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WORKERS' FREEDOM OF ASSOCIATION: OBSTACLES TO FORMING A UNION

HEARING

BEFORE THE

COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

WASHINGTON, DC

JUNE 20, 2002

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WORKERS' FREEDOM OF ASSOCIATION: OBSTACLES TO FORMING A UNION

THURSDAY, JUNE 20, 2002

U.S. SENATE,
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS,
Washington, DC.

The committee met, pursuant to notice, at 10:06 a.m., in room SD–430, Dirksen Senate Office Building, Hon. Edward M. Kennedy (Chairman of the Committee) presiding.

Present: Senators Kennedy, Dodd, Harkin, Wellstone, Murray, Edwards, Clinton, and Hutchinson.

OPENING STATEMENT OF SENATOR KENNEDY

The CHAIRMAN. We will come to order.

The fundamental right of workers to associate freely and join together to form a union is under attack in the United States today. Hard-won rights gained by American workers over two centuries have been undermined and distorted by law-breaking U.S. employers. Instead of respecting workers' rights to freely choose to form a union, more and more employers are resorting to threats, intimidation, and firings to thwart the exercise of these fundamental human rights.

American workers have sacrificed too much for too long to lose their right to form unions here in the 21st century. They have given their lives to improve the wages and working conditions of their fellow workers. In this time of Enron and corporate disregard for the well-being of workers, we should strengthen the ability of workers to protect themselves, not weaken it. That is what our hearing is all about today.

Despite our great labor traditions, it is extraordinary how commonplace illegal employer tactics have become when workers attempt to form unions. A Cornell study of the NLRB elections found that one-quarter of employers fire workers for union activity during organizing campaigns. Each year, employers unlawfully discriminate against more than 20,000 workers just for exercising their basic rights in the workplace. A majority of employers threaten to close down their plants in response to union activity. During the 1990s, the percent of employers engaging in full-scale anti-union campaigns to prevent a collective bargaining contract, even after the workers have prevailed in an NLRB election, jumped from less than 10 percent to more than a third.

Employers use these unlawful tactics because they are cruelly successful in thwarting the formation of unions. Although more than two-thirds of the workers say that protecting the right to

choose a union is essential or very important, far fewer workers are able to overcome the onslaught of illegal employer tactics designed to avoid unionization.

When employers illegally threaten to close a plant, workers understandably fear for their jobs, and their chance of success in forming a union declines dramatically.

Once workers successfully brave employer intimidation to vote to form a union, they face enormous obstacles in actually getting a first contract. Employers refuse to bargain. They fire workers who support the union. They threaten to close down the facility and continue mandatory meetings designed to intimidate workers. Even the lucky few who persevere in the face of such tactics still must spend years fighting to vindicate their democratic victory in the union election.

Far too often, employers get away with it. They face minimal penalties for violating labor law. In this day and age, workers can be fired for their union activity, and all employers found in violation have to do is rehire the worker and offer back pay. That is a slap on the wrist for obstructing the freedom of choice of America's workers and for denying them their dignity on the job.

The situation is far worse for immigrant workers, many of whom don't even have these minimal protections. After the Supreme Court's recent decision in *Hoffman Plastics*, millions of immigrants are left without any real means to exercise these fundamental rights.

We know that unions make a difference in the lives of average workers. Forming a union is the best way for workers to lift themselves out of poverty and improve their working conditions. Union workers earn 25 percent more than non-union workers. Joining a union is what lifts millions of janitors, farm workers, waitresses, and textile workers out of poverty-level wages.

When it comes to retirement security, the smartest step is for workers to join a union. Union workers are almost twice as likely to be covered by a pension plan and more than four times as likely to have a secure defined benefit pension plan.

Workers in the United States must have their fundamental rights protected in the workplace. At the core of our democracy is respect for the electoral process and the protection of basic human rights.

The culture of impunity in which employers routinely violate the law with few consequences for squelching the democratic voice and right to free association of America's workers is unacceptable. We should not stand for this. America's workers deserve far better. Indeed, American democracy deserves far better.

I want to especially commend my friend and colleague, Senator Paul Wellstone, who chairs the Labor Subcommittee, for his leadership on this issue. He has been a tireless advocate for workers' rights over his distinguished career in the U.S. Senate and is our leader on this issue and many others. So I value his friendship and his leadership, and I look forward to this morning's hearing.

Just finally, I asked the staff to go back and look at the figures of those who get the restoration of the back pay. It is tens of thousands every year. These are people that are fired illegally and they have to get the back pay. It is just a way of doing business for

many of these companies and corporations. But for those individuals who are out of pay and fired without the prospects for joy, it is their whole sense of livelihood and their whole sense of being and their families. It is just a way of doing business. These numbers haven't shifted or changed over a period of time, and it is a scandal.

Senator Hutchinson.

OPENING STATEMENT OF SENATOR HUTCHINSON

Senator HUTCHINSON. Thank you, Mr. Chairman. I look forward to the witnesses today, and I want to thank them for coming before the committee. I look forward to the exchange of ideas on how best to effectuate the Section 7 rights of workers to form, join, or assist labor organizations and, quote, "to refrain from any of these activities".

At today's hearing, we are going to hear of legitimate concerns from workers, unions, and companies about many shortcomings in the National Labor Relations Act. Many of the concerns expressed today and much of the testimony and the specifics of the testimony that we are going to hear are already illegal under current law, and it is likely that effective enforcement and education would alleviate the most serious problems.

Other topics today have been hotly debated for more than 25 years with no clear consensus reached. Still more issues such as coordinated corporate campaigns and card check certifications deal with newer tactics that operate outside the protections and procedures of the National Labor Relations Act.

I would like to just make one comment as to something the Chairman said. We all are very concerned, I think, about workers' rights. We should be. But we also realize that much of the antagonism that has historically existed between management and labor should be something in the past, that we should work toward a more cooperative arrangement between labor and management, and that while unions have played a very, very vital role in the history of our Nation, in the last 20 years the wages of non-union workers have risen faster than union workers, according to the Bureau of Labor Statistics.

So I want to make clear from the outset of the hearing that no one here supports the firing of workers because they seek to join a union. As the law states, workers must be free from threats, coercion, or intimidation, and it is my hope that no one here supports tactics designed to force unionization onto workers who do not want it or to drive a company out of business that resists illegal demands.

The National Labor Relations Act as amended is designed to be balanced and fair, and any proposed changes to the act must maintain that fundamental design or, as history has shown, there will be no changes.

Today's hearing may or may not be the opening event in a renewed campaign to overhaul the rules governing labor-management relations and union organizing. Like all of our workplace laws, changing times call for modernizing reforms, and with this in mind, Mr. Chairman, I look forward to the testimony of our witnesses.

The CHAIRMAN. Senator Wellstone.

OPENING STATEMENT OF SENATOR WELLSTONE

Senator WELLSTONE. Thank you, Mr. Chairman. I am really pleased that we are holding these hearings, and I think it is long past time that we focus on the concerns that we are going to hear about today. I am particularly grateful to the workers who have come here along with President Sweeney. Thank you for stepping forward and having the courage to tell your stories. To Ms. Buffkin, a particular thanks to you for your candor and your honesty and your willingness to do the right thing no matter what it costs you personally.

There are a lot of battles that many of us or many of our parents or many of our grandparents fought for, and I think we thought those battles were over—the integrity of Social Security, the 40-hour week—but issues that were raging at the turn of the last century and that we thought were settled a long time ago are resurfacing at the turn of the new century. I think nowhere is this more evident than the subject before us, which is the workers' freedom of association, the basic human right to join a union and bargain collectively.

As one of our witnesses, Mr. Roth, says, if the rights of workers are not respected and protected, then the strength of American democracy and freedom is diminished. I agree.

One organizer told me that all too many times you have to be a hero to organize at the workplace and, for that matter, the men and women who are willing to be a part of the efforts have to be heroes and heroines. I believe this is heroic work to organize the unorganized, but I do not believe that this was the promise of democracy and participation and of the freedom of association that really was in the National Labor Relations Act 70 years ago. You should not have to be a hero to exercise your basic rights in a democracy in the United States of America today.

Mr. Chairman, very quickly, just to show what we are dealing with, let me just ask a few questions and answer them.

What is the remedy under current law if an employer illegally fires workers during an organizing drive? Ten thousand working Americans lose their jobs illegally every year. The Dunlop Commission found that one in four employers illegally fired union activists during organizing campaigns. What is the remedy?

The employer must reinstate the worker and give him or her back pay. This only happens if the National Labor Relations Board orders a remedy which, as we are going to hear today, can take years and years. As Human Rights Watch says in their report, "Many employers have come to view remedies like back pay for workers fired because of union activities as a routine cost of business, well worth it to get rid of organizing leaders and derail workers' organizing efforts." In other words, it is profitable to break the law.

If an employer oversteps the boundaries in captive-audience meetings or in one-to-one supervising meetings or threats to close the plant if workers vote for a union, do you know what the penalty is? The employer must post a blue and white notice saying

they violated the law and they won't do it again. That is today the law. That is the sanction.

