissed.

Mr. Andrews. Was that heard in federal court?

Mr. Whitehead. Yes it was.

Mr. Andrews. And it was heard under the confines of a federal RICO statute?

Mr. Whitehead. Yes it was. And there were other federal laws that could apply.

Mr. Andrews. When you say there was a dismissal, I assume that it was a summary judgment in that the facts failed to state a claim in which relief was granted?

Mr. Whitehead. I believe it was. I believe it was a 12(b)(6) motion.

Mr. Andrews. Are you an attorney, Mr. Whitehead?

Mr. Whitehead. Yes, I am.

Mr. Andrews. So I assume you know, then, that in dismissing that motion, the court must assume that all the facts alleged by the plaintiff are true, right? So that what you're telling me is that in the judicial matter, civil RICO matter, that when the judge assumed that every fact alleged by the employer was true, there was still a dismissal under the RICO statute. Is that right?

Mr. Whitehead. That's my understanding, and it is on appeal, 6th Circuit.

Mr. Andrews. Mr. Horn, is that right?

Mr. Horn. It is correct that the action is dismissed. It is also correct that it is on appeal, and the last word has not yet been written whether a claim was stated. But the judge held that we had not stated a RICO claim, there was no holding that there were no claim of any kind that could be stated, or that in the incidents that occurred had not occurred.

Mr. Andrews. Were there other theories of liability in the suit?

Mr. Horn. It was basically just a RICO filing.

Mr. Andrews. Well, I assume that your side would have an interest in asserting every right that it had. I assume also that the complaint essentially outlined the same allegations you made here today?

Mr. Horn. It was broader. Today we have focused on what occurred in Mansfield. The complaint was broader than just Mansfield.

Mr. Andrews. Well, actually, in the lawsuit you alleged everything you've alleged today and then some other things broader than this.

Mr. Horn. There were other things beyond Mansfield; it did not focus on Mansfield.

Mr. Andrews. My time, I see, has expired. I want no ambiguity to exist here. If the conduct that was alleged occurred, it is wrong, it is criminal, and it should be punished. The question that this Committee has to confront is whether new statutes are necessary to deal with the problem. Thank you.

Chairman Johnson. Thank you, Mr. Andrews. How many people were convicted or were even questioned about jack rocks that were thrown or broken windows on cars?

Mr. Horn. We've had, to my recollection only one person convicted, who I believe was a member of the Steelworkers Union, for throwing jack rocks. They have been unable to identify the others who have placed jack rocks.

Chairman Johnson. Well, they throw a handful of them out there and it blows your tires and it's not a good deal. I don't want mine blown. And I don't think you all condone that, either.

I want to thank the witnesses for their valuable time and testimony and the Members for their participation. I think we're getting into this issue; we'll have some more hearings concerning it. Thank you so much for your attendance.

With no further business, the Subcommittee stands adjourned.

Whereupon, at 12:44 p.m., the Subcommittee was adjourned.

APPENDIX A - WRITTEN OPENING STATEMENT OF CHAIRMAN SAM JOHNSON, SUBCOMMITTEE ON EMPLOYER-EMPLOYEE RELATIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE

Opening Statement of Rep. Sam Johnson,
Chairman

Subcommittee on Employer-Employee Relations

September 26, 2002

It's estimated that Americans spend more time in the workplace than any other industrialized nation. It makes sense that people should feel safe at work. Sadly, not everyone enjoys that luxury we often take for granted.

It's unconscionable that people trying to work get pulled from their cars and beaten - or even worse. For those people who want to work during a strike to pay the bills, keep food on the table and roof overhead, violence in the workplace has been a sad reality. And sadly, more and more people are becoming victims of union violence when all they want to do is earn enough money to make ends meet.

The real issue is what steps can employers take to assure the safety of employees, customers, and neighborhoods. Also, how can policy-makers help employees enjoy safety in the workplace during day to day operations and whether new laws may be needed, or whether existing laws may need to be improved. We are not here today pushing any specific legislation. However, we are here today to begin a public dialogue on the importance of workplace security, protecting employees and preventing violence and sabotage.

What we are really here for is to asses potential security problems inside the workplace, whether they be union or otherwise. And, yes, part of that is discussing union issues. Employees are an essential part of workforce security, whether organized or not. Regardless of one's affiliation, workplace violence cannot be tolerated. We need to ensure that all American workers can perform their jobs in a safe environment.

This is the first in a series of hearings this Subcommittee will conduct on emerging trends in employment and labor law. What we learn in these hearings, I hope, can provide useful information to future Congresses about updating our antiquated laws and securing the workplace for all Americans.

APPENDIX B- WRITTEN STATEMENT OF EUGENE RUGALA, SUPERVISORY SPECIAL AGENT, FEDERAL BUREAU OF INVESTIGATION ACADEMY, QUANTICO, VA

Testimony of Mr. Eugene Rugala,
Supervisory Special Agent
Federal Bureau of Investigation

September 26, 2002

It is an honor to testify before you today about the problem of workplace violence and the scope of the problem in America's workplaces.

Before I speak to the issue of workplace violence, it may be helpful if I briefly explain the roles of the FBI's Critical Incident Response Group (CIRG) and that of the National Center For the Analysis of Violent Crime (NCAVC). The CIRG is an FBI field entity located at the FBI Academy in Quantico, Virginia. Established in May of 1994, the CIRG was designed to provide rapid assistance to incidents of a crisis nature. It furnishes emergency response to terrorist activities, hostage situations, barricaded subjects, and other critical incidents.

The CIRG is composed of diverse units that provide operational support and training and conduct research in related areas. Expertise is furnished in cases involving abduction or mysterious disappearance of children; crime scene analysis; profiling; crisis management; hostage negotiations; and, special weapons and tactics.

The NCAVC, is comprised of FBI Special Agents and Professional Support staff who provide advice and support in the general areas of Crimes Against Children; Crimes Against Adults; and, Threat Assessment, Corruption, and Property Crimes. Typical cases received for services include: child abductions or mysterious disappearance of children; serial murder; single homicides; serial rapes; threats and assessment of dangerousness in workplace violence; school violence; domestic violence; and, stalking. Other matters that NCAVC personnel respond to include: extortion; kidnaping; product tampering; arson and bombings; weapons of mass destruction; public corruption; and, domestic and international terrorism. Annually, NCAVC personnel respond to over 1500 requests for assistance from law enforcement all over the world.

The NCAVC reviews crimes from both a behavioral and investigative perspective. This criminal investigative analysis process serves as a tool for client law enforcement agencies by providing them with an analysis of the crime, as well as, an understanding of criminal motivation and behavioral descriptions of the likely offender. Also, the NCAVC conducts research into violent crime from a law enforcement perspective in an effort to gain insight into criminal thought processes, motivations, and behavior. Results of the research are shared with the law enforcement and academic world through publications, presentations and training, as well as, through application of knowledge to the investigative and operational functions of the center.

The NCAVC, specifically gets involved in matters of workplace violence when contacted

by a law enforcement agency, which, when responding to a request by an employer about a potentially dangerous employee, contacts our unit to conduct a threat assessment and render an opinion as to the potential for dangerousness. Once this assessment is done, NCAVC members will recommend intervention strategies to lower the level of threat.

In June of this year, the NCAVC, held a Violence in the Workplace Symposium in Leesburg, Virginia. Approximately 150 recognized experts in workplace violence and violent behavior from law enforcement, private industry, government, law, labor, professional organizations, victim services, the military, academia, and mental health looked at this issue from a multi-disciplinary perspective. Issues discussed included workplace violence prevention, threat assessment and management, crisis management, critical incident response, research, and legislative recommendations. It is through this symposium and the issues discussed that a written monograph will be produced detailing findings and recommendations. This monograph will be available to anyone who has a need, and will be furnished to this committee for review.

For our purposes today at this hearing, workplace violence can be defined as any action that may threaten the safety of an employee, impact the employee's physical and/or psychological well-being, or cause damage to company property. Workplace violence is now recognized as a specific category of violent crime which calls for distinct and specific responses from employers, law enforcement, and the community. However, this recognition is relatively recent. Before the mid-1980's, the few research and preventative efforts that existed were focused on particular issues like patient assaults on healthcare workers, or the high robbery and murder risks facing certain occupations such as taxi drivers or late-night convenience store clerks. It was a number of shootings at U.S. Postal facilities around the country in the mid 1980's, where employees killed other employees, that raised public awareness of the kind of incident that is most commonly associated with the phrase "workplace violence." In fact, the phrase "going postal" has been accepted as part of the public lexicon for this type of activity.

Once workplace killings by unstable employees came to be seen as a trend, incidents tended to attract wider news coverage. Thus, the apparent rise in such cases may have been, in part, an impression created by more media attention. In subsequent years, other mass workplace shootings have occurred with the most recent being seven co-workers slain by a software engineer at the Edgewater Technology company in Wakefield, Massachusetts in December, 2000. Four workers were killed at a Navistar plant outside of Chicago in February, 2001. There were multiple shootings that occurred at an aircraft parts plant in Indiana earlier this year.

However, sensational multiple homicides represent only a tiny fraction of violent workplace incidents. The vast majority are lesser cases of assaults, threats, harassment and physical or emotional abuse that makes no headlines and, in many cases, are not even reported to company managers or law enforcement. While data on homicides and other assaultive behavior may be captured, specific data as to threats and intimidating behavior are lacking.

In a December, 2001, Bureau of Justice Statistics, National Crime Victimization Survey on

Violence in the Workplace from 1993-1999, it was found that an average of 1.7 million violent victimizations were committed during that period. The most common being simple assault. This number does not include an average of 900 homicides which occurred in the workplace during that period. Also, this study showed, that along with all violent crime occurring in the U.S., there was a decrease in workplace violent crime. Since approximately 1993, workplace homicides have been on the decline. Dropping from a peak of over a 1000 in the early 1990s to approximately 677 in 2000. It should be noted that the majority of workplace homicides, about 77%, are the result of robberies and related crimes. Part of the decline in homicides may be the result of better security programs implemented by companies impacted by this type of crime (i.e. better lighting, bullet proof glass, video cameras, etc.). The remaining homicides are the result of disgruntled employees, clients and customers, domestic violence and stalking situations which spillover in the workplace.

Analysts and other occupational safety specialists have broadly agreed that responding to workplace violence requires attention to more than just an actual physical attack. Direct physical assault is on a spectrum that also includes threats, harassment, bullying, emotional abuse, intimidation, and other forms of conduct that create hurt and fear. All are part of the workplace violence problem; and, workplace violence prevention policies that do not consider threats and harassment, are unlikely to be effective.

Workplace violence falls into four broad categories: (1) violent acts committed by criminals who have no connection with the workplace, but enter to commit robbery or another crime; (2) violence directed at employees by customers, clients, patients, or any others for whom an organization provides service; (3) violence against co-workers, supervisors or managers by a present or former employee; and, (4) violence committed in the workplace by someone who doesn't work there, but has a personal relationship with an employee, an abusive spouse, domestic partner, boyfriend or girlfriend, etc.

While much has been done by the retail industry to lower the risk of violent crime associated with category one type crime, additional efforts should be focused to identify, prevent and/or manage workplace violence that involve the remaining categories.

The impact of violence in the workplace from lost work time and wages, reduced productivity, medical costs, worker compensation payments, legal, and security expenses, is estimated to be in the many millions of dollars. However, the impact of this type of crime goes beyond the workplace. By impacting society as a whole, it damages trust, harms the community, and threatens the sense of security every worker has a right to feel while on the job. In that sense, everyone loses when a violent act takes place within the work environment. Everyone has a stake in efforts to stop violence from happening where they work.

There is no one size fits all strategy. Discussions with the multi-disciplinary group of experts in workplace violence and violent behavior, who attended the NCVACs violence in the workplace symposium in June, 2002, suggest that success will depend on several factors. First, employers have a legal and ethical obligation to provide a safe environment for workers; and, as a result, can face economic loss as a result of violence. Second,

employees have a right to expect to work in a safe environment, free from violence, threats or harassment. However, employees also have a stake in workplace violence prevention and have to be an integral partner in any such effort. Third, law enforcement, through the community-oriented policing concept, have placed greater emphasis on prevention and responding to threats and violent incidents, rather than the traditional view that law enforcement should be called as a last resort or to effect an arrest.

Fourth, unions should regard workplace safety from violence as an employee's right just as worthy of union defense as wages or any other contractual right. Fifth, occupational, safety, and criminal justice agencies at the federal and state level have an important role in developing model policies, improving record-keeping as to number and type of incidents, and reaching out to employers. Especially, those in small companies. Sixth, medical, mental health, and social service communities have a role in assessment of threats and recommending intervention strategies and additional research regarding this issue. Finally, legislators, policymakers and the legal community can review legal questions that have an impact on workplace violence and on preventative efforts such as identifying potentially violent employees.

A multi-disciplinary, broad-based and proactive approach, at all levels, is what is needed to quantify, understand, and prevent and/or manage the potential for violence in the workplace.

I am grateful for the for the opportunity to contribute to this hearing, and hope that what we do here today helps in dealing with an issue that potentially impacts us all. I am willing to answer any questions that you may have at this time.

APPENDIX C - WRITTEN STATEMENT OF REBECCA A. SPEER, ESQ., PRINCIPAL, SPEER ASSOCIATES, SAN FRANCISCO, CA, TESTIFYING ON BEHALF OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT

Testimony of Ms. Rebecca A. Speer, Esq.
Principal, Speer Associates/Workplace Counsel

Testifying on Behalf of the Society of Human Resource Management

September 26, 2002

Good morning Chairman Johnson and members of the subcommittee. My name is Rebecca Speer. I am an attorney and the principal of Speer Associates/Workplace Counsel based in San Francisco, California. Speer Associates provides employment law consulting with a specialized focus on employee relations management, internal investigations, and the prevention and management of workplace violence and sexual harassment. My client base includes major corporations cross-industry, public-sector organizations, trade associations, and professional firms. I have lectured and written extensively on workplace violence.

Currently, I participate as a member of a select working group chosen by the Federal Bureau of Investigation (FBI) to address workplace violence. I am also a member of a Joint Working Group On Workplace Violence, led by the Special Operations Division of the San Francisco Police Department. In 2000, I was appointed by the Department of Labor (DOL) as a representative to the Tri-National Conference On Violence As A Workplace Risk, sponsored by the governments of Canada, Mexico, and the US. In addition, I conduct outreach to the business and legal communities regarding this important issue.

The aftermath of the terrorist attacks at the World Trade Center and the Pentagon last year have left many employees and employers alike feeling unsafe at work, particularly those working in high-rises in major cities across the country. Due to the shocking nature of the attacks, and the fact they targeted Americans at work, employers, business organizations, and union groups have shifted their focus to workplace safety, security, and crisis response.

While September 11 riveted our attention toward workplace safety, I want to emphasize that corporate America has struggled with the issue of workplace safety for decades, particularly since the mid-1980's, when the nation caught its first glimpse of violent outbreaks in the workplace. It seems that, increasingly, we have faced disturbing headlines reporting multiple workplace slayings in a variety of settings: manufacturing plants, technology companies, state lottery offices, and even law firms. In 1993, I spent several hours barricaded in an office as a gunman killed eight people on the floors directly above me before taking his own life in the stairwell around the corner from where I hid.