If the NLRB finds that there is no first contract because the employer has been engaged in bad-faith bargaining, do you know what the remedy is? The NLRB can order the employer back to the bargaining table for more delay and more bad-faith bargaining.

Something must be done, and we are focused on labor law reform. There are going to be many bills. We will all work together. I introduced S. 1102, which is the Right to Organize Act, and what I am interested in remedying are the following severe problems: captive-audience meetings, insufficient remedies for workers who are discharged for organizing, extended delays in holding elections, even where a majority of the workers have indicated a desire to join the union, and, finally, bad-faith first contract negotiations.

Mr. Chairman, I really appreciate this hearing, and as Chair of the Subcommittee on Employment, Safety and Training, which has jurisdiction over the National Labor Relations Act, I want to just assure everyone in here that this hearing is just the beginning of all of our legislative work together, could not be a more important issue, could not be a more important set of questions, and I am ready to go to work.

The CHAIRMAN. Very good.

I see our friends Senator Dodd and Senator Clinton are here. If they wanted to make a brief comment on this, we would be glad to hear from them.

OPENING STATEMENT OF SENATOR CLINTON

Senator CLINTON. Well, thank you, Mr. Chairman, because unfortunately I cannot stay, and I am very sorry about that. But we have, as the Chairman knows, a long-scheduled meeting with representatives of the Hispanic organizations, and I know that many of them are deeply concerned about these issues as well, because I know from my own experience in New York, we have many immigrants who are basically denied all of their rights under labor laws. That I hope will be a focus of our concern.

I want to thank President Sweeney for being here and for once again articulating, as he does in his testimony so well, the need for an overhaul of our labor laws. We need labor laws for the 21st century. We have had very good success until relatively recently with the labor laws that we began to put into place at the beginning of the last century, culminating in the 1940s and 1950s and 1960s.

But now we do need to take a look. Work has changed. The kind of problems that workers run into are different. We have to focus on using some new tools to try to better enforce the contract between employers and employees.

So I am very grateful that the Chairman has held this hearing and that Senator Wellstone and others are committed to working with the witnesses who will appear. I particularly want to thank Ken Roth from New York and also from Human Rights Watch for focusing on this, because it is not just a labor issue; it is a human rights issue.

Since I won't be here for Mr. Roth's testimony, I would hope people will focus on some of the concerns that he expresses about the way people are being treated, which violates not only labor laws

but basic standards of human decency. I have been very disappointed that one of the new tools that we have, which is using the Internet and using the disclosure of information basically to create an environment in which employers would be motivated to do the right thing without legal sanctions, has seen a big step backwards. That is particularly true in the garment industry with sweatshops, because at the end of the last administration we began to, through the Department of Labor, post the names of factories that violated the law, that didn't pay minimum wage, that didn't follow basic health and safety regulations, that didn't apply Fair Labor Standards Act provisions. I was very disheartened to learn that the Bush administration discontinued this practice shortly after taking office.

This is a really good idea that should be reinstated, and I would call on the Department of Labor and the administration to do that, because while we are looking for ways to overhaul the laws to make them 21st century labor and employment laws that recognize the new realities in the workforce, let's continue to use moral suasion, let's continue to use full disclosure to bring into the light those employers that really are violating the standards of their industry as well as labor standards and human rights standards.

So I would hope that the Secretary of Labor would reinstate this very simple program where labor inspectors who found wage violations, who found fake or incomplete records, since we know that trying to get any kind of legal remedy takes so long that basically it doesn't really amount to a remedy—it is a violation and a process that doesn't result in a realistic remedy—you know, let's at least go back and use the tools that we have got that were beginning to work.

So I thank all of our witnesses. I look forward to reviewing the testimony, and I thank the Chairman for, you know, really bringing attention on the need for us to do, as President Sweeney said, a very complete analysis of our existing laws and try to bring them up to date.

Thank you, Mr. Chairman.

The CHAIRMAN. The Senator from Connecticut.

OPENING STATEMENT OF SENATOR DODD

Senator DODD. Very briefly, Mr. Chairman. Thank you for doing this. This is the first hearing I think we have had on this subject matter since the late 1980s. Going back I think the late 1980s was the last time we talked about this very fundamental right that is guaranteed, of course, by Section 7 of the NLRB, and the National Labor Relations Act, the United Nation's charters, the international concepts incorporated the right of people to organize and choose the people who represent them.

The statistics that John Sweeney and others will share with the committee should alarm every Member. Whether you agree with every organizing campaign or not, when you end up with statistics that exceed 50 percent where there are acts of intimidation when it comes to people's exercising their rights to organize and to choose the people who represent them, then it ought to concern everyone.

I note in Mr. Sweeney's testimony that he cites some recent data collected by some national polling operations in the wake of Enron and related scandals that there is this growing sense—and it is not just an impression, but I think one that the realities are beginning to catch up with the impressions—that ordinary people are being disadvantaged all the time, whether it is in their pensions at Enron or their right to pick who will sit and negotiate their working conditions and their wages and salaries, that this is not an equal, level playing field. It never really has been, but it is getting less equal all the time.

Hank Paulson of Goldman Sachs had the guts and the intestinal fortitude a week ago to pretty much call it as it is when he described the situation in the country as one that is really getting out of control. He said very much that the criticism is very much deserved when it comes to some of the actions being taken by corporate America.

So I think it is important we not only have a hearing—and we certainly commend Senator Wellstone for his efforts legislatively, the suggestion that Senator Clinton has just made as well, Mr. Chairman, I think are worthy of pursuit. I think having a hearing like this is critically important to raise in the public profile of what is occurring. I certainly look forward to some ideas and suggestions on how we can strengthen this basic right.

It is not just about strengthening the rights of workers. That in itself would be important. But it is strengthening the economic condition of our country, and that is why this works. The great engine of American success economically can be attributed to many things, not the least of which has been the right of American workers to organize and to play a critical role in the economic well-being of this country. Too often when people talk about how successful we are, they leave out that piece of the equation. This hearing today gives us a chance to talk about the critical role that labor has played in America's success story, and we are delighted to have you here today.

Thank you, Mr. Chairman.

The CHAIRMAN. We are joined by Senator Edwards, and if you would like to make a comment, then we will proceed with the testimony.

OPENING STATEMENT OF SENATOR EDWARDS

Senator EDWARDS. Very briefly, Mr. Chairman.

Mr. Chairman, first of all, thank you for having this hearing, and thank you to the witnesses for being here. This is a matter that is of actual personal concern to me. I have a brother who is in the IBEW, a mother who was a member of the Letter Carriers; my father worked in textile mills all his life, and I know how important it is for workers' rights to be protected, for organized labor to give voice to people who have no voice, no chance without them being heard through their representatives. This hearing is long overdue, Mr. Chairman. I know it has been, I think, 14, 15 years since we have had a hearing on this subject, and the problem, of course—and I have seen it firsthand with my own family's experiences—is that the right to join a union, which every employee should have, exists on paper, but we know what the reality of the workplace is

many times. A lot of the men and women I see in this room understand it, and understand it very well firsthand. Some of the practices that have been engaged in, some of which I think we will hear about today, are outrageous.

We have got to get to the place where this right doesn't just exist on paper. This is not about statutes and about laws and about regulations, although those things matter. It is about people's lives and real people having a real chance to have decent working conditions and to have access to health care. That is what this is about.

So I am very proud to be here, proud, Mr. Chairman, that you are calling this hearing and for all of your leadership on this issue for so long. I am particularly proud of the men and women who are here to testify today and who devoted their lives to making sure that people like my mother and my brother had half a chance.

Thank you, Mr. Chairman.

The CHAIRMAN. We will ask John Sweeney, Ken Roth, Eric Vizier, and Dan Yager if they would come forward.

John Sweeney, as we all know, is the president of the AFL–CIO. He has been a valued friend of mine for many, many years. He is the spokesman for workers in this country, a tireless advocate for their rights and their families' rights, and he is always at the barricades on every issue affecting working men and women. We welcome him to our hearing.

Mr. Roth is the executive director of Human Rights Watch, the largest human rights organization based in the United States. The dedicated work of Human Rights Watch has kept a spotlight on human rights abuses around the world. Human Rights Watch issued a comprehensive report on workers' freedom of association. Thank you, Mr. Roth, for joining us.

Eric Vizier is a third-generation oil-field boat captain, an extremely accomplished mariner, worked for Guidry Brothers towing service, an offshore rig in the Gulf of Mexico. He was fired for his attempts to organize the mariners in the Offshore Mariners United Union.

Dan Yager is the senior vice president and general counsel, Labor Policy Association, a public policy organization based in Washington, DC that represents corporate interests in the human rights policy.

Mr. Sweeney.

STATEMENT OF JOHN J. SWEENEY, PRESIDENT, AFL–CIO, WASHINGTON, DC

Mr. SWEENEY. Thank you, Senator Kennedy, for your introductions. Thank you for your continued support for working families and for your leadership in holding this hearing.

I also want to thank Senator Wellstone for his longstanding attention to the issues being discussed today, and I also am happy that Senator Hutchinson is here with us as well.

I want to say to all of you that you obviously share our anger and our outrage over the secret and pervasive war against workers that is being carried on by American employers. Your presence and the testimony here today help us shine a light on the responsible parties from the highest pedestal of our Government and begin to expose that war and all its ugliness.

This morning, as Senator Kennedy has told us, you will hear testimony from Ken Roth, the director of Human Rights Watch. He will tell you that the world's most enduring democracy is greatly lacking in its respect for human rights, freedom of association, and other international standards of corporate conduct.

You will also hear from workers who will translate this awful truth into stark terms of aggression and oppression. They will tell you that workers I our country are routinely denied the basic freedom to make their own decision to join with their coworkers to gain a voice on the job. They will tell you that when workers try to form unions to lift up their lives, employers use despicable tactics to interfere with their choice—and pay no price for it.

What I want to tell you this morning is that the actions Mr. Roth and these workers will describe are an international disgrace and the shame of our Nation.

Last week, Henry Paulson, CEO of Goldman Sachs, noted the scandals at Enron and Arthur Andersen, at Tyco and MicroStrategy, and dozens of other firms, and said, "In my lifetime, American business has never been under such scrutiny and, to be blunt, much of it is deserved."

In a national survey taken in May, findings by Pollster Stanley Greenberg echoes that observation. Eighty-six percent of likely voters found "some" or "a great deal of truth" in the following statement, and again I quote:

> Enron was very bad on its own, but Enron represents a bigger problem in America. Too many people in powerful positions are acting irresponsibly, hurting ordinary people, and they are not being held accountable for their actions.

Those of us who talk to workers like those here today on a regular basis—and to other men and women who are struggling to join or form unions so they can improve life for their families—have known for some time about the growing and scandalous corporate abuse of power.

For the past 25 years, businesses have been twisting, manipulating, and ignoring our country's labor laws and getting away with it. Even when they get caught, the penalties are so weak and the process so unfair that few, if any, are ever held accountable for their actions.

In 25 percent of union organizing campaigns, employers illegally fire workers for supporting a union, and they do it because they know they will be punished lightly, if at all.

As with many of the revolting actions taken by Enron, many of the sordid deeds being carried out against workers who try to form or join unions are also perfectly legal.

When faced with a union campaign, for instance, 92 percent of employers demand that workers attend mandatory anti-union meetings, and 78 percent force them into one-on-one meetings with their supervisors who have been charged with reversing their decision in favor of unionizing.

It isn't illegal, but it should be.

Seventy percent of employers send an average of 6.5 anti-union letters to workers' homes during union drives. It isn't illegal, but, goddammit, it should be.

Seventy-one percent of employers in manufacturing threaten to close or relocate plants if workers chose a union, and when they

threaten, it scares the hell out of workers and cuts the organizing success rate nearly in half.

Such threats are illegal, but they parse words and do it anyway and it is outrageous.

When these kinds of tactics succeed, they destroy not just the chances of workers for a better life, they tear at the moral and economic fiber of our national community.

Union workers make 25 to 30 percent higher wages, and greater percentages of union members have good health insurance and decent pensions. It means they can provide for their families' needs, and they don't have to work two and three jobs, so they can spend more time with their children and contributing to their communities.

Whether legal or illegal, the tactics that oppress workers and block their free choice are disgusting, disgraceful, and damaging to our nation.

I submit to you that the need for overhaul of our labor laws is overdue.

At this hearing today, we will not attempt to outline comprehensive solutions, but to lay out the dimensions of the problem that workers in this country face. I want to remind you that the voices you will hear today are but a few of the hundreds of thousands who are affected.

We must begin now working towards laws that give American workers a meaningful right to a voice in their workplace, laws that prohibit employers from thwarting a worker's own decision to form or join a union and laws that guarantee a meaningful right to bargain a contract.

When we make those laws, we must extend their protection to all workers in our new economy, and back them up just as seriously as we do our race, sex, and age discrimination laws, as diligently as we enforce our antitrust laws and our environmental laws.

We must do so mindful that a strong majority of Americans believe it is wrong for employers to interfere with the freedom of workers to join unions.

We do so secure in the knowledge that there are 30 million American workers who say they would join a union and lift themselves up if they had the opportunity.

Reform will not be an easy task, and it may take years. In the meantime, we ask elected officials at every level and from all parties to join with us in exposing the failures of our current laws and to stand publicly with workers who are struggling to win a voice at work, despite the shortcomings of our laws and the employer greed they endorse.

Thank you for undertaking this initiative.

The CHAIRMAN. Thank you very much, Mr. Sweeney.

[The prepared statement of Mr. Sweeney follows:]

PREPARED STATEMENT OF JOHN J. SWEENEY, PRESIDENT, AFL–CIO

Thank you, Sen. Kennedy, for your remarks, for your continued support for working families, and for holding this hearing.

I also want to thank Sen. Wellstone for your longstanding attention to the issues being discussed today. I appreciate the comments and concerns of other Senators, as well, who obviously share our anger and outrage over the secret and pervasive

war against workers that is being carried out by American employers. Your presence and the testimony here today help us shine a light on the responsible parties from the highest pedestal of our government and begin to expose that war in all its ugliness.

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As with many of the revolting actions taken by Enron, many of the sordid deeds being carried out against workers who try to form or join unions are also perfectly legal.

When faced with a union campaign, for instance, 92 percent of employers demand that workers attend mandatory anti-union meetings and 78 percent force them into one-on-one meetings with their supervisors charged with reversing their decision in favor of unionizing.

It isn't illegal, but it should be.

Seventy percent of employers send an average of 6.5 anti-union letters to workers' homes during union drives.

It isn't illegal, but it should be.

Seventy-one percent of employers in manufacturing threaten to close or relocate plants if workers choose a union, and when they threaten, it scares the hell out of workers and cuts the organizing success rate nearly in half.

Such threats are illegal, but they parse words and do it anyway and it's outrageous.

When these kinds of tactics succeed, they destroy not just the chances of workers for a better life, they tear at the moral and economic fiber of our national community.

Union workers make 30 percent higher wages and greater percentages of union members have good health insurance and decent pensions. It means they can provide for their families' needs, and they don't have to work two and three jobs, so they can spend more time with their children and contributing to their communities.

Whether legal or illegal, the tactics that oppress workers and block their free choice are disgusting, disgraceful and damaging to our nation.

I submit to you that the need for overhaul of our labor laws is overdue.

At this hearing today, we will not attempt to outline comprehensive solutions, but to lay out the dimensions of the problem workers in this country face—and I want to remind you that the voices you will hear today are but a few of the hundreds of thousands who are affected.

We must begin now working towards laws that give American workers a meaningful right to a voice in their workplace, laws that prohibit employers from thwarting a worker's decision to form or join a union and laws that guarantee a meaningful right to bargain a contract.

When we make those laws, we must extend their protection to all workers in our new economy, and back them up just as seriously as we do our race, sex and age discrimination laws, as diligently as we enforce our anti-trust laws and environmental laws.

We must do so mindful that a strong majority of Americans believe it's wrong for employers to interfere with the freedom of workers to join unions.

We do so secure in the knowledge that there are 30 million American workers who say they would join a union and lift themselves up if they had the opportunity.

Reform will not be an easy task and it may take years. In the meantime, we ask elected officials at every level and from all parties to join with us in exposing the failures of our current laws, and to stand publicly with workers who are struggling to win a voice at work, despite the shortcomings of our laws and the employer greed they endorse.

Thank you very much for undertaking this initiative.

Issue Brief

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The Silent War:

The Assault on Workers' Freedom to Choose a Union and Bargain Collectively in the United States

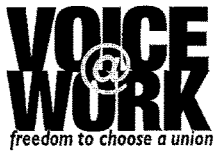
June 2002

Introduction

THE FREEDOM OF WORKERS TO JOIN TOGETHER in unions and bargain collectively is a fundamental human right that U.S. labor law guarantees in principle. But when America's workers seek to exercise this right today, they nearly always run into a buzz saw of employer threats, intimidation, coercion and outright warfare. The experiences of the workers quoted in this report, sad to say, are typical.

These employer tactics are designed to suppress workers' freedom to organize a union, which they do with devastating effectiveness. The law, which is supposed to uphold and defend the right to form unions, has become a Catch-22 of ineffective enforcement and interminable delay. Millions of American workers completely lack legal protection of their right to make a free choice to form or join a union.

Workers in particular and society as a whole pay a huge price for the widespread denial of the freedom to form unions. This price is measured, in part, by the suppression of wages, enormous and widening gaps in the distribution of income and wealth, weakening of the safety net, decline in civic and political participation, unchecked corporate power and harm to the quality of life. Perhaps as serious is the suppression of democracy.