Due to these, and other incidents, workplace violence is now increasingly recognized as a specific category of violent crime that calls for distinct and specific responses from law enforcement, employers, and the community.

Today, I'd like to focus on the impact of workplace violence on American businesses, on current responses to this complex problem, and on the opportunity that now exists for Congress to educate the public and to facilitate corporate America's response to this costly and troublesome problem.

The Impact of Workplace Violence

In terms of the impact of workplace violence, we know that it carries a clear human price. Homicide is the third leading cause of workplace deaths. Whereas occupational safety and health organizations at the federal and state levels traditionally have focused on dangers from toxic chemicals, shoddy scaffolding, and machinery, they now must also focus, on violence. The Bureau of Labor Statistics (BLS) reports that 11 percent of all workplace deaths are caused by violence, nearly 30 percent of women who die at work do so as the result of a violent attack and nearly a third of employees who die at work in California are victims of homicide.

As shocking as these statistics seem, they form only a small part of the workplace violence problem. Beyond homicide – beyond the headline events – lie millions of incidents of non-fatal workplace violence. These incidents consist of non-fatal assaults, threats, aggressive harassment, stalking, and other conduct that create a reasonable fear for physical safety. According to the Department of Justice, 1.7 million employees fall victim to reported, fatal violent crime on the job each year. Eighteen percent of all violent crimes that occur annually in the US are committed at work. Many more incidents go unreported. Informal studies speak to the problem of non-fatal workplace violence. One insurance industry study conducted in the 1990's suggested that nearly one in four full-time employees will suffer from some form of non-fatal assault, harassment, or threat every year. SHRM in its own study, conducted in 1999, revealed that 57 percent of corporate respondents had experienced a violent incident during the preceding three-year period. Data regarding non-fatal workplace violence has been "scattered and sketchy," prompting efforts to determine formal means to more accurately assess the fuller extent of the problem.

Where do these problems originate? Currently, a consensus exists among specialists that workplace violence falls into four broad categories, with lines drawn depending on the perpetrator's relationship to the workplace. These categories include the following:

> **Type 1**: Consists of violent acts by criminals who enter the workplace with the specific purpose of committing a robbery or other crime. Many workplace homicides present Type 1 violence. This is the type of workplace violence that most commonly affects night retail establishments and other "cash and carry" industries, such as the taxi cab industry.
>
> **Type 2**: Consists of violence directed at an employee by a current or former customer, client, patient, or other person who is or had been a recipient of services provided by the employer. Type 2 violence commonly occurs in the healthcare industry, where disturbed patients attack healthcare workers. This type of

violence is seen in other settings as well. For instance, the much-publicized attack several years ago by a day trader against a brokerage firm constituted Type 2 violence. Furthermore, the 1993 massacre in San Francisco, mentioned in my opening remarks, occurred at the hands of a disgruntled former client of one of the largest and most prestigious law firms in the city, which shut its doors a few years after the attack, having never fully recovered from the incident.

Type 3: Consists of violence against co-workers, supervisors, and managers by a present or former employee. This type of workplace violence in particular has captured headlines. The seven people slain at a Xerox facility in Honolulu, Hawaii in 1999; the seven killed at the Edgewater Technology Company in Wakefield, Massachusetts in 2000; and the four shot down at a Navistar plant in Chicago in 2001 all died at the hands of a current or former co-worker. At times called "grudge violence," Type 3 workplace violence has caught the particular attention of many employers.

Type 4: Type 4 workplace violence occurs as the outgrowth of domestic violence and occurs at the hands of a family member, or a former or current spouse or intimate of an employee. Type 4 violence occurs when what we may term "private" violence plays itself out in the workplace, with threats or assaults occurring on-site after a battering partner tracks the victim to the workplace. This type of violence further manifests itself when a battering partner uses company resources – such as telephones and fax machines – to harass and stalk the victim. Indeed, a study conducted in the 1990s showed that over 90 percent of security officers at the major corporations polled deemed domestic violence a "high security concern" for their organizations.

This system of categorization hints at the broad, and multi-faceted, nature of the workplace violence problem.

In addition to its human cost, workplace violence exacts a steep financial price. Studies estimate that workplace violence costs American businesses millions, even billions, of dollars annually. According to one study, 18,000 weekly workplace assaults cause 500,000 employees to lose 1,751,100 days of work annually, leading to a loss of $55 million in wages alone. The BLS has estimated that workplace violence costs employers an estimated $3 to $5 billion annually. Other informal studies measuring losses from additional factors such as lost productivity, diminished public image, increased security and insurance expenses, and other related factors report that workplace violence costs American businesses anywhere from *$6.4 billion to $36 billion annually.*

One aspect of costs to employers consists, predictably, of legal liability. Employers

struggle to balance an array of laws that compel them to promote a safe workplace, while respecting a myriad of rights that attend to the alleged wrongdoer, including rights to privacy and to due process. As a consequence, employers experience legal exposure from all sides. While no formal studies currently exist regarding the magnitude of this legal exposure, some literature has noted that the average jury award in cases of workplace violence totals millions of dollars.

Legal liability stems from two sources: (1) statutory requirements, and (2) judicially-imposed requirements. In terms of statutory obligations, states uniformly require employers to maintain a safe workplace. Courts increasingly have interpreted those statutes to require efforts to promote safety from violence. In terms of judicial mandates, cases litigated throughout the country have produced an array of theories under which employers may be held liable for failing reasonably to prevent and manage threats and violence affecting the workplace. Collectively, these theories communicate society's judgment that employers should not take a "back seat" to workplace violence but must proactively address the impact of known threats and violence, and to take reasonable preventive measures. Theories of liability include the following:

> **Premises Liability**: Employees, customers, and even passersby are harmed by assaults, mass shootings, and botched robberies at the hands of third parties and employees all have asserted claims of premises liability in their effort to hold business and property owners accountable for failing to protect them from violence. In assessing liability under premises liability claims, courts apply a traditional negligence analysis that looks at whether a special relationship existed between the premises owner and victim giving rise to a duty to protect the victim from violence; whether the violent act was legally "foreseeable"; if so, whether the owner took reasonable preventive steps; and if not, whether that failure legally caused the injury in question.
>
> Despite a stated reluctance to hold property owners liable for the criminal acts of third parties, courts have permitted claims of premises liability when, despite an adequate level of foreseeability of violence, the property or business owners failed to take reasonable preventive steps. Some courts have expressly articulated an affirmative duty on the part of property owners to investigate the potential for violence: that is, to discover criminal acts being committed or likely to be committed on their premises.
>
> **Vicarious Liability**: Under the principle of *respondeat superior*, employers remain vicariously liable for the acts of employees within the "course and scope" of employment, even if the acts are unauthorized, unforeseeable, and criminal. Because an employer's vicarious liability extends beyond the purely lawful, authorized acts of employees – at least when those acts fall within the scope of employment – many victims turn to *respondeat superior* in an

effort to hold organizations liable for the violence of its employees.

Courts apply various, and not altogether consistent, tests in determining whether an act falls within the "course and scope" of employment, triggering vicarious liability. Courts generally impose liability where the act in question is at least broadly incidental to the employer's enterprise and is "foreseeable" in the sense that the conduct is not so unusual given the nature of the employee's duties that it would be unfair to hold the employer accountable for losses resulting from it.

Direct Liability by Ratification: Direct liability may arise when an employer, after receiving notice of a threatening or violent employee, fails to take reasonable steps to prevent or mitigate violence. When employers turn a blind eye to a problem employee, they may be charged with having ratified the employee's wrongful acts.

Negligent Hiring, Supervision, and Retention: Where claims of *respondeat superior* focus on an employer's vicarious liability for the wrongdoing of employees, claims of negligent hiring, retention, and supervision focus on an employer's own failures. These situations arise most commonly in cases where the employer fails to perform a pre-hiring background check that would have exposed an employee's violent past, or fails to terminate an employee with known violent propensities. By creating direct liability based on an employer's independent duty to screen out potentially violent job applicants and to properly supervise, discipline, and terminate employees who present a potential threat, claims of negligent hiring, retention, and supervision work to erode the limited protection an employer may otherwise find under *respondeat superior* principles.

Sexual Harassment: Although we might not often think of sexual harassment in these terms, harassment can at times carry workplace violence implications. When employee-on-employee sexual harassment leads to sexual assault, courts have held employers strictly liable for resultant injuries. In fact, early this year, a federal court permitted claims to stand against a major airline for sexual harassment based on allegations that a male flight attendant had drugged and raped a female flight attendant during a layover oversees.

Mismanaging Threats: Liability does not end with an employer's failure to take adequate preventive efforts. An employer – even the most well-intentioned and quick to act in

> circumstances that raise concerns about workplace safety – still may incur substantial liability if it mismanages its efforts to address or defuse a threatening situation. An employer who fails uniformly and responsibly to apply a workplace violence prevention policy; who hastily fires an employee who, though exhibiting behavior perceived as threatening, may in fact be suffering from a psychological disability triggering protection and employer obligations under the Americans with Disabilities Act; who even in a laudable effort refers a potentially threatening employee to counseling but fails then to properly respect resultant privacy rights; and who in an attempt to thoroughly investigate a claim of threatened violence unreasonably detains suspected employees all have been held accountable under various causes, including claims of discrimination, violation of privacy, wrongful termination, defamation, infliction of emotional distress, and false imprisonment.

All told, the above liabilities place a premium on thoughtful efforts by employers to prevent and to manage threats and violence affecting the workplace.

Employer Responses to Workplace Violence

In addition to stiff economic costs, the clear human toll of workplace violence and a desire to create a positive environment for employees has propelled employers to tackle the problem of workplace violence head-on by implementing strong measures to promote workplace safety from violence. Studies currently are being undertaken on a national level to determine the efficacy of common preventive measures. However, an emerging consensus exists regarding the positive effect of the following steps:

Environmental controls. The first line of defense, environmental controls consist primarily of physical security measures designed to limit access to a facility. Often, employers will conduct a security analysis to determine the nature of any vulnerability from third-party violence and then take steps to mitigate those vulnerabilities. Employers will examine the existence of any prior violent incidents and other factors affecting security, such as the nature of the business, its location, and crime data of the surrounding community. Based on this analysis, the employer will then design a security program consisting of such elements as access controls, security personnel, and security procedures.

Organizational approaches. Many employers further develop an organizational approach implementing a multi-dimensional "Workplace Violence Prevention Program." Typically, these programs consist of several key elements:

> (i) A thoughtful workplace violence policy and related policies that govern employee behavior. Policies that address threats and violence, weapons possession, harassment, and drug and alcohol use all set clear expectations regarding workplace behavior

and create a vehicle for employers to promote a safe and respectful workplace;

(ii) Incident response team. Many companies form incident response teams that are trained and charged with the responsibility of responding to reports of threats and violence affecting the workplace. As general practice, these teams are interdisciplinary, respecting the multi-faceted dimension of workplace violence. Typically, the teams consists of managers, human resource professionals, lawyers, and security employees, who at times seek outside help from threat assessment psychologists;

(iii) Incident management processes. Workplace violence programs also include guidelines that assist the processing of complaints made under a workplace violence policy. These guidelines facilitate the flow of information, and responsibilities, relative to an incident, and provide a helpful structure for handling the most troublesome behavior an employer will face;

(iv) Training of incident response teams, human resource and security personnel, managers and supervisors, and other employee groups – help to ensure full participation in safety practices. Typically, training serves the purpose of instructing employees regarding the parameters of a workplace violence program and their respective responsibilities under it. In addition, training often involves information that assists employees in spotting troublesome behavior that could escalate into violence;

(v) Additionally, employers adopt a variety of other strategies to promote safety. Some strategies include pre-hiring screening from some personnel, conflict management training, the effective use of Employee Assistance Programs, and techniques to ensure the safe termination of problematic employees.

Ultimately, a workplace violence program provides a thoughtful, comprehensive approach that better prepares employers to prevent and to manage threatening behavior and violence.

Current Legislative Efforts

Clearly, workplace violence places a heavy burden on the steps of corporate America, which faces significant practical, economic, and legal challenges in effectively addressing this problem. Previously reserved for law enforcement's expertise, business owners, managers, and human resources professionals are now required to turn attention to violent and threatening behavior affecting the workplace.

State lawmakers are considering various means to assist employers in this heavy task. Indeed, SHRM has spearheaded two legislative initiatives that have gained significant momentum on the state level. These initiates consist of:

The Workplace Violence Safety Act

The Workplace Violence Safety Act allows employers to obtain restraining and other stay-away orders directed at persons who have threatened or endangered the workplace. Already in effect in several states, this legislation permits employers, where warranted, to take an active step to protect hourly, weekly, and monthly employees, supervisors, managers, officers, subcontractors, volunteers, board members, and independent contractors. The Act does not expand the scope of employer liability and permits the acquisition of a restraining order against anyone, including third parties. This legislation currently is in effect in 9 states: Arizona, Arkansas, California, Colorado, Georgia, Indiana, Nevada, Rhode Island, and Tennessee. California was the first to enact legislation, doing so in 1994; most recently, Tennessee enacted legislation effective July of 2002.

Reference Checking Legislation

Reference checking legislation also has garnered the interest of state lawmakers. Reference checking can play an important role in permitting an employer to appropriately screen out employees with a relevant history of violent behavior, based on responsible corporate policies pertinent to the issue. However, a proliferation of lawsuits stemming from job reference practices – and the threat of such lawsuits – has undermined the efficacy of reference checking. The specter of potential liability from such claims as defamation and "negligent referral" has prompted many employers to adopt a "no-comment" or "non-disclosure" policy that permits solely the disclosure of technical information such as dates of hire to the prospective new employer of a current or former employee. As a consequence, well-intentioned employers who seek information regarding a job applicant's past job performance and behavior become unable to obtain that important information. Similarly, an employer who has terminated an employee due to violent or threatening behavior is dissuaded from warning prospective employers.

SHRM has steadily worked in conjunction with its local affiliated chapters to endorse state legislation that would help remove these obstacles to the responsible sharing of information between prospective and current employers. The legislation aims at offering the following protections to employers who disclose information to prospective employers. In major part, the legislation:

> (i) Creates a presumption of "good faith" when employers respond to requests for information about

a current or former employee;

(ii) Permits an opportunity to the employee to rebut this good faith presumption by demonstrating a lack of good faith through clear and convincing evidence;

(iii) Provides immunity from civil liability under the presumption of good faith. The legislation limits immunity to situations in which the person requesting the information does so in writing and provides a written release signed by the former or current employee.

So far, thirty-five states have enacted reference checking legislation. Ultimately, this legislation protects employers who responsibly provide reference information. In addition, it permits employees with no history of violent or threatening behavior to obtain helpful positive references that can enhance their opportunities for employment.

Where To Go From Here

Given the breadth of the workplace violence problem and its potential impact on businesses across the country, a significant opportunity exists for Congress to consider means to facilitate efforts by employers to effectively address this growing problem. An effort that has gained interest is the consideration of tax incentives that would encourage companies to implement workplace violence prevention programs. In addition, Congress might consider efforts to bring public education to this significant problem.

Conclusion

Mr. Chairman, this concludes my written statement. I ask that a copy of my testimony be included in the hearing record for review. Thank you for the opportunity to appear before you today. I will be pleased to answer any questions that you or the other members of the subcommittee may have.