Employer Interference by the Numbers

Employers that illegally fire at least one worker for union activity during organizing campaigns:	**25 percent**
Employers that hire consultants to help them fight union organizing drives:	**75 percent**
Employers that force employees to attend one-on-one anti-union meetings with managers:	**78 percent**
Employers that force employees to attend mandatory anti-union presentations:	**92 percent**
Employers that threaten to call the Immigration and Naturalization Service during organizing drives that include undocumented employees:	**52 percent**
Companies that threaten to close the plant if the union wins the election:	**51 percent**
Companies that actually close their plants after a successful union election:	**1 percent**
Union elections workers win when the employer does not threaten to close or move:	**51 percent**
Union elections workers win when the employer does threaten to close or move:	**44 percent**
Workers in 1998 who won cases proving they had been illegally discriminated against for engaging in legally protected union activity:	**24,000**
Workers who say they want to join a union:	**30 million**
Share of U.S. workers who belong to unions:	**13.5 percent**
Share of U.S. workers who would be in unions if elections were fairer:	**44 percent**

Sources: U.S. Trade Deficit Review Commission, *Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages and Union Organizing*, by Kate Bronfenbrenner, Sept. 6, 2000; *Unfair Advantage: Workers' Freedom of Association in the United States Under International Human Rights Standards*, Human Rights Watch, 2000; *What Workers Want*, Richard B. Freeman and Joel Rogers, ILR Press.

Suppression of Workers' Freedom to Form Unions is Widespread in United States

IN SEPTEMBER 2000, Human Rights Watch, one of the world's most respected human rights organizations, published a historic, book-length report on workers' freedom to form unions and bargain collectively in the United States, after conducting a meticulous 18-month survey.[1] Human Rights Watch Executive Director Kenneth Roth summarized the report's findings as follows:

"Our findings are disturbing, to say the least. Loophole-ridden laws, paralyzing delays, and feeble enforcement have led to a culture of impunity in many areas of U.S. labor law and practice. Legal obstacles tilt the playing field so steeply against workers' freedom of association that the United States is in violation of international human rights standards for workers."[2]

So stark a conclusion from an unimpeachable source about the sorry state of workers' freedom to choose union membership in the largest economy and most powerful nation on earth should be a wake-up call to us all.

Human Rights Watch found that a large proportion of the U.S. workforce has no legally protected right to join together in unions whatsoever, including most agricultural workers, independent contractors, household workers and supervisors, as well as many federal employees and state and local government employees in the 14 states without collective bargaining laws. There is no justification in human rights terms, according to Human Rights Watch, for these enormous gaps in legal protection.

Moreover, workers who in theory enjoy legal protection of the freedom to form unions are scarcely better off. According to National Labor Relations Board (NLRB) records cited by Human Rights Watch, illegal reprisals against employees attempting to exercise their right to freedom of association have reached epidemic proportions. These illegal reprisals numbered fewer than 1,000 per year in the 1950s. That figure has grown exponentially by the decade, reaching more than 23,000 in 1998. When employer illegality reaches such a level, Human Rights Watch's conclusion that the law is too weak and is inadequately enforced seems inescapable. While employers are the main perpetrators, the report emphasizes that government bears ultimate responsibility for protecting workers' freedom of association.

> *We were subjected to one-on-one meetings with our supervisors in which they pressured us to oppose the union. Imagine how powerful such a negative message is for nurses when it is coming from the person who sets your schedule and assignments, approves your time off, has the power to impose disciplinary action and has a say in whether you get a raise.*
>
> —Neonatal nurse Nancy Schweikhard (testimony before the U.S. Senate Health, Education, Labor and Pensions Committee, June 20, 2002)

Equally if not more potent in suppressing workers' freedom of association, according to Human Rights Watch, is a wide array of employer tactics that are perfectly legal under U.S. law. Examples include mandatory captive-audience meetings, during which a one-sided, anti-union message is presented and veiled threats that the workplace will be moved or closed should the workers vote to form a union. If these and other strong-arm tactics are not

enough, employers can and do avail themselves of interminable administrative and procedural delays.

The report's longest chapter is a compelling presentation of case studies of violations of workers' freedom of association. The workers' own words are far more powerful than any NLRB statistic. Human Rights Watch researchers interviewed "apple pickers and computer programmers in Washington State; hotel workers in California; nursing home workers in Florida; steelworkers in Colorado; shipyard workers in Louisiana; factory workers in Michigan, Illinois and Maryland; farm workers and hog processing workers in North Carolina; sweatshop workers in New York; and more."[4]

A mosaic of pervasive suppression of workers' freedom to choose a union emerges from these case studies. In the United States today, unfortunately, the fine rhetoric of the 1935 National Labor Relations Act (NLRA)—according to which, "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other mutual aid or protection"—has become a false promise for most workers.

> *Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other mutual aid or protection.*
>
> —National Labor Relations Act (NLRA, passed by Congress in 1935)

Human Rights Watch's findings are reinforced by Dr. Kate Bronfenbrenner's analysis of more than 400 union representation election campaigns during 1998 and 1999.[4] A partial list of employer tactics tabulated by Bronfenbrenner includes:

- Mandatory captive-audience meetings, in which workers are forced to sit through one-sided, anti-union presentations;
- Repeated closed-door, one-on-one meetings with supervisors, during which workers are interrogated about their views of unions and pro-union workers are advised to change their minds;
- Employer assistance to anti-union workplace committees;
- Widespread threats that the workplace will close or move should the workers vote to form a union; and
- Illegal discharge of workers who support forming a union.

A ***captive-audience meeting*** is a meeting on company time during which a strong, one-sided, anti-union message is presented. Workers can be fired for refusing to attend. Workers who support the union can be forbidden to attend. No equal time—or, indeed, any time—is allowed during working hours for workers seeking union representation to make their case. According to Bronfenbrenner's research, private-sector employers use captive-audience meetings as a tactic to suppress workers' freedom to form unions during 92 percent of union organizing drives. On average, these employers hold 11 captive-audience meetings during every NLRB representation election campaign.

Seventy-eight percent of private-sector employers force employees to attend one-on-one anti-union meetings with managers during NLRB representation election campaigns. In two-

thirds of representation elections, these one-on-one meetings take place at least once a week during the campaign.

Fifty-five percent of private-sector employers force workers to watch anti-union videos during NLRB representation election campaigns. Seventy percent send anti-union letters to workers' homes; an average of 6.5 such letters are sent to each worker's home by these employers during a typical campaign. Three-quarters of private-sector employers distribute anti-union leaflets to workers during NLRB representation election campaigns; on average, 13 separate anti-union leaflets are distributed by these employers during a typical campaign.

Bronfenbrenner's report focused on threats made by employers during organizing campaigns to close or move the workplace if the workers vote for a union. She found employers made such threats during 51 percent of the 407 1998–1999 organizing campaigns she analyzed. In mobile industries, the proportion of threats to close or move is even higher. For example, such threats were made during 71 percent of the manufacturing sector organizing campaigns in her sample. With increased globalization and capital mobility, especially since the passage of the North America Free Trade Agreement (NAFTA), employer threats to close or move have become much more common features of organizing campaigns. The prevalence of employer threats to close or move rose from 29 percent during organizing campaigns in 1986–1987 to the 51 percent recorded for 1998–1999.

Though threats to close or move if the workers vote to form unions are illegal, employers have become adept at wording them instead as legal "predictions." Penalties for making threats, furthermore, are so trivial that they are not a deterrent.

Employer threats to close or move are strongly associated with election outcomes. Workers voted to form unions in 51 percent of representation election campaigns during which the employer did not threaten to close or move. By contrast, workers voted for a union in only 38 percent of elections when employers did threaten to close or move, and in only 24 percent of elections when employers threatened to move to another country. Similarly, workers won their unions at far higher rates in the least mobile industries, such as health care (60 percent), than in manufacturing (28 percent).

Bronfenbrenner finds that one out of every four employers illegally fires workers for union activity during organizing campaigns. On average, these employers fire four workers during a typical NLRB representation election campaign. Illegal discharges have a chilling effect on the entire workforce. Penalties for illegal discharge for union activity are miniscule, making it extremely cheap for an employer to illegally suppress the right to organize by firing union supporters.

In workplaces with high proportions of undocumented workers, during more than half of all NLRB representation election campaigns the employer threatens to call the Immigration and Naturalization Service if workers vote for a union.

This is just a partial sample of the tactics commonly used by U.S. employers to suppress workers' freedom to choose a union. Bronfenbrenner found that employers increasingly use large numbers of these tactics, often 10 of them or more, as building blocks of aggressive, comprehensive campaigns designed to frustrate workers who seek nothing more than to exercise their fundamental human right to to join together in a union. As Bronfenbrenner put it in earlier work done with Tom Juravich:

"...the overwhelming majority of employers use a broad range of aggressive legal and illegal anti-union tactics, including discharging workers for union activity, giving workers illegal wage increases and imposing unilateral changes in benefits, conducting one-on-one supervisor meetings with

employees, offering bribes, supporting anti-union committees, holding captive-audience meetings, establishing employee involvement programs, holding social events and mailing letters and distributing leaflets...most of these tactics are associated with significantly lower win rates...."

The probability of workers winning their union declines 7 percent for each additional anti-union tactic the employer uses "when the influence of election environment, bargaining unit demographics, and union tactics were controlled for."[5]

Bronfenbrenner's findings reinforce the conclusion that the suppression of workers' basic freedom to join a union and engage in collective bargaining has reached epidemic proportions in the United States.

During three-fourths of all NLRB representation election campaigns, employers hire experienced professional anti-union consultants—union-busters—to advise them on strategy and tactics and to coordinate their anti-union campaigns. There is an entire industry in the United States of anti-union consultants whose sole objective is to suppress the freedom of workers to join unions—that is, to snuff out a fundamental human right.[6] As labor historian John Logan describes it, this is an industry:

"...whose entire purpose is to enable employers to 'circumvent the intent' of the National Labor Relations Act (NLRA) through a stunning array of union-busting tactics, implemented before the union arrives and continuing until after it is defeated or decertified, tactics that are designed, at every step of the way, to undermine employees' right to select bargaining representatives free from management interference."

The world of anti-union consultants and lawyers is shadowy, and the size and scope of this pernicious industry is not well known. One academic who published a study in 1990 reported that employers were spending about $200 million per year on anti-union consultants, and a total of $1 billion annually for their campaigns to thwart their employees' freedom to form unions.[7] Another academic study published in 1995 had this to say about fees paid to anti-union lawyers to suppress workers' freedom to organize:

"One attorney interviewed for this study stated that the going rate for an experienced Atlanta attorney from a well-established, specialized labor law firm is in the $150–$250 per hour range, with rates for 'big name' attorneys being $300 per hour or more (in 1992)....

An inexpensive campaign in a small-medium size firm with one attorney may cost the employer $20,000 to $30,000 in legal fees, whereas an 'all out' campaign with several attorneys and all the latest campaign tools (e.g., slick videotapes, visits by prominent politicians or civil rights leaders) can easily exceed $100,000. Campaigns in a large, multiunion facility firm may involve a dozen or more attorneys and cost in excess of $1 million."[8]

If the figures from these two academic studies are accurate, updating for inflation the corresponding 2002 amounts would be more than $275 million per year paid to anti-union consultants, $1.4 billion spent yearly by employers on campaigns to thwart workers' organizing and attorneys' fees in excess of $1.2 million for a typical large firm's anti-union campaign.

John Logan describes the "stunning array" of tactics routinely deployed by anti-union consultants and the employers who hire them when workers try to form unions:[9]

■ Consultants advise employers to respond hard and fast to undermine workers' desire to form a union. "Prior to a certification election, the union is required to submit to the NLRB authorization cards signed by at least 30 percent of the eligible bargaining unit. Consultants encourage employers to act quickly and aggressively against card drives because 'no

company has ever lost an election that wasn't held.' The tougher you are at the outset, the consultants advise, the better....Before the union files the cards, consultants emphasize their critical importance, cautioning employees that signing an authorization card is akin to 'signing over power of attorney to the union' or 'signing a blank check.' One consultant distributed anti-union leaflets stating that authorization cards are 'legally binding contracts.... You are now obligated to abide by all the union's rules and regulations....You could be fined. If you refuse to pay the fine, the union can sue you to collect payment.' "

■ If workers have signed authorization cards but the union has not filed them yet with the NLRB, workers are told they should ask the union to give back their cards. To encourage this, workers frequently are given form letters, written by the consultant, that ask the union to return their signed cards. Similar letters are addressed to the NLRB, with envelopes provided.

■ "After the union has submitted the authorization cards to the NLRB, management stresses the lack of importance of the cards, reassuring employees that 'even if you signed a card, you can, and should, *vote no* in the forthcoming election. No one will know how you vote.'" Consultants advise management never to agree to the union's request to examine authorization cards. If, however, the union makes the mistake of presenting the employer with original signed cards, consultants tell the employer to "destroy them immediately because the union is required to supply the labor board with originals."

■ Consultants advise management how to skirt the employer's legal requirement, once signed authorization cards have been filed with the NLRB, to supply the union with employees' names and contact information. Employers are counseled to provide an "incomplete, outdated, and misleading list...at the last minute permitted by law."

■ Consultants counsel employers to utilize NLRB procedures to manipulate the definition of the bargaining unit to frustrate workers' efforts to form unions. "Consultants advise employers on how to object to both the size and make-up of the bargaining unit, how to pack units with anti-union employees, exclude pro-union employees and reduce the number of employees eligible for collective bargaining." This commonly used tactic reduces the proportion of pro-union workers who will be eligible to vote in the representation election, divides the workforce and introduces lengthy delays that frustrate workers' freedom to join unions.

■ A potent tactic frequently recommended by consultants is to claim that workers seeking a union perform supervisory duties and therefore lack the legally protected right to organize under the NLRA. Frequently the job duties of the workers in question have little if anything to do with supervision. "Consultants often attempt to persuade the labor board that union activists are, in fact, supervisors, thereby removing them from the union campaign and leading to possible charges that supervisors have unlawfully assisted an organizing drive. By reclassifying ordinary employees as supervisors... or as 'independent contractors'—none of whom are covered by the NLRA—employers can reduce significantly the number of employees who are eligible for unionization."

> *After the firings [of union supporters] everybody clammed up. They were afraid....Even now I'm shunned by people who used to be my friends there. They're afraid of losing their jobs.*
>
> —Jewel Parham, fired for attempting to organize a union at a Miami nursing home (interviewed by Human Rights Watch)

■ Intentional fostering of delay is another poison arrow in the consultants' quiver. "Consultants have...developed a host of complex legal maneuvers designed to delay NLRB proceedings. They stress that time is on the side of the employer and teach managers how to file frivolous complaints with the labor board....Delays extend the duration and effectiveness of the employer campaign and undermine employee confidence in the effectiveness of both the union and the labor board."

■ Because a frequent consultant tactic is to portray the union as an "outsider," consultants often go to great lengths to conceal their involvement in the campaign from the workers. Because another frequent tactic is to attack the "lavish" salaries of union officials, consultants go to great lengths to conceal the fees being paid to them by the employer. "In most counter-organizing campaigns, consultants work surreptitiously and employees rarely see the firm's chief campaign strategist. Indeed, in many campaigns, employees are blissfully unaware of the consultant's presence in the workplace. This allows the consultant to...avoid becoming the focus of union attacks, and sidestep the reporting requirements of the LMRDA [Labor-Management Reporting and Disclosure Act]."

■ Consultants advise employers to use front-line supervisors as the primary foot soldiers in the campaign to suppress workers' freedom to form a union. "Consultants gain the cooperation of supervisors by warning that unionization will be a personal calamity for them because a union contract will undermine their authority on the shop floor and advise that, as part of management, supervisors can be terminated for refusing to participate in anti-union campaigns....[10] Supervisors are made to believe their future and entire worth at the company is dependent on how many 'no' votes they deliver in the election."[11]

■ If supervisors are the foot soldiers, consultants are the generals. In a typical campaign to suppress workers' freedom of choice about union membership, consultants meet frequently with supervisors and use these meetings to orchestrate the employer's campaign. "Supervisors... serve as 'precinct captains' during counter-organizing campaigns, and consultants advise having a minimum of one supervisor to every 10–20 employees. Consultants hold regular meetings with individual supervisors to follow what is happening in every section of the facility. They require supervisors to talk daily to employees on a one-to-one basis and record their reactions to the conversations. These meetings become more frequent and consultant pressure on supervisors and supervisor pressure on employees intensifies as the campaign progresses.... Towards the end of the campaign, supervisors report to the consultants on a daily basis or even more frequently. Based on information obtained from the supervisors' reports, consultants compile detailed lists of pro-union, anti-union and undecided workers, thereby allowing managers and supervisors to target more effectively undecided workers."

■ Consultants frequently advise employers to discriminate against workers who favor forming a union, and since such discrimination is technically illegal they further advise employers how to cover it up. "Pro-union workers are given unfavorable evaluations, transferred to undesirable jobs and physically isolated within the workplace—moved to areas where they have little opportunity to influence undecided workers—while supervisors psychologically isolate activists by spreading malicious rumors designed to undermine their credibility."

■ "Vote no" committees have become an increasingly common weapon in the consultants' arsenal. Though such committees frequently appear to form spontaneously during

NLRB representation election campaigns, in reality their formation is often anything but spontaneous. "Consultants teach supervisors how to identify and organize anti-union employees into 'vote no' committees...to put pressure on undecided employees, even though direct management involvement in such groups is illegal."

■ Consultants advise employers, in detail, about the nature, content and timing of their communications to workers throughout the NLRB representation election campaign. "Consultants try to persuade employees that the company, not the union, is the sole source of credible information. Designed to create an atmosphere of fear, intimidation and confusion within the workplace, most employer communications stress familiar themes—strikes, violence, insecurity and disruption. Large consulting firms frequently boast of their extensive files of counter-organizing literature.... Consultants' anti-union propaganda includes predictions of violent strikes and permanent replacements, restrictive clauses of the union constitution, salaries of union officials, union dues, allegations of corruption, charges that employees will surrender their right to deal directly with management and warnings about the difficulty in decertifying unwanted unions."