APPENDIX D - WRITTEN STATEMENT OF CARL DONAWAY, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, AIRBORNE EXPRESS, SEATTLE, WA

Testimony of Mr. Carl Donaway,
Chairman & CEO, Airborne Express

September 26, 2002

I commend the committee for looking into this important matter of workplace security.

My name is Carl Donaway. I am the Chairman and Chief Executive Officer of Airborne Express, the third-largest overnight package delivery company in the United States.

I appear before you this morning for three reasons. First, I would like to take this opportunity to describe for you the steps companies like mine currently take in an effort to reduce the likelihood of violence in the workplace. Second, I feel it is important to reiterate the magnitude of the workplace violence problem we continue to confront as a nation. Finally, I wish to direct your attention to several weaknesses in the dispute resolution system that I believe are resulting in the reinstatement of dangerous people into the workplace.

As an employer, I take both the moral and legal obligations of ensuring the safety and physical security of Airborne's 22,283 workers with the utmost seriousness. I believe, as I am sure each of you do, that every employee expects to be able to work within conditions free of violence.

Airborne Express directs significant resources toward workplace safety. To begin with, the company operates under a strict zero-tolerance policy with regard to any act or threat of violence made by one employee toward another or any other member of the public. An employee found in violation of Airborne's workplace safety guidelines is immediately subject to discipline, up to and including termination, regardless of that employee's position or seniority within company.

At the time of hire, every applicant we consider for employment must agree to a rigorous screening process designed to detect any history of or tendency toward violence. This process includes a 7-year criminal background check, a 10-year previous employment check, a 10-year previous residency check, a 5-year credit history check and a 3-year motor vehicle records check.

Additionally, applicants for all positions must pass a drug test at the time of hire while random drug and alcohol tests are administered for those in safety sensitive positions throughout the course of their employment.

We also utilize a variety of physical measures designed to enhance personal security and protect company premises. These include guards, restricted entrances, bright lighting, key cards, alarms, and various types of surveillance systems.

Finally, Airborne has established a strict weapons policy, a consistent termination policy, and a crisis-management program specifically designed to respond to any incident or threat of violence made by or against an employee. Airborne works through various communications channels to ensure that all employees know these policies and understand that any claim of workplace violence will be investigated immediately and remedied promptly.

Yet despite all that we and thousands of other companies do to reduce its likelihood, workplace violence remains one of the gravest issues facing employers today. According to the National Institute of Occupational Safety and Health, the number of violent acts in the workplace has increased 300% during the past decade. Homicide has now become the leading cause of death on the job for American women, and the second leading cause of death on the job for American men. According to the Center for Disease Control, an average of 20 people per week are murdered at work.

Combine these numbers with the far more frequent, but no less significant incidents of threat, intimidation and assault that go unreported by the media.

The CDC indicates that 18,000 Americans will be assaulted this week while at work or on duty. That's over 936,000 workplace assaults a year!

I find such statistics staggering. Yet they only tell half the story. Those who survive workplace attacks often suffer a severe toll in terms of physical injury or post-traumatic stress. Feelings of fear and depression are not uncommon. Further, work performance after an attack can deteriorate significantly causing the victim additional anxiety and stress. Such stress may end up turning to anger ultimately directed toward the victim's employer. This is especially true if the employer is ordered to reinstate an individual it believes is a clear and present danger to the rest of its workforce.

Workplace violence by definition usually occurs on an employer's property. Victims, their families and the government often seek to hold the employer accountable for any injuries or loss of life resulting from such incidents. As a result, employers must navigate through a complicated mix of regulations, privacy rules, case law, and arbitration procedures to protect themselves, their customers and, not least of all, their employees from the violent acts of others.

Naturally, a unionized employee is no more immune from violence than any other worker. Early in the history of collective bargaining, employers and union representatives routinely recognized and made many attempts to deal with the problem. For instance, current collective bargaining agreements usually provide that fighting is a dischargeable offense, while others specify that guns, knives, or other dangerous items are not to be carried on to the work site. These agreements reflect the simple fact that both employers and their unionized workforces share a paramount goal, namely a violence free workplace.

Despite this commonality of goals, arbitrators are routinely called upon to resolve disputes between unions and employers over discipline issued for workplace safety violations. In fact, it would be fair to say that workplace fights have been a mainstay of arbitration

proceedings for decades. The difference is that, until very recently, few arbitrators appear to have had much experience in confronting the types and degree of violence that is now resulting in the death and injury statistics I mentioned earlier.

Taken as a whole, many arbitration professionals appear to be unaware of the magnitude of the problem. As a result, they continue to take the standards of review used for simple rule disputes and apply them directly to the far more serious matters of modern workplace violence despite the obvious distinctions. Further, arbitrators retain tremendous political discretion in determining whether or not an employer has imposed discipline proportional to the infraction. Often, binding decisions to set aside a suspension or termination are issued on procedural grounds rather than any genuine concern the arbitrator may share with the employer regarding the safety of the victims or other co-workers in similar peril. Unfortunately for all parties involved, opportunities for appellate review of flawed arbitration decisions are essentially non-existent. There are currently no laws that permit the courts to vacate an arbitration award that is contrary to the public policy concerns of workplace safety.

A review of recent arbitration decisions demonstrates that arbitrators are often inclined to set aside or reduce discipline in workplace violence cases if the employer fails to satisfy the "traditional" burdens of proof otherwise imposed in matters of simple workplace rule violation. Yet, what I find puzzling is that the pattern and pace of such set asides has not diminished despite the epidemic of workplace violence employers are now responsible for addressing.

Consider one of the more recent examples with which my company was confronted.

Not long ago, an Airborne Express employee threatened to kill a co-worker, his family, and other Airborne employees with a rifle after he learned that management suspected him of stealing laptop computers from one of our customers. The victims, in genuine fear for their own safety, complained to company management. Airborne conducted an investigation and as a result, terminated the employee for outrageous conduct and notified the police.

Shortly afterward, a grievance panel reinstated the employee with a significant back pay penalty indicating that the incident appeared to be merely "shop talk" and not sufficiently outrageous to support a discharge.

A few months later, the same individual sued Airborne, alleging defamation, wrongful termination, intentional infliction of emotional distress and conspiracy among other charges.

While conducting further investigation in light of the lawsuit, Airborne belatedly discovered that the employee had actually been terminated by a previous employer for involvement in a knife fight at work. Airborne also learned of additional complaints of domestic violence, intimidating a witness, discharging a gun, and other acts of dangerous behavior. To remove what we considered to be an obvious threat to workplace safety, Airborne promptly terminated the employee again, this time for dishonesty on his job

application.

During discussion with several prominent labor law firms, we were told that no matter what the merits of our termination, the grievance panel handling the case would likely return this employee back to the workplace for both procedural and political reasons. Upon receiving this news, I personally instructed our legal department to immediately secure a global settlement for both the litigation and the grievance that included a substantial payment to secure the employee's resignation.

My concern, unlike that of the grievance panel, was to insure that Airborne's workplace safety concerns were addressed and that my employees were protected from the threat of future violence at the hands of this individual. Although the settlement cost was significant, it was obvious that the company could not afford to honor an unfavorable arbitration decision that would compel us to reinstate a clearly dangerous person into the workplace. Yet rewarding dangerous individuals is not a viable solution to this type of problem.

I believe this example and dozens of others like it point to a special set of problems associated with the absence of an appellate review of flawed arbitration decisions arising from an ever growing number of workplace violence incidents. An act of violence can change an employee's life forever. Yet, the workplace violence policies we administer to help protect our workers mean nothing if an evenhanded resolution of disputes cannot be accomplished. In the absence of appellate review, employers are too often put in the impossible situation of having to reinstate dangerous people into a workplace they have pledged to keep violence free.

Meanwhile, the statistics mount. It seems to me that Congress has both an opportunity and a responsibility to the victims of workplace violence to address this contradiction in workplace safety as soon as possible.

APPENDIX E - WRITTEN STATEMENT OF LEWIS L. MALTBY, PRESIDENT, NATIONAL WORKRIGHTS INSTITUTE, PRINCETON, NJ

Testimony of Mr. Lewis Maltby,
President, National Workrights Institute

September 26, 2002

Executive Summary

Workplace violence is an important but misunderstood problem. The primary problem is not violence by workers, but violence against workers. The most common form of workplace violence consists of attacks by outsiders against workers. In light of this, the most important step in reducing workplace violence is to increase workplace security.

Another constructive step would be to make the workplace less stressful by increasing workers' rights and reducing abusive behavior by supervisors.

It would also be helpful for the government to help employers acquire the skills needed to respond effectively to potentially violent situations.

Increasing electronic surveillance of workers would not reduce violence, but increase violence by elevating the already high level of workplace stress.

Introduction

My name is Lewis Maltby. I am president of the National Workrights Institute. The Institute is a not-for-profit organization dedicated to expanding human rights in the workplace. Thank you for inviting me to testify today.

Testimony

I. NATURE OF THE PROBLEM

The issue of workplace violence is important, but widely misunderstood. Many people believe that workplace violence primarily consists of workers assaulting other workers, or attacking managers. This is not the case. The majority of workplace violence consists of outsiders attacking workers. Common forms of this include police officers being shot, and taxi drivers and convenience store clerks being robbed. Another common form of violence is medical workers being attacked by patients, especially those who have been institutionalized for mental problems. Attacks by workers on co-workers and managers are far less frequent.

In order to solve any problem, the first rule is to focus our efforts on the largest part of the problem. In the case of workplace violence, this means protecting workers from assaults by outsiders, clients, and customers.

There is much that can be done in this area. Physical barriers, more secure workplaces, and better alarm systems have already helped, and more extensive use of these tools will yield additional benefits. OSHA's voluntary standards for reducing workplace violence are steps in the right direction.

II. REDUCE WORKPLACE STRESS

In the less common case where violence comes from workers themselves, there are also constructive steps to be taken. The first is to reduce the level of stress in the workplace. Work is inherently stressful. There are deadlines to meet, abrasive supervisors and co-workers to deal with, and the constant knowledge that if we don't perform well enough, or the company falters, we may be fired. Termination of employment is second only to the death of a loved one in producing human stress.

The level of stress in the American workplace has increased sharply in recent years due to greater levels of competition. American employers must now compete with foreign firms, many of whom have lower wages and benefits. This leads to higher production quotas and shorter deadlines, while reductions in force leave fewer people to do the work.

There are many steps employers could take to reduce the level of stress. For example, employers could specify the circumstances under which employees will be terminated and provide progressive discipline culminating with review by an arbitrator or other neutral. Many employers have taken this step with no loss of productivity or profit.

Employers could also adopt and enforce rules against supervisory harassment. Many corporations today have strict policies against sexual harassment. A supervisor who belittles female workers for their gender or makes sexually inappropriate remarks will often be subject to discipline. But a supervisor who is generally hostile or abusive to men and women alike is all too often ignored, even when the problem is brought to management's attention. For example, there is a well-known incident at the Anderson Water Valley District in which management became aware that workers reporting to a particular foreman were having nightmares about him, often of a violent nature. The response was treat the nightmares as threats and fire the workers. Management made no attempt to look into the behavior of the supervisor whose behavior caused the nightmares.

Employers could establish Employee Assistance Plans. Trouble often occurs when workplace stress is added to the stress of personal problems, such as substance abuse or financial difficulties. While some employers have EAPs, many do not. And many employers with EAPs provide little or no financial support for employees who need counseling. Employers who want to invest in reducing working violence should seriously consider better funding for the EAP.

III. RESPONDING TO POTENTIALLY DANGEROUS SITUATIONS

Even the most successful stress reduction program will not completely eliminate workplace violence. Workplace stress can not be completely eliminated. Nor is it possible

to avoid the existence of troubled individuals, many of whom will inevitably have jobs.

Therefore, it is necessary for employers to be prepared to deal with potentially violent situations. Contrary to popular belief, people rarely become violent without giving warning. The problem is that others, including employers, fail to heed the signals, or do the wrong thing.

One key to responding to potential violence is advance preparation. When potential violence arises, fast reaction is essential. But careful thought is also required. This can only occur when the employer has determined in advance who is responsible for dealing with such situations, the rules and principles to be used, and provided proper training.

A critical step in advance preparation is forming a working relationship with a violence prevention expert. Consultants are available with deep expertise in the psychology of human violence and extensive industrial experience. Trying to handle a potentially violent situation without access to this expertise is like representing oneself in court or trying to remove one's own appendix. For example, the threshold question is whether an individual is actually dangerous. Managers are not trained to make this decision, and the consequences of a wrong answer can be severe. Violence prevention specialists are capable of providing much better answers.

IV. GOVERNMENT ACTION

The government's ability to reduce workplace violence is limited, but important. Government can not eliminate stress from the workplace. Many of the steps needed to reduce violence are the responsibility of management, and do not lend themselves to legislative solutions. But there are steps government can take that would make a positive contribution. These include:

a. Safety Standards

There are many steps that can be taken to reduce the risk of violence against workers by outsiders. These include physical modifications that make it harder for intruders to enter the workplace, better alarm systems to detect intrusions, and physical barriers between workers and others in high risk environments (such as taxis). Some employers have made steps in this direction voluntarily. But many employers have not been willing to spend the money required to implement such steps.

The government can help by developing and enforcing standards in this area. Current OSHA standards are helpful, but need more complete development. The current standards are also voluntary. They would be far more useful if they were mandatory.

OSHA could also help through better development and enforcement of safety and health standards. Lawmakers generally think about workplace violence and workplace accidents as distinct issues. But from the standpoint of the worker, they are very much the same. In each case, a person dies violently in the workplace.

Moreover, fatal workplace accidents are more common than fatal workplace assaults. Following the principle of directing the greatest effort toward the most damaging aspect of a problem, government's first priority in making the workplace safer should be to make OSHA more effective.

b. Whistleblower Protection

Even where we have legally required safety standards, they are often of little help because our law makes them extremely difficult to enforce. Workers are generally the first to know when an illegal unsafe condition exists. But workers who report such situations are generally punished by the managers they embarrass. Neither federal nor state law provides meaningful protection for whistleblowers. The result is that many, perhaps most, illegal dangerous situations go unreported.

c. Training

As discussed above, even the strongest management team needs training on how to respond to situations of potential violence. While large employers can afford to pay for this training, many smaller employers find the cost to be a serious obstacle.

The federal government has often helped small employers acquire knowledge of important workplace subjects. It might constructively play a similar role here.

d. Right to Organize

It is well known that incidents of violence by ordinary people (including workers) are deeply rooted in feelings of desperation. Violence occurs when someone feels that he or she cannot live in their current situation and feel powerless to change it.

This suggests that changes which give workers a voice with which they can influence their working lives reduce workplace violence. Unions provide workers with the ability to affect workplace conditions through collective bargaining and the grievance/arbitration process.

Federal law, however, does not effectively protect the right to organize. While this right is protected in theory by the National Labor Relations Act, the penalties for firing employees who try to organize are so trivial that they have little or no impact in practice. Reforming the NLRA to make the right to organize meaningful could be a helpful step in reducing workplace violence.

V. COUNTERPRODUCTIVE ACTIONS

The bedrock principle of medicine is "first, do no harm". This principle applies with equal force to lawmaking. The least those who are concerned about workplace violence can do is to avoid making the situation worse.