> *They [tire iron- and baseball bat-wielding anti-union thugs] left me for dead. I surprised them. I'm still here and I'll continue to fight until we win.*
>
> —Mario Vidales, Las Vegas casino worker (testimony before the U.S. Senate Health, Education, Labor and Pensions Committee, June 20, 2002)

■ The sowing of misinformation, disinformation and fear is a common feature of consultant-designed employer communications strategy. "Consultants write or help employers to write anti-union letters signed by senior management that are delivered to employees on the job by supervisors....Consultant-scripted letters predict job losses, plant closures or relocations in the event of a union victory, and stress the general 'futility' of unionization—employers are not required to agree to the union's demands or even to sign a contract and management hostility will continue long after the election campaign. Consultants recommend that management organize 'going out of business' discussions—especially in manufacturing plants, where the threat of closure or relocation is greatest."

■ Employers and their consultants frequently predict or threaten that the workplace will close or move if the workers vote to form a union. Such "predictions" have become especially common since passage of the North American Free Trade Agreement (NAFTA), particularly in sectors of the economy like manufacturing that are especially susceptible to plant closings and relocations. "Management in 'mobile' sectors of the economy can easily get its relocation message across to employees without violating the law—for example, by placing maps of Mexico around the workplace."

■ Consultants use scare tactics to persuade workers that if they vote for a union, collective bargaining with their employer will be futile or worse. "The consultant warns employees about the potentially disastrous consequences of collective bargaining. If the union were to win, employees are told, the company would be forced to abandon its flexible attitude to work rules, negotiations would 'start from scratch, management would bargain 'hard' and employees may lose, rather than gain, as a result of the bargaining process." Even though strikes are extremely rare in the United States today, "employer communications frequently imply that strikes are all-but-inevitable if the union wins the election and warn that during strikes, employees lose not only wages but

health insurance, face the threat of permanent replacement and have no automatic right to unemployment insurance benefits."

■ The imagination of consultants knows few bounds in conveying a message of fear and intimidation to workers. "Consultants utilize gimmicks such as anti-union comic books, cartoons, competitions and 'vote no' T-shirts and buttons. Competitions typically include the 'Longest Union Strike Contest' (the correct answer being the greatest of three possible choices) or 'true or false' quizzes....Consultants try to schedule NLRB elections to coincide with paydays, holiday periods, immediately after annual pay increases or at other 'feel good' times. On payday elections, employees receive two paychecks—one for the amount of the monthly union dues, the other for their regular amount minus the dues money."

■ Unlike political elections, access to the voters is almost completely one-sided in union representation elections. "Aside from its superior financial resources, consultants stress that management's greatest advantage during an organizing campaign lies with its exclusive and unlimited access to employees at the workplace." Workers who favor forming unions, by contrast, are limited to contacting their colleagues outside the workplace or during nonworking time.

■ Intentional creation of turmoil and disruption in the workplace is another common consultant tactic during NLRB representation election campaigns. "Consultants deliberately create an atmosphere of divisiveness in the workplace, especially when the workforce consists of white-collar or professional employees. They believe that confrontation and disruption are more effective than fear and intimidation in turning professional employees, such as health care workers, against the union. In these campaigns, employer communications stress that unionization is incompatible with the employees' professional identity and that collective bargaining would create an 'adversarial' and hostile relationship between management and employees....The consultant's intention is to disrupt the customary functioning of the firm and create the impression that the union is responsible for this unwanted upheaval. But if the employees were to reject the union, they are assured, the atmosphere in the workplace would return to normal."[12]

■ Consultants advise employers on how to time their NLRB representation election campaigns for maximum impact. "The consultant times the employer campaign to ensure that anti-union sentiment peaks just before the election. Management organizes a final captive meeting 24 hours prior to the election (speeches during the final day are illegal), stressing that it recognizes that it has made mistakes, that it has 'heard' the employees' complaints and intends to introduce improvements and asks that it be given 'another chance.' "

■ The law is so weak and so poorly enforced that many consultants routinely advise employers to violate it. "The most ruthless consultants have advised their clients to take illegal actions to counteract union campaigns, especially if the outcome of the

I've thought about organizing in my new job, but I need to be guaranteed that I won't be fired. As long as there is no law to protect us better, I don't think it is likely that I will organize again.

—Mario Ramirez, fired for attempting to organize in a New York City sewing shop (interviewed by Human Rights Watch)

election is in any doubt. Some consultants tell employers to fire a few union activists, if possible, for 'just cause,' and teach them how to make these terminations appear legitimate. Consultants assure employers they are unlikely to get caught, that the penalties for violating the law are weak, that the NLRB takes months to reinstate sacked workers and that the 'chilling effect' created by sacking activists can stop a union campaign in its tracks, as employees' fear of reprisal for union activity immediately loses all of its vagueness."

■ Consultant advice to break the law goes beyond counseling employers to fire workers who support forming a union. "Consultants... tutor management and supervisors on how to engage in unlawful activities—such as surveillance, interrogation, unscheduled pay increases and threats of dismissal—without fear of facing ULP [unfair labor practice] charges."[13]

Workers' freedom to bargain collectively often is not respected even after they vote to form a union. Bronfenbrenner finds that a year after elections, unions were able to negotiate first contracts only 68 percent of the time, primarily because of challenges to the election results, refusals to bargain and other delaying tactics. As with union representation elections, experienced anti-union consultants often are retained to orchestrate employers' anti-first contract campaigns. According to Logan:

"During the mid-1980s, unions were able to negotiate first contracts after only two-thirds of representation victories; with continuing employer opposition, that figure fell to just over half three years after a union election victory. In negotiations involving consultant activity, unions were 2.5 times less likely to secure a first contract than in cases when consultants were not used....

"After a union victory, consultants continue to advise management on anti-union hiring practices. With the termination of pro-union employees, high labor turnover and the recruitment of carefully selected anti-union employees, the company can engineer a sea change in the union sentiment of the workforce. Consultants advise management on how to stall or prolong the bargaining process, almost indefinitely—'bargaining to the point of boredom,' in consultant parlance. Delays in bargaining allow more time for labor turnover, create employee dissatisfaction with the union and prevent the signing of a contract. Without a contract, the union is unable to improve working conditions, negotiate wage increases or represent the workers effectively with grievances; and by exhausting every conceivable legal maneuver, certain firms have successfully avoided signing contracts with certified unions for several decades."

The Union Advantage by the Numbers

Union workers' median weekly earnings: $718
Nonunion workers' median weekly earnings: $575
Union wage advantage: 25%

Union women's median weekly earnings: $643
Nonunion women's median weekly earnings: $494
Union wage advantage for women: 30%

African American union workers' median weekly earnings: $603
African American nonunion workers' median weekly earnings: $463
Union wage advantage for African Americans: 30%

Latino union workers' median weekly earnings: $578
Latino nonunion workers' median weekly earnings: $398
Union wage advantage for Latinos: 45%

Union workers with guaranteed (defined-benefit) pension: 70%
Nonunion workers with guaranteed (defined-benefit) pension: 16%
Union pension advantage: 54 percentage points

Union workers who get health benefits: 73%
Nonunion workers who get health benefits: 51%
Union health benefits advantage: 22 percentage points

Union workers who get short-term disability coverage: 66%
Nonunion workers who get short-term disability coverage: 33%
Union disability coverage advantage: 33 percentage points

Union workers who get life insurance coverage: 78%
Nonunion workers who get life insurance coverage: 53%
Union life insurance coverage advantage: 25 percentage points

Sources: U.S. Department of Labor, Employment and Earnings, January 2002; Bureau of Labor Statistics, Employee Benefits in Private Industry, 1999.

25

The High Cost of Suppressing Workers' Freedom to Form a Union

EMPLOYER INTERFERENCE has a devastating impact on workers' freedom to choose a union. According to a paper by Phil Comstock and Maier Fox, 36 percent of "no" voters in union representation elections explain their vote as a response to employer pressure, and 86 percent of those mention fear of job loss specifically.[14]

According to recent updates of a major survey by Richard Freeman and Joel Rogers, more than 42 million nonsupervisory, nonunion employees want to join a union. Freeman and Rogers find that the "natural" rate of union membership in the mid-1990s—if there were a "free market" for union representation—would have been 44 percent, the highest in U.S. history. Freeman and Rogers also find that management's anti-union wars on workers are the principal reason that workers who say they want a union do not have one.[15]

The consequences of failing to protect the freedom of workers to organize go way beyond the loss of wages, benefits and respect on the job, serious though these are. They also include the silencing of workers' voices in the political process and the weakening of the counterweight against corporate power that is so essential to the preservation of democracy.