One response which will do nothing to reduce workplace violence, and may even increase

it, is to expand electronic surveillance of workers. Electronic surveillance has already stripped Americans of their privacy on the job. At least 80% of employers now conduct electronic surveillance of workers.

Some forms of surveillance are valuable. We are all safer when employers place security cameras in parking garages and parking lots. There are also circumstances where employers legitimately use electronic technology to examine employees' work.

But much electronic surveillance serves no legitimate purpose, and intrudes deeply upon the privacy of workers. For example, employers may often need to read the contents of work related e-mail messages. But when a worker sends his or her spouse an e-mail about an intimate family matter, the employer has no legitimate right to read it.

Federal law recognizes the principle that personal communication is ordinarily off-limits to the employer. The Electronic Communication Privacy Act of 1986 (ECPA) generally prohibits employers from listening to the contents of personal telephone calls to or from the workplace. This requirement has not been a problem for employers.

It is time to update ECPA to cover other forms of communication which were not commonly used in 1986.

There are many other steps employers can take to meet their legitimate needs while reducing intrusiveness. One such technique involves the response to excessive personal web surfing. Traditionally, employers have monitored each and every web site visit on an employee by employee basis. Detecting abuse after it has occurred is of very limited use to employers, and is extremely intrusive for employees.

Advanced web access software is now available that automatically enforces any employer's individual web access policy. This allows employers to eliminate unauthorized web use without monitoring the web sites each employee visits.

Many employers are now engaged in the process of determining how to reduce the intrusiveness of monitoring without sacrificing management goals. Leading employer organizations such as Business for Social Responsibility and Privacy and American Business are working with their members in this area. Many leading corporations, such as the Cannon Corporation, have already adopted these new techniques.

Proposals for wall-to-wall monitoring undercut this important process.

Moreover, excessive monitoring makes the workplace less safe. Research conducted by the University of Wisconsin establishes that workers who are intensively monitored experience higher levels of stress than other workers.

Increasing workplace stress will only increase violence.

Another approach that would be extremely counterproductive is to use the issue of workplace violence as a vehicle to advance pre-existing political agendas. Many

individuals and organizations, including the Institute, have strong and conflicting opinions about unions, and about workplace privacy. While the strength of unions and employer surveillance practices have some impact on workplace safety, they are not the critical factors. Workplace safety deserves to be debated in terms of the criteria that truly affect it, not turned into a stalking horse to advance our views on other issues.

APPENDIX F - WRITTEN STATEMENT OF PAUL WHITEHEAD, GENERAL COUNSEL, UNITED STEELWORKERS OF AMERICA, PITTSBURGH, PA

Testimony of Mr. Paul Whitehead,
General Counsel, United Steelworkers of America

September 26, 2002

My name is Paul Whitehead. I am the General Counsel of the United Steelworkers of America. The Steelworkers Union is a labor organization composed of nearly 700,000 working men and women members employed throughout the United States and Canada in all sectors of our economy.

I appreciate the opportunity to appear before this Committee. When we first learned, just a little over a week ago, that this hearing was going to be held, we were advised that it was, in part, to consider S. 902, the so-called "Freedom From Union Violence Act of 2001," legislation that has been introduced over several Congresses running, but never reported out of a committee.

At first, we wondered, why? What has happened recently to account for interest in this topic? Violence, by anyone—a union or an employer -- is reprehensible. But there are already very strong criminal and civil penalties attached to violent conduct in our society. And there is certainly no "union violence crisis" in this country. Strikes—which, rarely involve physical violence on the part of management or labor despite the strong feelings they engender — have been and remain at historically low levels. In fact, as for our Union, in recent years you are more likely to see Steelworkers marching and demonstrating **with** steel industry management against steel imports that threaten the steel industry and its jobs and in favor of government help for lost retiree benefits.

So, we question the need at this time for new federal legislation to counter largely non-existent labor violence, especially at a time when our country is considering going to war and when we all live under the threat of real and deadly violence from terrorists groups that have targeted our country.

I want to turn to the proposed "Freedom From Union Violence Act," which since last week has been the subject of a paid media campaign across the country by the National Taxpayers Union and other organizations. This Act would significantly revise the Hobbs Act of 1946, 18 U.S.C. 1951, and authorize federal criminal enforcement against violence committed in the course of a labor dispute that is related to otherwise lawful union objectives.

I want to explain to you why we oppose this bill. It is certainly not because we believe that violence should go unpunished. Violence is wrong, period. This includes violence on picket lines, whether committed by employees or security guards. But it is already amply redressed under state criminal and civil law, as well as federal civil labor law. Not only is there no need for this amendment to long-standing federal law, but, as we will explain, we believe that to adopt S. 902 would upset the balance of collective bargaining relationships

and chill employees and union members in their exercise of federally protected rights.

The Hobbs Act has long defined as a federal crime interfering with commerce, or attempting or conspiring to do so, through robbery or extortion; or committing or threatening physical violence to person or property in order to do so.

S. 902 would change the definition of "extortion" as used in the Hobbs Act by substituting for the phrase "by wrongful use of actual or threatened force, violence, or fear" the language "(A) by actual or threatened use of force or violence, or fear thereof; or (B) by wrongful use of fear not involving force or violence." Second, S. 902 would expand the Hobbs Act's reach to conduct that occurs "during the course of a labor dispute or in pursuit of a legitimate business or labor objective" and without regard to whether that conduct "is also a violation of State or local law." Third, S. 902 would exempt from this expansion of the Hobbs Act conduct that is "incidental to otherwise peaceful picketing during the course of a labor dispute"; "consists solely of minor bodily injury, or minor damage to property, or threat or fear of such minor injury or damage"; and is "not part of a pattern of violent conduct or of coordinated violent activity." Violations involving such conduct, the bill directs, could be prosecuted only by state and local authorities.

These proposed amendments are designed to nullify a 1973 Supreme Court decision, United States v. Enmons, 410 U.S. 396 (1973). In that decision, the Court held that the Hobbs Act's prohibition against extortion does not reach violence or threats of violence in connection with an attempt, during a labor dispute, to induce an employer to agree to such legitimate union objectives as improved wages, hours and other terms and conditions of employment. As the Enmons court related, the Hobbs Act's legislative history was quite clear that Congress meant to deal with conduct by employees and union officials that was not for a legitimate purpose -- for example, to secure payoffs to union officials or payments to workers for unwanted services. Congress did not seek to deal with force or violence engaged in to secure a legitimate union objective. 410 U.S. at 401-08. In rejecting the argument that the Hobbs Act should extend to conduct in aid of legitimate union objectives, the Enmons Court analyzed the text and legislative history of the Act and emphasized three further concerns. First, the Court pointed to the unduly broad sweep that would be given the Hobbs Act:

> The Government's broad concept of extortion - the wrongful use of force to obtain even the legitimate union demands of higher wages - is not easily restricted. It would cover all overtly coercive conduct in the course of an economic strike, obstructing, delaying or affecting commerce. The worker who threw a punch on the picket line, or the striker who deflated the tires on his employer's truck would be subject to a Hobbs Act prosecution and the possibility of 20 years' imprisonment and a $10,000 fine. [Id. at 410 (footnote omitted).]

Second, the Court noted that expanding the Hobbs Act to cover force in support of legitimate labor objectives "work[s] . . . an extraordinary change in federal labor law." Id. at 411. And third, the interpretation would produce an "unprecedented incursion into the

criminal jurisdiction of the states." Id.

In the near-quarter century since Enmons was decided, bills have been routinely introduced in both Houses of Congress to overrule the decision and expressly apply the Hobbs Act to union conduct in aid of legitimate union goals. But no Congress -- Republican or Democratic -- has passed such a bill, and no Administration -- Republican or Democratic -- has made such legislation a priority. We believe this is because the concerns expressed by the Supreme Court in Enmons have been and remain today a strong rebuttal to the amendments proposed in the "Freedom From Union Violence Act of 2001."

Under Enmons, the ability of federal law under both the Hobbs Act and other criminal statutes to prosecute and punish coercive behavior by union officials that seeks personal aggrandizement or other illegitimate objectives has been fully preserved. However, proponents of S. 902 contend that because Enmons excludes from the reach of the Hobbs Act violence that is in support of traditional union objectives, it creates a loophole that immunizes union-instigated violence from the reach of the law.

This is false. The intentional commission of violence against person or property is a crime in every state. Nothing that would be made a federal crime by S. 902 is not currently a state or local crime everywhere. I am unaware of any empirical evidence to support the propositions that labor-related violence is a serious national problem; that state criminal law is lacking to deter and punish such violence; that state and local enforcement of such law is ineffective; and that a federal role in such enforcement provides the solution. In this day, it seems more than needless—it seems wrong and maybe dangerous—to divert precious federal resources to duplicating responsibilities for redressing criminal conduct that are already exercised by the states. In an era of real threats to our nation that can only be addressed on a federal level, there is no warrant for diverting manpower from the prosecution of crimes that are uniquely federal.

Second, S. 902 would also fundamentally alter federal labor law, a point made forcefully by the Enmons Court. 410 U.S. at 411. Labor disputes can be emotionally charged situations, and ill-advised statements are sometimes made and ill-advised actions are sometimes taken. It does not follow that all such actions should be made punishable by 20 years' imprisonment. In addition to the ample federal and state criminal law described above, a long-established federal and state civil law system routinely redresses labor-management violence as well. State courts have long enjoined violence and other threatening conduct occurring in connection with labor disputes, on application by the employer. See, e.g. Youngdahl v. Rainfair, 355 U.S. 131 (1957); United Automobile Workers v. Anderson, 351 U.S. 959 (1956). Moreover, civil law affords individual remedies -- compensatory and punitive damages -- to those injured by violence arising from a labor dispute. United Mine Workers v. Gibbs, 383 U.S. 715, 721 (1966); United Automobile Workers v. Russell, 356 U.S. 634 (1957); United Construction Workers v. Laburnum Construction Co., 347 U.S. 634 (1954). And the National Labor Relations Act provides additional civil regulation of violent conduct. whether committed by a union, 29 U.S.C. 158(b)(1)(A)), or an employer. 29 U.S.C. 158(a)(1). Specifically, the NLRB may and does "proceed against union tactics involving violence, intimidation, and reprisal or threats thereof . . . ." NLRB v. Drivers Local Union No. 639, 362 U.S. 274, 290 (1960).

See also NLRB v. Union Nacional de Trajabadores, 540 F.2d 1 (1st Cir. 1976), cert. denied, 429 U.S. 1039 (1977). Finally, federal law permits employers to fire strikers who engage in serious violence. NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939), adding still another significant disincentive for employees to engage in misconduct during a labor dispute.

S. 902 would upset this balance between federal and state, and criminal and civil, regulation of violence arising from labor-management disputes. The Enmons Court correctly warned that recasting as extortion the use of force in a strike to bolster bargaining demands "is not easily restricted" and would subject to federal prosecution a striker who "threw a punch on a picket line" or "deflated his employer's tires." 410 U.S. at 410. In fact, S. 902 at least acknowledges the accuracy of this critique by purporting to limit the expansion of the Hobbs Act to exclude "minor" threats, damage or injury. But this will be an ineffective limitation.

Section (d)(2)(B) of S. 902 would negate Enmons by specifically authorizing the Hobbs Act to reach conduct "occurr[ing] during the course of a labor dispute or in pursuit of a legitimate business or labor objective." Section (c)(1) of the bill says that it would not reach conduct, however, if it meets the three combined requirements that it be "incidental to otherwise peaceful picketing during the course of a labor dispute;" "consist[ ] solely of minor bodily injury, or minor damage to property, or threat or fear of such minor injury or damage;" *and* not be "part of a pattern of violent conduct or of coordinated violent activity." Section (c)(1) would restrain criminal enforcement far less than its proponents might suggest.

First, this limitation would apply only when "peaceful picketing" is underway. In labor disputes not involving picketing, the full force of the Hobbs Act would apply, and thereby reach any assault, barroom brawl, or act of vandalism that could be construed to occur in furtherance of a union cause. Second, the notion of dividing personal injury and property damage along a "major-minor" axis is without precedent, perhaps unconstitutionally vague, and invites arbitrariness.

S. 902's other concepts – "pattern of violent conduct" and "pattern of coordinated violent activity" -- are also inherently vague. What suffices to form a "pattern of violent conduct"? And S. 902 provides no guidance as to what "coordinated" means. Given these uncertainties, it must be anticipated that S. 902 would usher in a legal regime under which the coincidence of union bargaining demands and strike misconduct could add up to a successful Hobbs Act prosecution – and that is a gross distortion of how labor law is supposed to operate. See United States v. Caldes, 457 F.2d 74, 78-79 (9th Cir. 1972). Most labor disputes involve demands for increased wages, benefits or improved working conditions -- the legitimate objectives of collective bargaining -- that can be construed as demands for the property of the employer. If S. 902 were enacted, any misconduct during a labor dispute would be grounds for a federal indictment for extortion. This would transmute the Hobbs Act into a different kind of law. The Hobbs Act is aimed at extortion. Violence in support of legitimate objectives is unlawful, to be sure, and it is unlawful everywhere, but it is not extortion. It is punishable under state law because it is violence, not because of its motivation. S. 902 would totally change the purpose of the Hobbs Act.

Indeed, the bill would open for federal prosecution union conduct *not* involving force or violence but only " fear," and the fear induced may simply be fear of economic harm or loss. United States v. Stolfi, 889 F.2d at 381; United States v. Robilotto, 828 F.2d at 944; United States v. Duhon, 565 F.2d 345, 351 (5th Cir.), cert. denied, 435 U.S. 952 (1978). Under S. 902, then, non-violent, non-threatening traditional union conduct that is designed to induce an employer to fear economic loss so the employer will make a recognitional or bargaining concession could be subject to federal criminal prosecution. This would be the ultimate criminalization of union activity, unprecedented in any free society.

Another major flaw in S. 902 is its one-sidededness. Although it is evenhanded on the surface, by precluding reliance on a legitimate "business . . . objective" as well as "labor objective," it is the employer's property that is at issue in a labor dispute. In the ordinary course, the employer does not demand or receive the employees' property during bargaining, strikes or lockouts. Thus, under S. 902, an unscrupulous employer's hiring of goons to beat up strikers would not be subject to the penalties of S. 902, while a rock thrown by a striker at a taunting replacement worker would. In this regard, the bill's title -- the "Freedom From Union Violence Act" -- makes plain that it is intended to criminalize and punish union activity alone.

The advent of the labor movement and collective bargaining have introduced a significant measure of democracy to the workplace and equity to society. Without collective bargaining, the individual worker has little voice. With collective bargaining, he or she shares with other employees an opportunity to use an orderly procedure for assuring job security, health and welfare coverage, retirement benefits, and decent wages and working conditions.

As practiced in our country, collective bargaining recognizes the right of employers to disagree with workers, and the right of workers to disagree with management. Such disagreements are routine, yet year in and year out all but a tiny percentage of all contracts between management and labor are settled without strikes, and the overwhelming number of strikes are not marred by violence from any quarter, and certainly not by violence that is more than "minor." When union members walk a picket line, they are risking their paychecks, and sometimes their jobs, but in the overwhelming percentage of situations, these men and women almost always conduct themselves responsibly.

In those rare instances when violence flares, there is ample legal means in place to redress the problem. As discussed above, there is no call to "federalize" criminal misconduct simply because it occurs on a picket line or in the midst a labor dispute. The organized pressure groups that feel differently, and that have orchestrated a media campaign in favor of S. 902, are not, to my mind, concerned with honestly addressing real problems of violence in American life or in the American workplace. Rather, they seek through S. 902 to gain a club in collective.bargaining in the form of unneeded, invasive, one-sided federal scrutiny of union members' conduct in labor disputes, backed up with a threat of enormously disproportionate criminal penalties to be imposed against union members who commit acts for which, in any other context, the penalty would be less severe.

S. 902 does not represent an attempt to forge sound public policy. It represents an effort to

advance the private interests and initiatives of those who are hostile to unions generally. The anti-union agenda of these private interests should not become the law of the land.

Finally, we understand that the Committee will be hearing from a witness representing AK Steel about events surrounding its lockout of approximately 600 Steelworker-represented employees at its steel mill in Mansfield, Ohio. AK Steel (or its pre-1999 predecessor, Armco Steel) has operated the Mansfield plant with Steelworkers for many decades. Up until 1999, and over a long series of contract negotiations, the relationship at Mansfield had been marked by 29 years of labor peace. On September 1, 1999, AK Steel and the Steelworkers Union saw their most recent collective bargaining agreement at Mansfield expire. For its part, the Steelworkers Union offered to have its 600 members continue working beyond that expiration date. But AK Steel rejected that proposal, locked out its 600 Steelworkers, and replaced them with temporary workers. AK secured its Mansfield mill with an out-of-state security service whose chief executive is apparently a felon, and we will be happy to provide to the Committee other unsavory details about this firm. As of today, the AK lockout has deprived 600 Mansfield families of their livelihoods for over three years and counting.

Over the course of the dispute, the Steelworkers Union has offered to put all outstanding issues in the negotiations to final and binding arbitration by a neutral umpire. AK has refused this proposal. In the year 2000, 10 members of the House of Representatives from the Ohio delegation urged AK to accept the Steelworkers proposal to end the lockout through arbitration. AK refused this appeal from members of this body. Later in the dispute, most of those Ohio Congresspersons renewed their request and were again rebuffed by AK.

Over the course of the dispute, AK has aggressively mounted a series of outrageous allegations against the Steelworkers Union, its Local 169, and their members and supporters. Most of those allegations have been rejected by neutral decision makers. For example, in a federal RICO lawsuit set forth in a 225-page complaint, AK alleged that the Steelworkers Union has essentially conducted a massive criminal enterprise over 20 years of bargaining across several industries. In dismissing this accusation, the federal district judge stated that "[AK's] . . . Complaint, despite its bloated length, nevertheless fails to satisfy even the first element [of RICO] and therefore fails to state a claim upon which relief can be granted." The judge recognized that unsubstantiated rhetoric is a specialty of AK Steel. She pointed out that "AK Steel relies on vast quantities of conclusory, legalistic language to conceal the absence of well-pleaded factual allegations." The judge concluded that "[AK]'s allegations, though large in number and broad in scope, are unsupported by specific, factual allegations. "

We have not received any advance notice of the substance of the presentation AK will be making to this Committee, But based on AK's track record, we are confident that AK's presentation will be neither fair nor fully forthcoming. We warn this Committee of what we know, and what the federal judge I quoted learned: AK's complaints tend to be unsubstantiated hyperbole that come wrapped in half truths, with misleading and unfair conclusions. Accordingly, we request the right to respond further through our oral testimony.

APPENDIX G - WRITTEN STATEMENT OF DAVID C. HORN, VICE PRESIDENT AND GENERAL COUNSEL, AK STEEL CORPORATION, MIDDLETOWN, OH

Testimony of Mr. David C. Horn,
Vice President and General Counsel
AK Steel Corporation

September 26, 2002

Chairman Johnson and Distinguished Members of the Subcommittee on Employer-Employee Relations: On behalf of AK Steel Corporation, I'd like to thank you for the opportunity to present testimony concerning AK Steel's recent experiences of workplace violence to the Subcommittee on Employer-Employee Relations. Specifically this testimony relates to union member violence associated with an ongoing labor dispute.

AK Steel is a Fortune 500 company involved in the production of carbon, stainless and electrical steels, as well as related products and services. AK Steel employs about ten thousand, seven hundred men and women in12 facilities that are located in eight states. Various international, national and independent unions represent about 70 percent of our workforce.

Historically our company has maintained a good working relationship with these unions and their members. For example, in our largest plant, in Middletown, Ohio, we have been producing iron and steel continuously for 102 years. An independent union, the AEIF, represents the 3,200 hourly production and maintenance employees at the Middletown Works. In the history of the Middletown Works, there has been only a single work stoppage, in 1986, and it lasted less than one week.

In our Butler, Pennsylvania plant, northeast of Pittsburgh, there has never been a work stoppage in more than 75 years of operation. An independent union, the BAIU, represents the nearly 2,000 hourly production and maintenance employees at our Butler Works. An independent union, the ZAIU, also represents our hourly employees in Zanesville, Ohio, where there has never been a work stoppage.

In Ashland, Kentucky, two unions represent our employees, The United Steelworkers of America (USWA) and the Paper, Allied-Industrial & Chemical International Union, or PACE. Neither of those union locals have been involved in a work stoppage in at least the last 35 years.

There is, however, one significant and disturbing exception to our labor peace, and that exception is in Mansfield, Ohio, where a labor dispute involving about 550 members of the United Steelworkers of America has entered its fourth year.

The Mansfield facility is one of several assets that AK Steel acquired with its merger with the former Armco Inc. on September 29, 1999. However, the beginnings of the labor dispute pre-dated our acquisition of Mansfield Works by several months. The following is

a chronology which focuses on the violent nature of this labor dispute.

March, 1999 - Early negotiation talks (the labor agreement expired August 31, 1999) between company and union officials faltered. Crudely drawn posters then appeared on plant bulletin boards with the messages, "Get a gas mask and we will see you at the picket line. Buy your guns and ammo, baseball bats and rocks" and "Wanted – good reliable small arms, unused explosives (C-4 preferred), names and addresses of all salary employees. Payback time!"

July 15, 1999 - Following a union rally near the plant, several international and local union officials trespass on company property, force their way into the plant's administrative offices and accost the plant manager. Local law enforcement officials refuse to press criminal charges. Among the USWA officials was now-International President Leo Gerard.

August 1999 - A notice issued to USWA Local 169 members by its president warns "We hope soon to make Armco sorry that it did not approach this matter in the spirit of cooperation," referring to the bargaining issue of overtime.

August 17, 1999 - An anonymous voice over the Mansfield plant's walkie-talkie system threatens that the plant manager should be shot, his wife raped and his house burned down.

August 31, 1999 - Citing the potential for continued work slow downs, sabotage and threats to personnel, the company (Armco) locks out USWA Local 169 at the expiration of the contract. The first of what will become thousands of jack rocks, nails welded to form a tire-piercing star pattern, are found on the company's main plant driveway.

September 3, 1999 - A state court judge issues a Temporary Restraining Order aimed at controlling picket line conduct and company conduct. The judge later refers to the company's replacement workers in open court as "scabs."

September 6, 1999 - A state court judge issues a TRO prohibiting the company from using replacement workers to operate the Mansfield plant, a violation of federal law.

September 9, 1999 - Company attorneys finally succeed in having the unconstitutional TRO dissolved. The company and local law enforcement personnel hear rumors that union members and supporters are planning a massive and potentially violent rally at the plant early the morning of September 10, 1999. The company alerts the appropriate state government officials, who refuse to become involved, citing a statutory prohibition against interceding in "labor disputes."

September 10, 1999 - A mob of hundreds of union members and their supporters assemble in the early morning hours at the entrance to the Mansfield Works. Many of their faces are hidden by masks. After hurling golf balls, rocks and bricks at company guards for more than an hour, they attack lawful and peaceful replacement workers and security guards with rocks, bats and sticks. As they attempted to enter the plant, eight of the guards and replacement workers are beaten so severely as to require hospital treatment. Video tape evidence helps to identify and charge 17 union members for their roles in the riot.

September 24, 1999 - A bomb threat is phoned into a Mansfield motel being utilized by AK Steel security personnel.

September 25, 1999 - Two 1-gallon explosive devices wrapped with nails are found on plant property. The fuses had been lit but failed to detonate the devices. Police estimate the devices each had the explosive power of one stick of dynamite.

October 1999 - A Mansfield council member who is also a locked out USWA Local 169 member, introduces an ordinance that would have required AK Steel to provide confidential address and identification information about its security guards to city officials.

October 5, 1999 - Evidence is found of an exploded bottle bomb near the plant. Picketers threaten security guards saying, "is it worth it, coming out in a body bag?"

October 14, 1999 – A Mansfield motel receives threatening phone calls, "You'd better be careful when you go home. We do not like scabs staying at your motel. Do you understand?", and "Scabs, scabs go boom, boom."

October 15, 1999 - A bomb threat is phoned in to a Mansfield restaurant that supplies meals to AK Steel replacement employees. A burned-out Molotov cocktail is discovered near an oxygen-hauling truck near the plant.

October 18, 1999 - A bomb threat is phoned in to the plant's health care unit warning that the plant would be blown up unless the "(vulgar expletive) goons" were removed.

October 24, 1999 - A severed hog's head is placed in the yard of a salaried employee.

November 2, 1999 - A salaried employee working in the plant receives a letter that threatens, "Remember, you are only protected 12 hours a day. The only good scab is a dead scab. Get the message?"

November 7, 1999 - USWA picketers threaten security guards by saying,

"Day is coming boys. We got your names and addresses. We'll get your wife and kid. Them f---ers, too, we'll get them when we get back in."

November 10, 1999 - A bomb threat is phoned in to the 800 Customer Service number at AK Steel's headquarters in Middletown. The call is traced and a member of the USWA eventually is charged with phoning in the threat, two counts of intimidating a federal witness and obstructing justice.

November 11, 2000 - Two pipe bombs are thrown into the plant. One bomb explodes, but there are no injuries.

November 20, 1999 - Police cite a USWA member for disorderly conduct, assault and criminal damaging for shattering a replacement worker's van window with a rock, sending broken glass into the worker's eye.

November 22, 1999 - A USWA member threatens to blow up the Mansfield plant, claiming he has enough explosives to blow up the entire facility.

December 2, 1999 - A trucking firm in Paulding, Ohio that hauls for AK Steel receives a threatening phone call suggesting that if the company doesn't stop hauling for AK Steel, something will happen.

December 4, 1999 - Four shots are fired into the office of the Paulding trucking company that received the phone threat, causing a fire and barely missing the owner.

December 6, 1999 - The mailbox of a salaried employee in Mansfield is blown up.

December 9, 1999 - The mailbox of a salaried employee in Mansfield is blown up.

December 10, 1999 - A USWA member is cited for possession of criminal tools (jackrocks).

December 11, 1999 - A bomb placed on the fuel tank of a semi-tractor explodes, injuring a woman sleeping in the cab. The truck's owner had hauled scrap steel to AK Steel's scrap supplier earlier in the week.

December 11, 1999 - The mailbox of a salaried Mansfield Works employee is blown up with a pipe bomb.

December 12, 1999 - A Mansfield laundry that does business with AK Steel receives a bomb threat.

December 27, 1999 - A bomb destroys a Lucas, Ohio restaurant. A salaried

AK Steel employee has a family connection with the restaurant's owners. The AK Steel employee had testified against a member of the USWA the week before.

January 16, 2000 - A locked out USWA Local 169 member is apprehended by police after allegedly firing a shotgun into the plant after serving picket duty. AK Steel finds a high-voltage transformer has been damaged and is leaking coolant, a potentially explosive situation. He is found to have a recently fired shotgun and spent shotgun shells.

January 21, 2000 - A USWA 169 member smashes his truck through a locked plant gate, drives through the plant and smashes the gate of an adjoining company and flees.

April 14, 2000 - Seven USWA members, including an international staff representative, terrorize the Woodbridge, Virginia corporate headquarters of Securcorp, a firm providing security for AK Steel in Mansfield. The protestors burst into the offices, shouting obscenities through bullhorns. Prince William County issues a warrant for the arrest of the driver of the van. Four of the protestors, including a representative of the International, are eventually found in contempt of court.

May 10, 2000 - The word "scab" is spray painted in large letters on the home of a lawful replacement worker.

May 17, 2000 – A USWA Local 169 member uses a slingshot to fire a marble into the vehicle of a security employee. The union member is cited for criminal damaging.

July 18, 2000 – In a news story, an anonymous union representative said, "They're (the company) going to get somebody killed by not coming to the (bargaining) table."

August 2000 – The wife and family of an AK Steel employee is threatened with repeated phone calls and harassing and menacing behavior in their neighborhood.

August 26, 2000 – The words "Die SCAB" are scratched into the paint of a replacement worker's vehicle.

September 4, 2000 - Union members in Mansfield hold a rally and sell chances to bash a van marked "AK Scab Van" with a sledgehammer to raise money for USWA Local 169.

March 29, 2001 – In a story about the labor dispute and the September 10, 1999 riot, A USWA international spokesman tells a Cincinnati newspaper, "Yeah, we did send eight scabs and goons to the hospital."

July 26, 2001 – A temporary replacement worker reports his vehicle window was smashed by a rock by one of a group of people assembled near the plant as he left the Mansfield Works.

August 31, 2001 - A USWA Local 169 member hurls a brick into the vehicle of a contractor employee.

May 18, 2002 – The mailbox of a salaried employee is burned to the ground.

March 28, 2002 – Federal authorities arrest a Mansfield United Autoworker (UAW) union member. The federal Bureau of Alcohol, Tobacco and Firearms alleges the autoworker was plotting to fire rockets into the Mansfield Works to put the "scabs" out of work in solidarity with the locked out steelworkers. According to news reports, the union member had distilled rocket fuel, test fired grenades and was unconcerned about the potential of killing picketing union members, referring to them as "collateral damage."

Our legal system has not overlooked nor neglected the intricate and complex association between employers, employees and their labor unions. In fact, our nation has developed an extensive body of statutes that regulates virtually every relationship and much of the conduct between employers and employees under the National Labor Relations Act.

These laws have stood the test of time and affirmation by nearly countless courts of law. These laws recognize that each party has federal law rights and protections which are intended to insure that each is afforded the opportunity to enter into agreements that are economically and socially workable and justifiable.

Unfortunately, however, it has been our experience, directly and through the investigation of other similar situations, that many union members, including those of the USWA, have a deep-seated, fanatical belief that an employer's use of replacement workers during labor disputes is "morally" wrong, no matter what the law says, and even is an offense which is, justifiably punishable by union members. We have heard and read time and again union members recite this belief with near religious fervor during our own labor dispute.

Following the September 10, 1999 riot described above, for instance, a member of the steelworker's union, commenting to newspaper about the injuries inflicted to the company's peaceful and lawful replacement workers, said "I can't condone violence, but sometimes I think those people deserve that. They're doing something they know is wrong."

The fact is, they are not doing something wrong, according to the law. Unfortunately,

these union beliefs against lawful replacement workers are deeply engrained and continually reinforced through the public rhetoric of their fellow union members and leaders.

Time and again, union leaders have laced their rhetoric against our company to their

members with references to violence or violent acts against the company and its replacement workers, including a call to fight AK Steel "tooth and nail," "hurting the company more," and "AK Steel is history!" Union leaders have also exhorted that members need to "find a way to stop them scabs..."