Unions raise wages for all workers, as the fact sheet "The Union Advantage by the Numbers" (see page 12) makes clear—but they raise them the most for members of excluded and disadvantaged groups.[16] Overall, union members earn 25 percent more per week than nonunion workers. The union difference is even greater for members of traditionally excluded groups. Female union members earn 30 percent more per week than nonunion female workers, and the union wage advantage is also greater for African Americans (30 percent) and Latinos (45 percent).

The freedom to choose a union is especially important to low-wage workers. Millions of nonunion workers toil at jobs paying wages so low that they and their families live in poverty, despite working full-time and year-round. As the following chart shows, union membership is the ticket out of poverty for workers in many low-wage occupations. For example, union janitors earn 39 percent more than nonunion janitors, union farm workers earn 36 percent more than nonunion farm workers and union cashiers earn 37 percent more than nonunion cashiers.[17]

How Unions Bring Low-Wage Workers Out of Poverty

Pay of union and nonunion workers in selected occupations—2000

Selected Low-Wage Occupation	Average Hourly Wage Union	Average Hourly Wage Nonunion	Yearly Wage Union	Yearly Wage Nonunion	Union Difference	Union Difference
Cashiers	$10.04	$7.35	$20,883	$15,288	37%	$5,595
Library clerks	$11.23	$8.43	$23,358	$17,534	33%	$5,824
Other protective service occupations	$13.00	$8.25	$27,040	$17,160	58%	$9,880
Cooks, including short order	$9.93	$8.02	$20,654	$16,682	24%	$3,973
Kitchen workers, food preparation	$8.66	$7.30	$18,013	$15,184	19%	$2,829
Waiters'/ waitresses' assistants	$10.63	$8.05	$22,110	$16,744	32%	$5,366
Misc. food preparation occupations	$9.60	$7.06	$19,968	$14,685	36%	$5,283
Maids and housemen	$9.86	$7.76	$20,509	$16,141	27%	$4,368
Janitors and cleaners	$12.12	$8.69	$25,210	$18,075	39%	$7,134
Child care, except private household	$9.46	$7.69	$19,677	$15,995	23%	$3,682
Farm workers	$10.51	$7.71	$21,861	$16,037	36%	$5,824
Textile sewing machine operators	$9.80	$8.24	$20,384	$17,139	19%	$3,245
Graders and sorters, except agriculture	$12.30	$8.13	$25,584	$16,910	51%	$8,674
Stock handlers and baggers	$9.59	$7.80	$19,947	$16,224	23%	$3,723
Hand packers and packagers	$10.27	$8.12	$21,362	$16,890	26%	$4,472
			Hourly	**Annual**		
Poverty Threshold for Family of Four*			$8.40*	$17,472		

*Assumes full-time, full-year work

Sources: U.S. Census; *Union Membership and Earnings Data Book*, Barry T. Hirsch and David A. Macpherson, Bureau of National Affairs, 2001.

Not surprisingly, then, suppressing the freedom to form a union has contributed to one of the nation's most serious social and economic ills, namely increased inequality in the distribution of income.[18] Suppressing the freedom to choose a union also has contributed to declining medical insurance coverage[19] and declining pension coverage.[20] Seventy-three percent of union workers had health insurance benefits in 1999 (latest figures), compared with only 51 percent of nonunion workers. Seventy percent of union members had guaranteed or defined-benefit pensions in 1999, as against only 16 percent of nonunion workers. There are also large union/nonunion gaps in access to other important job-related benefits, such as disability benefits and life insurance.

Justice in the workplace suffers from the denial of workers' freedom to form a union. In virtually all unionized workplaces, workers only can be discharged for "just cause."[21] By contrast, in virtually all nonunion workplaces in the private sector, workers are "employees at will" who can be discharged for almost any reason, good or bad—or for no reason—by their employer.

All workers, union and nonunion alike, have suffered from suppression of the freedom to form a union—because access to benefits and protections under a variety of existing laws depends on union membership and a strong union movement.[22] Examples include workplace health and safety, unemployment insurance and workers' compensation. With the strength and expertise of their union backing them up, research shows that union members are better able than nonunion workers to access the protections of these and other safety net programs.

Further evidence of how and why strong unions are important to all workers, union and nonunion alike—and indeed all of society—can be found in the fact sheet, "The Benefits of Strong Unions" (see page 21). This fact sheet compares the 10 states where unions are strongest, as measured by union density (the proportion of the workforce that is unionized), with the 10 states where unions are weakest. According to this fact sheet, wages and incomes are higher in states where unions are strong than in states where unions are weak, for all workers—not just for union members. The pay gap between women and men is smaller in states where unions are stronger, for all workers—not just for union members. Such safety net programs as workers' compensation and unemployment insurance are better in states where unions are strong than in states where unions are weak, for all workers—not just for union members. Health care is better in the stronger union states: a smaller percentage of people lack medical insurance, there are more physicians in relation to population, infant mortality rates are lower and life expectancy is higher. The rate of poverty is lower in the states where unions are stronger, and by various measures education is better, including the percentage of the population that has graduated from high school. Crime rates are lower in the strong union states.

Of particular importance is the result that voter participation is higher in states where unions are stronger. This finding is consistent with political science research, according to which the decline in unionization is a major cause of the long-term decline in voter participation in the United States.[23] Thus unions hold an important key to unlocking greater civic participation by working Americans.

Even American employers pay a heavy price for systematically denying workers' rights to organize a union, and for the incredibly conflict-ridden and acrimonious path that they—and the anti-union consultants they hire—have made virtually the only path to union recognition. The high-performance work organization methods that may hold the key to future economic success work best in workplaces where the freedom to form a union is respected.[24] As Karl Klare puts it, "wise managers know…(that) when employees feel secure, fairly treated, and welcomed as partners with a genuine voice in the enterprise, they contribute enormously to productivity, product innovation, and flexible adaptation to changing markets."[25]

Everyone has the right to form and to join trade unions for the protection of his interests.
—Universal Declaration of Human Rights, U.N. General Assembly (1948)

Workers...without distinction whatsoever shall have the right to establish and...join organizations of their own choosing.
—International Labor Organization (a United Nations agency), Convention No. 87

Workers shall enjoy adequate protection against acts of anti-union discrimination.
—International Labor Organization, Convention No. 98

All member countries have an obligation...to respect, to promote, and to realize the principles concerning the fundamental rights which are the subject of those Conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining....
—International Labor Organization, 1998 Declaration on Fundamental Principles and Rights at Work (adopted with unanimous support of all U.S. delegates, including employer representatives)

Everyone shall have the right to freedom of association with others, including the right to form and join trade unions.
—International Covenant on Civil and Political Rights (ratified by the United States in 1992)

The Church fully supports the right of workers to form unions...to secure their rights to fair wages and working conditions....No one may deny the right to organize without attacking human dignity.
—National Conference of Catholic Bishops (1986 pastoral letter on Catholic social teaching and the U.S. economy)

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other mutual aid or protection.
—National Labor Relations Act (passed by Congress in 1935)

The reality of NLRA enforcement falls far short of its goals. Many workers who try to form and join trade unions...are spied on, harassed, pressured, threatened, suspended, fired, deported or otherwise victimized...labor law enforcement efforts often fail to deter unlawful conduct...enervating delays and weak remedies invite continued violations. Any employer intent on resisting workers' self-organization can drag out legal proceedings for years.
—Human Rights Watch (August 2000)

29

Freedom to Choose a Union is a Fundamental Human Right

NOT ONLY ARE AMERICAN WORKERS and all of society paying a heavy price, but the suppression of workers' freedom to form a union constitutes a serious violation of human rights. Many people, including many trade unionists, are surprised initially to learn that the freedom to form a union is a fundamental human right. Yet support for this proposition is overwhelming, both from secular and religious sources.[26] As the 1948 *Universal Declaration of Human Rights* makes clear, "Everyone has the right to form and to join trade unions for the protection of his interests." Particularly noteworthy is the International Labor Organization's 1998 *Declaration on Fundamental Principles and Rights at Work*. This declaration was adopted at the instigation of the United States, and enjoyed unanimous support by all U.S. delegates to the ILO, including the employer representatives. According to the 1998 *Declaration*, all ILO member countries have an obligation "to respect, to promote, and to realize...fundamental rights (including)... freedom of association and the effective recognition of the right to collective bargaining."

Why Freedom to Choose a Union is a Fundamental Human Right

The notion that freedom to form a union and bargain collectively is a fundamental human right follows directly from the concept that every human being has value and should be treated with respect and dignity. If human beings have value and should be treated with respect and dignity, then they are entitled to participate in important decisions affecting their lives, such as determination of the terms and conditions of their employment. Denying any person the right to participate in these decisions is an affront to human dignity.