At a union rally in Mansfield on March 25, 2000, then-USWA International President George Becker, who was also a vice president of the AFL-CIO executive council, set forth the USWA view that: "I'll stretch the legalities just a little bit. This is your [union members'] plant. You've built this plant. You've worked a lifetime in this plant....You have more right and more claim on that facility than the management that's running it into the ground."

During the same rally, AFL-CIO International Secretary-Treasurer Richard Trumka sent this message to AK Steel, "you can hire 1,000 goons and you can hire 1,000 scabs and you can lock us out for 1,000 days, but we won't give an inch and you won't get a second of peace as long as we're out here."

In June of 2000, the steel trade magazine *New Steel* published an interview with Becker. In response to questions about reported USWA member violence against Rocky Mountain Steel Mills, a labor dispute involving replacement workers, Becker was quoted as saying, "What about the violence the people who have lost their jobs have suffered? Violence imposed on the families, the children. What about the violence of broken dreams and having to take kids out of school? That's violence."

Predictably, in our opinion, union members have heeded their leaders' thinly veiled threats and calls to violence against lawful replacement workers. That union members continually provoke such historically based hatred of lawful workers is disturbing enough. However, even the National Labor Relations Board has sanctioned the right of union members to publicly declare the honor and righteousness in bringing death to "scabs" by citing a 100-year-old Jack London poem that brought the term to notoriety.

We are cognizant of the delicate balance that must be maintained in this country in order to protect our valued First Amendment rights. As such, our courts have established boundaries. We have no such protection to yell "fire" in a theater or to joke about bombs while boarding an airplane as expressions of free speech. We have recognized, as a people, that these expressions have an intolerable likelihood of causing harm to others.

We have experienced first hand the correlation between the use of lawful replacement workers and union violence. We have experienced first hand the incendiary rhetoric of union leaders to their members, which has been followed by union member violence against lawful and peaceful replacement workers. Union members and leaders should not afforded free speech protections for words that have such a clear motivation and correlation to unlawful behavior.

It is our belief and our experience that most union members deplore the seamy underbelly of violent activity in which some of its radical members engage. We applaud this Subcommittee's efforts to focus Congressional attention on violence in the workplace.

We urge you to address this issue through legislation that establishes laws that allow for swift prosecution against those guilty of violence in the name of collective bargaining. We urge you to do this for the safety and well-being of all working Americans.

APPENDIX H – SUBMITTED FOR THE RECORD, ADDENDUM TO WRITTEN TESTIMONY BY DAVID C. HORN, VICE PRESIDENT AND GENERAL COUNSEL, AK STEEL CORPORATION, MIDDLETOWN, OH

Addendum To
Written Testimony By David C. Horn
Vice President and General Counsel
AK Steel Corporation
On
Workforce Security and Union Violence
Before
The Subcommittee on Employer-Employee Relations
Of
The Committee on Education and the Workforce
U.S. House of Representatives
October 10, 2002

To Chairman Johnson and Distinguished Members of the Subcommittee on Employer-Employee Relations: This testimony is presented as an addendum to my previously submitted written testimony of September 26, 2002.

AK Steel again thanks the Subcommittee on Employer-Employee Relations for its inquiry into the alarming issue of workplace and union violence. I would like to address some specific issues raised from the testimony and questions presented during your September 26, 2002 hearing.

Several Subcommittee members questioned the need for federal legislation specific to labor dispute violence, or the potential for violence, suggesting that existing local and state remedies are adequate. Based upon AK Steel's actual experience, in particular throughout its labor dispute with the United Steelworkers of America (USWA) in Mansfield, Ohio, we respectfully and strongly disagree with that premise. Quite to the contrary, it has been our experience that state and local authorities have an aversion to enforcing criminal statutes, even in the course of what is an extraordinarily violent labor dispute. I cite several specific examples from our Mansfield experience and elsewhere in support of our position:

- On July 15, 1999, a mass rally was held at the USWA's Local 169 hall in Mansfield. Following the rally, the group marched about a mile to the company's administrative offices to protest. The local newspaper estimated the crowd at 1,000. Company officials recognized among the marchers the mayor of Mansfield,

one of the members of city council and even the county prosecutor. Upon reaching the offices, five union members, including one International union officer (Leo Gerard, currently USWA International President) trespassed on company property, forced their way past security guards and accosted the plant manager. The company filed a police report and urged the city's law director to press criminal trespass and assault charges against the union members. The city refused to file any charges against the union members, despite the city's acknowledgement to the company that there was a violation of the law. According to news stories, the city law director decided "it wasn't in anyone's best interest to file charges."

- Following the expiration of the labor agreement on August 31, 1999, and citing, among other things, the potential for continued sabotage and work disruptions, the company locked out members of USWA Local 169. [At the time of the lock out, the Mansfield plant was owned by Armco Inc. Subsequently, AK Steel acquired Armco Inc. on September 30, 1999. References to the "company" herein refer to Armco prior to September 30 and to AK Steel on and after September 30.] When the company appeared before a state court judge seeking a restraining order against unlawful and violent union picket line conduct, the judge stated in open court that the company's action in locking out the workforce, and then asking the court for a restraining order, was "outrageous." That judge's brother was a locked out member of USWA Local 169.
- On September 6, 1999, this same judge with a brother in the locked out union, issued an unlawful restraining order against the company preventing it from exercising its lawful federal right to use temporary replacement workers. In court documents and newspaper interviews, this judge later acknowledged freely that he issued his order knowing that he had no right nor authority to do so and in an attempt to force the company to negotiate with the union. He stated he did this because he had been warned by union representatives that the company's use of replacement workers would likely result in union violence. In other words, this state court judge violated federal law and denied the company the right to operate in order to "keep the peace" at the request of the very union which threatened to cause the violence.

- The state court judge warned the mayor of Mansfield and the company on September 9, 1999 that he had learned of the potential for a violent union riot at the company's plant in Mansfield. The mayor of Mansfield made a request to the State of Ohio for protective public services. The State of Ohio denied those requests, citing sections (5503.01 and 5503.02) of the Ohio Revised Code (ORC) that prohibit state police from intervening in labor disputes.
- Following the violent union riot of September 10, 1999 that the union threatened would happen the prior evening, company officials made repeated pleas to the staffs of the governor and lieutenant governor for protective public services. All pleas were flatly denied with state officials citing statutory prohibitions in the ORC. The company was forced to maintain a large presence of private security guards for its plant and employees.
- During the course of this labor dispute, several hundred cases of violent union member misconduct have been referred for criminal prosecution to local prosecutors, who are elective officeholders. The criminal charges have included inciting to riot, criminal damaging, assault, aggravated vehicular assault and discharging a firearm within the city. Despite this, only 90 cases have been prosecuted. About half of these cases have resulted in dismissal or diversion. Diversion affords offenders the ability to have criminal charges dismissed and ultimately expunged. In fact, we could find no evidence that a single individual charged under state or local law has spent any time in jail. Those who pled to charges typically were assessed minimal fines. In one case, a locked out member of USWA Local 169 was captured on video tape ramming his vehicle through a locked plant gate. Despite a felony charge of aggravated vehicular assault brought by the county prosecutor, the county Grand Jury did not issue an indictment. Another USWA member was not prosecuted for disorderly conduct because the Mansfield city law director, also an elective position, failed to serve the defendant, who is a Mansfield resident. In yet another case, a USWA member was charged with disorderly conduct for his assault and harassment against a salaried employee and his wife that occurred at a golf course. In a contempt hearing, the state court judge found that the USWA member did strike a company official. However, the

judge further stated that, because the evidence did not demonstrate that the union member believed that striking the official would affect the underlying labor dispute, the matter would be better left to the municipal court criminal system. However, the local prosecutor declined to prosecute the case.

- During the labor dispute, the company has sought both criminal and civil contempt sanctions against union members. A state court judge presiding over those motions referred the criminal contempt charges to the county prosecutor. The county prosecutor did not seek criminal contempt for any of the individuals who were the subject of the contempt motions even though a state court judge ruled that many of the union members' behaviors constituted "per se" violations of the court's restraining order. Some of that union behavior included the now-infamous mob riot on September 10, 1999, and which is submitted on video tape as an exhibit to my testimony. Other charges the state court judge found to be "per se" violations of the court's restrictive order included abusive, harassing or threatening language. One potentially explosive incident involved local USWA members and a staff representative of the International union attempting to run an oxygen truck making a delivery to the plant off the road with their vehicles. Another union member spat on security guards and another shined a laser light at the guards, causing an eye injury. Yet another union member threatened company personnel, saying, "a couple of firebombs would do you good," and "I have enough explosives to blow up this place." And yet, the county prosecutor did not seek criminal contempt charges against any of these union members.
- A member of Mansfield City Council, who is also a locked out member of the USWA, insisted that the city law director draft an ordinance that would have required AK Steel and it's security firm to provide confidential, detailed personal information about its security guards to the city. The ordinance passed, with the USWA member refusing to abstain from voting despite the obvious conflict. AK Steel was forced to file a federal lawsuit to prevent the enforcement of the ordinance. A federal judge agreed with AK Steel and struck down the ordinance, saying it dealt impermissibly with a labor dispute governed by federal labor law,

was passed unlawfully due to the USWA member's conflict of interest and it posed risks to the safety of the security guards and their families.

- In 1999, a Natchez, Mississippi municipal court judge in a directed decision, cleared 16 USWA members and their hired photographer of criminal trespass following an incident during a labor dispute at Titan Tire. The 17 and dozens of other striking USWA members had stormed past a security gate and into the plant chanting "scabs out, union in," according *The Natchez Democrat* on October 27, 1999. A video tape used as evidence clearly showed USWA members pushing the gate open while a security guard attempted to keep the gate closed. The city's prosecuting attorney said because of the "deafening" chanting, the prosecution could not prove beyond a reasonable doubt that each of the defendants had been warned they were trespassing. The city prosecutor said, "The judge made a good decision, a compassionate and measured decision," according to the newspaper.
- A violent one-day wildcat strike by members of the USWA at the Century Aluminum plant in Ravenswood , West Virginia, resulted in $6 million in damage to the plant and resulted in rock and ball bat damage to 59 vehicles and injuries to 11 people. Although the state police spent 682 hours on the investigation of the riotous illegal strike, no arrests were made, according the *Charleston Daily Mail* on November 10, 1999. A television reporter for WCHS-TV who covered the riot said he purposely avoided identifying picketers on camera because he was alone and the picketers had told him they would be fired if they were identified.

I have previously testified on behalf of AK Steel that there are strong connections between the inflammatory words of union leaders and violent actions by their members. I cite here additional proof of this phenomenon. Minutes of a union meeting held by officials of USWA Local 169 on September 9, 1999 indicate the president of the union notified members that the state court judge's order prohibiting replacement workers had been lifted. The minutes reflect that the union's official position with regard to "scabs" was that no one does anything illegal, but then added "***however, we realize it may be out of our control what our people do***." (Emphasis added.) The union then announced a "breakfast" to be held in the parking of the union hall near the plant at 5:00 a.m. for the morning of September 10, 1999 for union members and supporters. This "rally" was planned to begin a little more than an

hour before the company's replacement workers were scheduled to arrive at the plant for the first time. Conveniently, union leaders were then absent at the subsequent riot.

It is our opinion, based upon our own experience and observations of other labor disputes, that the USWA is cognizant of, and in fact counts upon the inclination of its membership to react violently and unlawfully in reaction to the use of replacement workers.

This "wink, nod and deflect" posture has been a pervasive element of the dialogue from the leadership of the USWA throughout the labor dispute with AK Steel and with other companies that have lawfully utilized replacement workers or been involved in similar labor disputes.

The leadership of the USWA has continually stated publicly that it "doesn't condone" violent behavior, but in the very next breath attempts to define "violence" on its own terms, including a lawful lockout.

For example, responding to a direct question about USWA member violence against Rocky Mountain Steel (where a labor dispute also involved the use of temporary replacement workers), then-USWA president George Becker simply avoided the question and attempted to turn the tables. He was quoted in *New Steel* magazine in June of 2000 as saying, "What about the violence the people who have lost their jobs have suffered? Violence imposed on the families, the children. What about the violence of broken dreams and having to take kids out of school? That's violence."

However, in August of 2000, Rocky Mountain Steel announced that the National Labor Relations Board (NLRB) found the International USWA and two locals in Pueblo, Colorado, guilty of conducting a three-year campaign of violence, harassment and threatening conduct against company employees and its security force, and of then shredding evidence to conceal the identities of the lawbreakers. According to the company, the NLRB Judge concluded that statements made by union leaders "reveal an attitude toward misconduct that not only fails to repudiate or disavow it, but actually encourages misconduct."

The preposterous union position that attempts to define a lawful bargaining position as "violence" continues to be dutifully delivered publicly by the USWA. I note that even following this Subcommittee's hearings on September 26, 2002, a USWA spokesperson, who was in attendance at the hearing, was quoted by *Gannett News Services* as saying, "If you look at Mansfield, the real violence is how AK locked out 600 families."

This theme – equating the exercise by the company of a federal right with union members engaging in criminal conduct - has been repeated frequently in letters to the editor *of The Mansfield News Journal* and through other media by USWA leaders, members and their supporters. The following is a small sample:

- "AK Steel Corp. is like the Taliban – AK CEO Richard Wardrop is bin Laden. The scabs and guards are the terrorists. They locked out innocent people with families, starving them out of house and home." Marla Kiser, in *The Mansfield News Journal.*
- "What violence the steelworkers may have committed is nothing compared to the violence this corporation has brought upon the 600 families they locked out." Ruth Irwin, in *The Mansfield News Journal.*
- "You just want to grab those scabs and tear their head off, because he's tearing my family apart." Fred Culbertson, to *WEWS-TV Channel 5*, Cleveland, Ohio.
- "If it takes union brothers and sisters blood to spill again to win this war, then so be it." Scott Tackett, USWA Local 169 member, in *The Mansfield News Journal.*
- "Our standard of living has been eroded enough. Our labor laws and legal system have all but done nothing to help us. AK wonders why there has been all the violence and vandalism. Many American workers say, 'Why not?" Kevin Fencil, in the *Butler (PA) Eagle.*
- "If it's war you want, you will probably get it. I can only hope and pray no one gets hurt. But if it comes to that point, look across the battlefield, I and many others will be standing with the people that made the company a profit last year." Skip Frontz, Carpenter's Local 735, to *The Mansfield Journal,* August 24, 1999.
- "Can't let 'em in. I mean, there's, if you let 'em in, let trucks come in and out, let scabs work, there's no reason for us standing out here." Skip Frontz, union protestor, to *WJW-TV*, Cleveland, following the riot on September 10, 1999.
- "AK Steel has taken violent action against its loyal work force by bringing out-of-state scabs and between 100 and 200 jack-booted security forces." Randy

Reeder, acting president, USWA Local 169, to *The Mansfield News Journal*, October 14, 1999.

Incredibly, however, the USWA has also proudly acknowledged its members' violent acts. Subcommittee members witnessed video tape of the union mob riot of September 10, 1999 in Mansfield. As I previously testified, 14 guards and replacement workers were injured, eight so severely as to require hospital treatment. To our knowledge, no union members were treated for injuries as a result of the union riot.

Yet while union officials continued for a time to publicly deny responsibility for their members' actions, in a moment of perhaps unplanned candor, an official spokesman for the International USWA admitted to *Cincinnati City Beat* magazine in March of 2001, "Yeah, we did send eight scabs and goons to the hospital" in reference to the September 10, 1999 riot.

This admission belies testimony provided to this Subcommittee on September 26, 2002, when the general counsel for the USWA said about the riot, "I think AK is frustrated. For the last three years they (AK) have been unable to show any local union or international union endorsement of this. This was a member event that occurred on a morning."

While we do not believe it was only a "member event," I would submit that when an official USWA International spokesperson acknowledges, in apparently proud fashion, that his union brothers and sisters sent "scabs and goons" to the hospital, the International union is both condoning and endorsing criminal behavior by its members.

Indeed, the USWA's general counsel, in written testimony to this Subcommittee, said that "Violence is wrong, period." We find it contradictory and hypocritical for one USWA International representative to brag about violent criminal conduct to the media while another USWA International representative claims before Congress that "Violence is wrong, period."

Faced with undeniable video tape evidence, the USWA has finally recognized in the Mansfield dispute that it can no longer credibly deny that's its members are engaging in violent, vulgar and harassing acts. After AK Steel issued copies of these video tapes publicly, even the USWA Local 169's acting president admitted the Ohio News Network, "It is a shocking video when you see it for the first time."

The union then began suggesting that any violence on behalf of its members had been provoked or instigated by AK Steel's security guards. Those accusations are totally false, and to the contrary, AK Steel has documented numerous examples, by way of video tape and

sworn testimony, that union members have taunted, harassed and otherwise attempted to provoke reactions from replacement workers, security guards and even child family members to incite them to fight union members.

For example, on a video tape of the September 10, 1999 union mob riot, it is clearly seen that, despite being pummeled with rocks, bricks, golf balls and even folding chairs, the security guards, replacement workers and salaried employees have shown remarkable restraint to union members' provocations.

Several USWA Local 169 members have admitted in sworn court testimony that they intentionally have attempted to provoke and incite security guards and non-union employees for the specific purpose of causing continued unrest and instability. One member, a white male, was captured on video tape continually hurling the most incendiary racial epithets possible at African-American security guards. To the credit of the guards and others who have been subjected to this relentless harassment, the union member's plan finally landed him in contempt of court and he was removed from the picket line.

Strikes and lockouts are two sides of the same coin. Yet the leadership of unions would have their members and the public believe that lockouts and the use of temporary replacement workers is illegal and immoral, knowing that radical members will commit unlawful acts, that by their very nature, coerce and intimidate some employers from exercising their lawful rights during labor disputes.

The USWA even attempted to sue AK Steel for the September 10, 1999 riot, alleging that the company's attempt at using lawful replacement workers was, by design, calculated to incite union members to violence. Using that perverted logic, we would be wise to empty our financial institutions of currency, since bankers must certainly know that its presence is an irresistible temptation to armed bank robbers.

Local and state laws are ineffective in curbing union violence for a number of reasons. First, some state statutes, such as in Ohio, prohibit the use of state police in labor disputes.

Second, it has been our experience, and the experience of other employers, that local law enforcement officials are reluctant to prosecute union members accused of criminal acts. We believe there are several factors that lead to this reluctance. Many local authorities are elected officials. Unions apply tremendous influence upon elective office holders, as evident by publicly available campaign disclosures. Incredibly, the state court judge who issued the

unlawful restraining order against the company using temporary employees in Mansfield referred to those employees as "scabs" on several of occasions.

In addition, the employees of many local and state authorities are represented by various unions, creating additional pressure against the arrest and prosecution of union members for their actions during labor disputes.

AK Steel has even had to contend with city employees who conveyed confidential tax information to the USWA's state political director, despite being warned by the city's law director against attempting to assist in the union's efforts to revoke a tax abatement granted the company. That issue was resolved only after the company filed a federal lawsuit to prevent further releases of confidential information from being passed to the union by city employees.

Mr. Whitehead's September 26, 2002 testimony also deserves some scrutiny and comment. For instance, Mr. Whitehead suggested that AK Steel's federal Racketeer Influenced and Corrupt Organizations Act (RICO) lawsuit filed against the USWA in 2000 was "outrageous." Mr. Whitehead failed to mention to this Subcommittee that his labor organization has been sued under RICO by at least three other companies, including Ravenswood Aluminum Corporation (1991), Bayou Steel Corporation (1995) and Titan International (2000). I presume the USWA was equally "outraged" by these lawsuits.

Mr. Whitehead also testified "And among the tiny percentage of cases (labor negotiations) that do go to dispute, either strike or lockout, the occurrence of violence in such situations is even more rare. Wrong, but rare."

If Mr. Whitehead is correct, then it appears that the USWA owns an incredibly disproportionate share of violent labor disputes, especially those that involve the use by companies of replacement workers, which the following examples amply illustrate (bold face emphasis added):

- "The police have arrested four more members of the **United Steelworkers of America** who were wanted in an incident on March 20 (2002) in which picketing union members allegedly attacked a contractor working for the Providence Gas Co. The police said that a supervisor for Double TT Corp., a company that was working at a site on Hill Avenue, was attacked by a group from the union, which has been **locked out** by Providence Gas. The supervisor, Mario Durand, 31, of 45 Liberty St., Fall

River, was trying to drive away when the driver's door window was smashed and two tires were slashed, the police said. **Broken glass** struck Durand in the face, the police reported. . *The Providence (RI) Journal-Bulletin*, April 1, 2002.

- "WCI Steel, Inc. (NYSE: WRN) today announced that the company is temporarily suspending operations due to the escalation of **violence** in the strike by the **United Steelworkers of America** that began September 1." News Release, September 29, 1995.
- "At the outset of the work stoppage, management appeared determined to keep the plant running with the **replacements**. But after a month, the **company backed down** in the face of **mounting violence** and increasing divisiveness, demonstrating how difficult it can be to take such a tough position in a small, tightly knit industrial community." *The Cleveland Plain Dealer*, October 8, 1995, on the WCI-USWA labor dispute.
- "In August, more than 1,600 union members declared a **wildcat strike** to protest the firing of an employee in Ravenswood. More than **50 cars were damaged and 11 people injured**, mostly from objects thrown **by strikers**." *The Charleston Gazette*, March 2, 2000, on a wildcat strike by the USWA against Century Aluminum in Ravenswood, West Virginia.
- "**Gunshots were fired** Wednesday at Bayou Steel Corp.'s chief negotiator in a **22-month labor dispute**, the company has reported." *The Advocate* (Baton Rouge, LA), February 18, 1995. The USWA had been **on strike** against Bayou since March of 1993.
- **"We won't sit back and allow them to bring scabs into the plant**." Walsh said. "Just like they say, they will use all of their resources to keep the company operating, **we will use all of our resources to keep scabs from going in** and taking our jobs." **Bob Walsh, USWA Local 2155 president** to *The Tribune Chronicle* (Warren, OH), February 9, 1999, regarding a violent and bitter labor dispute against RMI Titanium.
- "While saying motorists could safely drive on Warren Avenue Thursday night, (Bob) **Walsh warned motorists** to stay off the road if the company **tries to bring in replacement workers** this morning." The Tribune Chronicle, February 12, 1999.

In conclusion, I again thank the Chairman and the Subcommittee members for this opportunity to present evidence and AK Steel's viewpoint that penalties and punishment for union-related violence should be addressed through strong federal legislation. For a number of reasons, which I have set forth here, state and local laws are ineffective in dealing with union violence. AK Steel strongly supports legislation that would enable swift federal prosecution and punishment of violent union members.

I respectfully present this written addendum to my September 26, 2002 testimony, along with two VHS video tapes already delivered. Thank you.

Identification of Video Tapes Submitted As Testimony:

1. Violent, Vulgar, Racist and Sexist Conduct, United Steelworkers of America members. 2002.
2. USWA Union Members, Picket Line Racial Harassment, Mansfield, OH. 2002.

APPENDIX I – PLACED IN PERMANENT ARCHIVE FILE, VIDEOTAPES: (1) USWA UNION MEMBERS, PICKET LINE RACIAL HARASSMENT, MANSFIELD, OH, AND (2) VIOLENT, VULGAR, RACIST AND SEXIST CONDUCT, UNITED STEELWORKERS OF AMERICA MEMBERS, WARNING: THIS MATERIAL NOT SUITABLE FOR CHILDREN

APPENDIX J – SUBMITTED FOR THE RECORD, STATEMENT OF CONGRESSMAN JOE WILSON, SUBCOMMITTEE ON EMPLOYER-EMPLOYEE RELATIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE

Congressman Joe Wilson
2nd District of South Carolina

Introduction of the Freedom from Union Violence Act

September 26, 2002

Committee on Education and the Workforce
Subcommittee on Employer-Employee Relations
U.S. House of Representatives
Washington, D.C.

Mr. Chairman:

Soon I will be introducing legislation to close a long-standing loophole in our Nation's labor laws. The purpose of the bill is to make clear that violence conducted in the course of a strike is illegal under the Federal extortion law, the Hobbs Act.

Violence has no place in our society. If it were in my power to do so, I would put an absolute stop, without any compromise, to the disruption of commerce in this country by intimidation and violence, whatever the source.

Let me make clear that I agree that the Federal government should not get involved in minor, isolated physical altercations and vandalism that are bound to occur during a labor dispute when emotions are charged and tempers flare. However, when union violence moves beyond this and becomes a pattern of violent conduct or of coordinated violent activity, the Federal government should be empowered to act.

State and local governments sometimes fail to provide an effective remedy, whether because of a lack of will, a lack of resources, or an inability to focus on the interstate nature of the conduct. It is during these times that Federal involvement is needed to help control and stop violence.

Let me also point out that this legislation has never been an effort to involve the Federal government in a matter that traditionally has been reserved for the states. Labor relations are already regulated on a national basis, and labor management policies are national policies. There is no reason to keep the Federal Government out of serious labor violence that is intended to achieve labor objectives. Indeed, the Congress intended for the Hobbs Act to apply to the conduct we are addressing in this legislation today.

This bill that I am introducing would make it clear that the Hobbs Act punishes the actual or threatened use of force and violence which is calculated to obtain property without regard to

whether the extortionist has a colorable claim to such property, and without regard to his or her status as a labor representative, businessman or private citizen.

It is time we closed the loophole on union violence in America and that is why I am proud to introduce the **Freedom from Union Violence Act** soon. It is my hope that this year we will be successful.

APPENDIX K – SUBMITTED FOR THE RECORD, STATEMENT OF CONGRESSMAN DENNIS J. KUCINICH, COMMITTEE ON EDUCATION AND THE WORKFORCE

House Subcommittee on Employer-Employee Relations Hearing Statement
Rep. Dennis J. Kucinich
September 26, 2002

Mr. Chairman, thank you for allowing me to submit this statement.

I appreciate the opportunity to explain why I oppose the enactment of S. 230, the "Freedom From Union Violence Act of 2001". This Act would significantly revise the Hobbs Act of 1946, 18 U.S.C. 1951, and authorize federal criminal enforcement against violence committed in the course of a labor dispute that is related to otherwise lawful union objectives.

Collective bargaining is one of our nation's great democratic institutions. With it a worker shares with other workers an opportunity to utilize a set procedure to assure job security, health coverage, retirement benefits, a fair wage, and safe working conditions. It also recognizes the fundamental right of workers to disagree with management, and management to disagree with workers.

Few labor disagreements are settled with strikes, and an even smaller number of those disputes are marred by violence of any type. Picketing itself is a form of free speech, protected by both the First Amendment and federal law. However, the adoption of S. 902 would upset the careful balance of collective bargaining relationships and chill employees and union members in their exercise of these federally protected rights.

The Act could subject union members and officials to longer federal prison terms than are imposed for similar conduct under state law, including multiple state and federal prosecutions for the same conduct.

This bill unfairly singles out union members because it does not apply the new standard to the same crime committed by an employer. Employers who commit the same violent acts as union members during a labor dispute would not be subject to this greater penalty because they did not do so to obtain "property". Workers fighting for legitimate objectives such as higher wages and benefits should not be singled out for harsher treatment than others guilty of the same conduct.

Finally, and most problematically, this Act would greatly empower employers in labor-management disputes by adding the fear of criminal prosecution for union members as a result of unintended events arising from union economic pressure. Indeed, what good is federal protection of the right to strike if worker conduct could be subject to severe extortion law penalties?

In the extremely rare instance in which a labor dispute is tainted with violent action, there are already legal means of redress available to fix the problem. There should be no call to federalize criminal behavior simply because it occurs in the midst of a labor dispute.

It is clear to me that S. 902 would dislodge the delicate balance of collective bargaining relationships, to the detriment of American workers. It is not fair public policy and it should not become law.

Thank you.

APPENDIX L – SUBMITTED FOR THE RECORD, STATEMENT OF ASSOCIATED BUILDERS AND CONTRACTORS, ROSSLYN, VA

Statement of Associated Builders and Contractors

"Emerging Trends in Employment and Labor Law: Examining the Need for Greater Workplace Security and the Control of Workplace Violence"

Education and Workforce Subcommittee on Employer-Employee Relations
Chairman Sam Johnson
September 26, 2002

Associated Builders and Contractors (ABC) appreciates the opportunity to submit the following statement for the official record. We thank Chairman Sam Johnson (R-TX), Ranking Member Robert Andrews (D-NJ) and members of the subcommittee on Employer-Employee Relations for addressing the problems of violence in the workplace.

ABC is a national trade association representing over 23,000 contractors, subcontractors, material suppliers, and related firms from across the country and from all specialties in the construction industry. Our diverse membership is bound by a shared commitment to the merit shop philosophy of awarding construction contracts to the lowest responsible bidder, regardless of labor affiliation, through open shop and competitive bidding. With over 80 percent of construction today performed by open shop contractors, ABC is proud to be their voice.

Labor unions have lost a significant share of the market to non-union companies in recent years and are also experiencing a sharp decline in membership. In the construction industry, more than 80 percent of construction workers choose not to be represented by labor unions. In an effort to reclaim their share of the construction market, labor unions have significantly increased activity in nonunion jobsites to harass or disrupt company operations, apply economic pressure, increase operating and legal costs, and ultimately put the company out of business.

The Anti-Racketeering Act of 1934 (The Copeland Act) marked the beginning of the use of federal authority to prosecute and punish criminal acts of extortion affecting commerce. The original bill contained no provision exempting misdeeds committed in furtherance of labor objectives. However, in response to union fears that the law could be applied to non-violent forms of protest, the bill was amended to read "[t]hat no court of the United States shall construe or apply any of the provisions of this Act in such a manner as to impair, diminish, or in any manner affect the rights of bona-fide labor organizations in lawfully carrying out the legitimate objectives thereof, as such rights are expressed in existing statutes of the United States." In later years, the Copeland Act was amended by the Hobbs Act, which eliminated the exemption from violent acts carried out in the name of legitimate objectives of bona-fide labor organizations, thereby supplementing state jurisdiction with federal jurisdiction in cases where interstate commerce is involved.

However, in the early 1970's, the corrections to the 1934 Copeland Act were nullified by the Supreme Court ruling in United States v. Enmons. The court, in a five to four ruling, determined that the Hobbs Act has little application to the extortionate activities of employees or union officials in labor disputes, despite the clear

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Congressional intent of the Act. The Hobbs Act was deemed inapplicable because the violence took place in what was termed "an effort to promote appropriate collective bargaining demands."

ABC does not believe there is ever an "appropriate" use of violence to further "legitimate" labor goals. Union officials should not be immune from prosecution under federal law for violence committed to further union objectives.

One example of the many cases of union violence that have occurred and continue to occur around the country is the case of Met-Con Construction vs. Iron Workers Local 512 which Met-Con won in the Federal District Court in Minnesota.

Met-Con was the general contractor at a Waste Management Inc. (WMI) paper recycling facility being built in St. Paul. The incident began with a letter from the Ironworkers Local 512 that alleged Met-Con was not paying prevailing wages, and that informational picketing would take place. The facts (from the complaint) speak for themselves:

On February 29, 1996, the defendants inflicted damage upon two or more vehicles belonging to plaintiff Met-Con and upon two or more vehicles belonging to individual plaintiffs at the WMI project. The vehicle damage was achieved by the use of sledgehammers, baseball bats, crowbars, knives, iron pipes, hammers, screwdrivers, welded sharpened nails with numerous sharp points known as "tigertacks", "snowflakes", "stars" or "tire busters," and other sharp or blunt objects. The damage included, but was not limited to, breaking the vehicles' windows, headlights and taillights, slashing and puncturing tires, and smashing front hood grills, while the vehicles were occupied by their passengers, who were attempting lawfully to enter the WMI project.

The defendants surrounded, and, without provocation, attacked and inflicted bodily injuries upon several individual plaintiffs. The aforementioned bodily injuries included, but were not limited to, blows with baseball bats or other blunt, heavy objects upon the Individual plaintiffs' heads and shoulders. In addition, individual plaintiffs were injured when pieces of glass and other debris struck their heads and bodies. The defendants also repeatedly poked, shocked or shot plaintiff James P. Miller in his stomach and side with an electric cattle prod or stun gun, shocking him and causing him to become groggy and disoriented.

The incident as described in the example above illustrates the need to amend the Hobbs Act to provide a federal criminal law that would make it unlawful for a labor organization to use force or violence as a means to achieve its ends. The Enmons loophole should be eliminated so those union officials are no longer immune to prosecution under federal law for violence committed in furtherance of union objectives.

ABC strongly supports S. 902, the Freedom from Union Violence Act of 2001, introduced by Senator Strom Thurmond. The legislation will amend the Hobbs Act to restore the effectiveness of prosecutions of serious cases of extortion and violence when they occur in the course of a legitimate labor dispute.

While unions have the right to attempt to organize workers, open shop companies and their employees also have the right to be protected from unwarranted harassment, force, and violent acts. It is unethical for any group to manipulate the law to injure or destroy competitors and unconscionable for the federal government to condone it. Violent acts should never be protected as an appropriate means to reach an organization's objectives.

ABC asks the United States Congress to recognize that federal law should not condone violent activity and should instead protect individuals and property involved in interstate commerce who are affected by organized jobsite violence. The use of violence to achieve any ends, whether those ends are properly the subject of labor management relations or whether they are well outside the scope of proper labor objectives, is ultimately detrimental to all parties involved.

APPENDIX M – SUBMITTED FOR THE RECORD, STATEMENT OF LPA, WASHINGTON, D.C.

STATEMENT

OF

LPA

EMERGING TRENDS IN EMPLOYMENT AND LABOR LAW: EXAMINING THE NEED FOR GREATER WORKPLACE SECURITY AND THE CONTROL OF WORKPLACE VIOLENCE

BEFORE THE SUBCOMMITTEE ON
EMPLOYER-EMPLOYEE RELATIONS
HOUSE COMMITTEE ON EDUCATION AND THE WORKFORCE
WASHINGTON, DC

SEPTEMBER 26, 2002
(02-120)

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CHAIRMAN JOHNSON AND DISTINGUISHED MEMBERS OF THE SUBCOMMITTEE: Thank you for the opportunity to present the views of LPA regarding workplace security. As you know, providing a safe and secure workplace is among the highest priorities of our member companies.

As you may know, LPA is a public policy advocacy organization representing senior human resource executives of over 200 leading employers doing business in the United States. LPA provides in-depth information, analysis, and opinion regarding current situations and emerging trends in labor and employment policy among its member companies, policy makers, and the general public. Collectively, LPA members employ over 19 million people worldwide and over 12 percent of the U.S. private sector workforce. LPA member companies have revenue exceeding $4.3 trillion annually.

Since September 11, 2001, there has been an increased emphasis on security issues in the workplace. This emphasis has resulted in a substantial number of initiatives at all levels of government intended to prevent a recurrence of similar incidents. Many of these initiatives have focused on background checks of individuals and will have a significant impact on the efforts of American companies to address their own security needs, which are aligned with those of society as a whole. It is important that these governmental initiatives facilitate the establishment of human resource and data protection policies and procedures that address the pressing security needs facing America today in a workplace-friendly manner, while also protecting the privacy and confidentiality interests of employers and their employees.

Because of the profound implications for the American workplace, LPA has established a Workplace ID Advisory Board to provide expert advice on public policy proposals that will have an impact on corporate security and the protection of employees, employer facilities and informational infrastructures. The Board also examines security practices of American companies and is in the process of developing a protocol for corporate security policies that will provide guidance for companies in balancing their security needs with the privacy interests of their employees. This Board is composed of security, legal, human resource and technology experts to provide guidance to our organization in addressing the various proposals in play. This testimony reflects the views of those distinguished individuals.

Corporate Security After September 11

Because of the terrorist attacks of September 11, there is an increased emphasis on security issues in the workplace. Chief among those concerns facing employers is how to provide a high level of assurance to employees, customers, clients, and the general public that they maintain safe and secure workplaces. The importance of this concern is underscored by a survey reported in the *Wall Street Journal*, in which corporate chief executives were asked to identify those areas that posed a much greater concern for them today than before September 11. Of those chief executives polled, 79 percent listed protection of employees as such a concern.[1]

One step that employers often use to bolster security is to verify the identity of employees, contractors, guests, and other individuals who access employer facilities. At the same time, employers often need to conduct background checks on employees,

applicants, and others with access to the employer's premises. After September 11, employers are more routinely checking identity and implementing background checks, as is evidenced by reports that 51 percent of corporate chief executives report now conducting background checks on contract employees while 39 percent report now checking employee backgrounds more fully.[2]

Steps Necessary to Improve Security

An important matter in ensuring that employers provide a safe and secure workplace is determining whether employees have demonstrated behavioral patterns that render them inappropriate for the employment position for which they are being considered. For example, a well known failure of a background-check system in Milwaukee allowed people with criminal records to be certified for day care, including a convicted prostitute and a woman recently arrested on suspicion of beating her own daughter.[3]

In particular, employers, which already play an important roll as they seek to provide safe workplaces for employees and others, should have access to those tools necessary to help them implement appropriate security policies, the implementation of which will further bolster domestic security as a whole. In particular, LPA recommends that Congress remove barriers that hinder an employer's ability to make security decisions based on an individual's complete background. The federal government should also make the creation and maintenance of accurate and timely updated databases of criminal records a priority and should permit employers to have direct access to such information to the extent it already constitutes public information.

Adequate Employer Access to Data. Employers want to provide a high level of assurance to employees, customers, clients, and the general public that they maintain safe and secure workplaces. To provide such assurances, employers often need to conduct background checks on employees, applicants, and others with access to the employer's facilities, yet there are systematic constraints that often hinder an employer's ability to do this effectively.

One common component of a comprehensive background check is a check of an individual's criminal records. Unfortunately, no central, comprehensive database exists for checking criminal records. In fact, most states maintain criminal records at the local level and the most accurate reports may only be obtained by checking court records in individual counties. Even states that centrally collect their own county data often do not update it regularly or face technical problems that make reliance on such databases problematic.

In one recently publicized case, a Minnesota employer learned from reading a newspaper that his employee, Michael Titus, allegedly kidnapped a woman from a job site and then raped her. The employer had performed a criminal background check on the employee, searching the Minnesota Bureau of Criminal Apprehension's database of felony convictions for records of Michael C. Titus. Unfortunately, Mr. Titus's numerous convictions, which ranged from burglary to driving while intoxicated, were indexed under Michael Titus or Michael Columbus Titus, not Michael C. Titus.[4] Consequently, even though the employer thought he was searching for criminal records associated with his employee, the relevant records were not discovered until his employee had allegedly

committed his crime. In addition, a later search of county court records revealed that Mr. Titus had several arrests for crimes such as aggravated assault and domestic assault that did not appear at all in the state database.[5]

But the problem of incomplete databases is by no means limited to Minnesota. Every two years the Department of Justice publishes the Survey of State Criminal History Information Systems. One of the factors examined in the last survey is whether the state database records a disposition for arrests made within the last five years (i.e., conviction, released, acquitted, etc). In 19 states, more than 40 percent of all arrest records in the past five years have no disposition whatsoever associated with them.[6]

While not as comprehensive as local databases, the federal government does maintain databases containing criminal history information, the most comprehensive of which is probably the National Crime Information Center (NCIC), which is maintained by the Federal Bureau of Investigation. However, data contained within NCIC is generally only available to law enforcement. Employers simply have no access to this data, even those components of it which are simply a compilation of public information.

Employers are sensitive to concerns that data about prospective or current employees be used prudently and in compliance with applicable laws and regulations, including guidance from the Equal Employment Opportunity Commission. At the same time, this compliance can be problematic because of a tension that sometimes exists between the myriad state and federal laws and regulations governing data access or disclosure and use of such data. This patchwork of different laws and regulations, in conjunction with the decentralized nature of data collection that exists in most of the United States today, should be kept in mind by policy makers as they seek to enact new measures to enhance security.

To address these concerns and ensure that employers can have timely access to complete background information on which to base security decisions, employers should have direct access to federal databases containing criminal history information, such as NCIC, to the extent such information is public information. Furthermore, federal, state, and local governments must take steps to ensure that information within their control is updated in a timely manner and accurate. The creation of more centralized databases, such as on the state level rather than at the county level, would significantly help employers conduct appropriate background checks.

Legal Constraints. In ensuring employers' ability to protect their employees and the public at large, Congress also needs to reconsider some aspects of the Fair Credit Reporting Act (FCRA). While initially enacted primarily to ensure the accuracy of credit reports, FCRA also applies to employment-related background checks conducted by most third parties. FCRA imposes three principal requirements that can act as barriers to an employer seeking to base security decisions on an employee or applicant's complete record.

Specifically, the Act requires obtaining employee consent before a background check is conducted. FCRA also requires that employers disclose the content of the background check report prior to taking adverse action against the employee or applicant, and finally FCRA limits the lookback period that employers can examine in an individual's background, in most cases to seven years. In other words, employers are barred from

considering most things in an employee's background that happened more than seven years ago, regardless of their relevance to determining whether the employee poses a security threat. Many states impose additional, narrower, time constraints on data an employer may collect or consider.

While it is true that some employers avoid the burdens imposed by FCRA by conducting background checks themselves, most employers find it more cost effective to use third parties who specialize in collecting such information, consequently triggering FCRA for even the most routine background investigation. LPA recommends enacting amendments to FCRA that will permit employers to consider an employee's or applicant's full record in making security decisions without undermining the fundamental privacy interests the Act seeks to address. In doing so, Congress should recall the purpose of FCRA, as codified in the law, which placed the principal emphasis on protecting the confidentiality of credit records. As enacted, FCRA specifies four key findings that the law is designed to address: fair and accurate credit reporting; elaborate systems that exist to determine creditworthiness and character of consumers; the role of reporting agencies in evaluating consumer credit and other information; and the importance of reporting agencies operating with fairness, impartiality, and a respect for the consumer's right to privacy.[7]

An additional problem imposed by FCRA involves a Federal Trade Commission opinion letter (the so-called "Vail letter") that suggested that a third party's report of an investigation into employee misconduct triggered FCRA and thus was unlawful unless obtained with the consent of the employee. As noted above, triggering FCRA would also require disclosure of the contents of the report before taking adverse action. Triggering FCRA is this context is troublesome because in the case of many investigations, such as those for sexual harassment, tipping off the employee in advance could increase risk to the victim and could thwart the investigation. In light of increased security concerns in the workplace, employers are now finding the Vail letter problematical because it hampers their ability to investigate employees who make threats and inappropriate comments and those suspected of workplace violence. The heightened security concerns we live with today make it more urgent that Congress enact a legislative fix to this problem, such as that proposed by a bipartisan group of Members of the House of Representatives.[8]

Meanwhile, most large employers not only have their own employees working at their facilities but, at any given, a significant number of employees of their contractors are also on site. Particularly in vulnerable facilities such as power plants, chemical manufacturing plants, etc., employers want to be sure that these third parties do not pose a threat. Thus, it is critical to ensure that all personnel with access to secure areas be appropriately screened, regardless of whether they are a direct employee or a contract worker or non-traditional employee. Yet employers face substantial legal hurdles as they seek to ensure that such individuals have been appropriately screened.

To address this concern, employers may seek to have contractors conduct background checks on their employees, the contract workers. However, if the employer seeks to review those background checks to ensure that they comply with criteria the employer has established, then the contractor could be deemed to be a third party and effectively trigger FCRA. To alleviate this problem, Congress should create an exemption to FCRA

for employment-related background checks either by creating a safe harbor from finding a determination of joint-employment or by clarifying that contractor employers are not acting as third party "consumer reporting agencies" when relaying background check information on contract workers to employers.

A model for such a change already exists. FCRA currently contains an exemption for information that is shared between parent and subsidiary companies or others related by common ownership or affiliated by corporate control. A similar provision should be enacted permitting companies in a contractual relationship to share business-related information regarding employees in the same manner.

Statistical evidence underscores the importance of ensuring that employers can conduct complete and accurate background checks. As recently reported in a trade magazine, American Background Information Services reported that between January 1998 and October 2000 it found undisclosed criminal records on 12.6 percent of the individuals it screened.[9] The article reported that others found 8.3 percent of applicants to have criminal records while 23 percent misrepresented their employment or education credentials,[10] with numbers being dramatically higher in certain industries. For example, Background Check International reported that applicants in the telemarketing sector have a criminal record in 30 to 40 percent of cases.[11] Given the fact that so many applicants have criminal records or have misrepresented credentials, it is critical that employers have access to complete background information to ensure the security of the workplace.

Conclusion

Congress should do more to increase security nationwide by permitting employers to bolster workplace security by removing barriers that prevent employers from obtaining complete background records on which to base security decisions regarding their employees and others seeking access to the workplace. Furthermore, Congress should devote resources to improving federal, local, and state criminal databases and should provide employers with access to those databases, especially to the extent that they contain public information. Finally, Congress should amend existing laws, such as the Fair Credit Reporting Act, that restrain the ability of employers to provide an appropriate level of security in their workforce.

Thank you for the opportunity to present testimony today on these important issues. America's employers are committed to working with you to address these and other important security issues. Please do not hesitate to call on LPA as you move forward with these proposals.

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Endnotes

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[4] Casey Selix, *Background Check Backfires*, SAINT PAUL PIONEER PRESS (Mar. 31, 2002).
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[7] 15 U.S.C. 1681(a)(1)-(4).
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