So-called "individual bargaining," touted by some apologists of the suppression of workers' rights as an acceptable alternative to collective bargaining, fails miserably in human rights terms.[27] In the modern workplace, most terms and conditions of employment are set as a matter of policy for the entire workforce. It is hard to imagine, for example, how there could be individual bargaining over workplace health and safety policies. Even pay is usually set in accordance with workplace-wide job evaluation policies. For most workers in most workplaces, therefore, the only practical alternatives are employer fiat or collective bargaining. The difference between these two alternatives in human rights terms could not be clearer. In the words of Karl Klare, "only autonomous organization enables workers to protect their interests, achieve dignity and respect, and participate effectively in decisions affecting their lives."[28]

Consequences of Freedom to Choose a Union Being a Human Right

The consequences of workers' freedom to form a union and bargain collectively being a fundamental human right are far-reaching and profound. Calling something a fundamental human right "means that it is a moral right that prevails over considerations of convenience or efficiency, and gives way only to other moral rights."[29] If something is a fundamental human right, according to Hoyt Wheeler, "then it trumps mere economic interests of employers or the public."

If workers' freedom to form a union and bargain collectively is a fundamental human right, suppressing that right is morally equivalent to suppressing other such basic freedoms as the freedom of religion or the right to be free from discrimination based on race, gender or sexual orientation. If freedom to choose a union and bargain collectively is a fundamental human right, then it is a right "that all governments have a responsibility to uphold and promote, and which all individuals and employers have a responsibility to respect."[30]

30

Overcoming the Crisis

WORKERS FORM TRADE UNIONs to aggregate their power and deal collectively with employers. If you ever worked for a living, you know about the inequality of power between employers and employees. Constitutional protections that Americans hold dear often stop at the workplace door. Inside that door, the employer's word is law unless there is a countervailing force. The employer hires and fires, and apart from governmental regulations that are relatively minimal in the United States, the employer sets the terms and conditions of employment. Employees can quit, but often this imposes heavy personal costs and carries no guarantee that the situation will be better at the next place of employment.

When workers have strong unions, employers no longer set the terms and conditions of employment unilaterally. Instead, these critical decisions are made via collective bargaining between workers' democratically elected union representatives and employers. Workplace democracy replaces workplace autocracy.

As we have seen, denial of workers' freedom to join a union has reached epidemic proportions, imposing huge costs on workers and on all of society, and harming the quality of life for the vast majority of Americans. Solutions to this crisis are urgently needed and long overdue. The U.S. government must meet its obligation to protect workers' fundamental human right to join together in a union and bargain collectively.

This will require changing the law to recognize that the right of workers to form unions is a fundamental human right analogous to freedom of speech, freedom of religion and the right to be free from racial or sexual discrimination—and deserving of the same kind of protection as these other fundamental rights.

The law must prevent employers from suppressing workers' freedom to form a union and bargain collectively. To achieve this goal, employers must be taken out of the decision making process about whether or not workers want to join together in a union. As Karl Klare explains it, "the employer has no rightful claim in moral or democratic theory to participate in and contest an election among employees as to how they wish to deal with the employer. The employer has no more right to do so than the Democrats have to participate in selecting the Republican candidates they will oppose in political elections (or vice versa)."[31]

Workers who choose to be represented by a union must have a meaningful right to collective bargaining that ultimately results in a contract on fair terms.

Employers who break the law must be held accountable, with punishment that "fits the crime" and is severe enough to deter violations.

Protections of the law must be extended to *all* workers, regardless of their placement in such easily manipulated contingent workforce categories as "independent contractor," "supervisor," "temporary" or "seasonal," consistent with our recognition of changing employment relations in the new economy.

These and other needed changes in the law will not come quickly or easily, but without them American workers, the economy and our society will continue to pay a very heavy price. This price is measured, in part, by the suppression of wages, enormous and widening gaps in the distribution of income and wealth, weakening of the safety net, decline in civic and political participation, unchecked corporate power and harm to the quality of life. Even more serious is the affront to human dignity.

Footnotes

[1] Human Rights Watch, *Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards*, Washington, D.C., 2000. www.hrw.org/reports/2000/uslabor/.

[2] Kenneth Roth, "Workers' Rights in the United States," Industrial Relations Research Association, 2001, *Perspectives on Work*, V. 5, No. 1, pp. 19–20.

[3] Kenneth Roth, "Workers' Rights in the United States," Industrial Relations Research Association, 2001, *Perspectives on Work*, V. 5, No. 1, pp. 19–20.

[4] Dr. Kate Bronfenbrenner, "Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages and Union Organizing," *U.S. Trade Deficit Review Commission*, 2000. To access the report on the Web, go to www.ustdrc.gov/research and download the file bronfenbrenner.pdf. Her findings are summarized in the attached fact sheet "Voice@Work by the Numbers."

[5] Kate Bronfenbrenner and Tom Juravich, "It Takes More Than House Calls: Organizing to Win with a Comprehensive Union-Building Strategy," in Kate Bronfenbrenner, et. al. (eds.), *Organizing to Win: New Research on Union Strategies*, Cornell Press, 1998, p. 32; and Table 1.2, p. 30.

[6] For an excellent account of the activities of these anti-union consultants, see John Logan, "Consultants, Lawyers and the 'Union Free' Movement in the USA, 1970–2000," *Industrial Relations Journal*, forthcoming.

[7] John Lawler, *Unionization and Deunionization*, University of South Carolina Press, 1990.

[8] Bruce E. Kaufman and Paula E. Stephan, "The Role of Management Attorneys in Union Organizing Campaigns," *Journal of Labor Research*, Vol. XVI, No. 4, Fall 1995, pp. 439–454.

[9] See John Logan, op. cit.

[10] Other researchers have found this is more than an idle threat. According to Richard B. Freeman and Morris Kleiner, "managers whose establishments faced or lost organizing drives were more likely than other managers to suffer setbacks to their careers (firing, reassignment, retraining or failure to be promoted)."Richard B. Freeman and Morris Kleiner, "Employer Behavior in the Face of Union Organizing Drives," *Industrial and Labor Relations Review*, Vol. 43, No. 4 (April 1990), pp. 351–365.

[11] Other scholars also stress the potency of anti-union campaigning by supervisors. For example, according to Richard B. Freeman and Morris Kleiner, "the most effective 'hard-nosed' company tactic was to have supervisors campaign intensely against the union." See Richard B. Freeman and Morris Kleiner, op.cit., p. 361. According to the management attorneys interviewed by Kaufman and Stephans, "effectively marshaling the cooperation and support of the supervisors was the single most critical ingredient to defeating the union." See Bruce E. Kaufman and Paula E. Stephan, "The Role of Management Attorneys in Union Organizing Campaigns," *Journal of Labor Research*, Vol. XVI, No. 4, Fall 1995, p. 447.

[12] Support for this point can be found in Larry Cohen and Richard W. Hurd, "Fear, Conflict and Union Organizing," in Kate Bronfenbrenner, et. al. (eds.), *Organizing to Win: New Research on Union Strategies*, Cornell Press, 1998, pp. 181–196.

[13] See also Sheldon Friedman, Richard W. Hurd, Rudolph A. Oswald and Ronald L. Seeber (eds.), *Restoring the Promise of American Labor Law*, ILR Press, 1994. The editors noted in their introduction to this volume: "Management consultants have become so bold and so contemptuous of the weakness of the labor law that repeat violations are common, even after their clients are found guilty of unfair labor practices and required to post 'cease and desist' orders. In one particularly egregious but telling case, a union-busting consultant was ordered to post a cease and desist order seven years after a representation election was found to be tainted by his extensive unfair labor practices; he posted the notice on the seat of his employees' toilet."

[14] Phil Comstock and Maier B. Fox, "Employer Tactics and Labor Law Reform," in Sheldon Friedman, et. al. (eds.), *Restoring the Promise of American Labor Law*, ILR Press, 1994, pp. 90–109. Comstock and Fox also found that aggressive anti-union tactics are used especially often, and with the most powerful impact, to frustrate organizing in workplaces where workers want and need unions the most: in firms where job satisfaction is low, the desire for unionization is high and there are high concentrations of women, minority or less-skilled workers. Freeman and Kleiner also find that employers are most likely to strongly resist unionization with an all-out anti-union campaign where wages are low, working conditions are bad and supervisory practices are poor. In such cases, firms are more likely to mobilize supervisors and more likely to commit unfair labor practices as part of their anti-union campaigns. Other things being equal, committing unfair labor practices improves the chances that the employer will win the campaign. See Richard B. Freeman and Morris Kleiner, "Employer Behavior in the Face of Union Organizing Drives," *Industrial and Labor Relations Review*, Vol. 43, No. 4 (April 1990), pp. 351–365.

[15] Richard Freeman and Joel Rogers, *What Workers Want*, Cornell Press. In "A Proposal to American Labor" in *The Nation*, June 24, 2002, in view of the growth in the workforce since their survey, Freeman and Rogers write that "applying our results to today's workforce, about 42 million workers want an organization with elected representatives and arbitration of disputes with management"—in other words, a union. Other scholars have reached a similar

conclusion regarding the importance of employer opposition in suppressing workers' freedom to organize unions. See, for example, Paul Weiler, "Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA," *Harvard Law Review*, Vol. 96, No. 8 (June 1983), pp. 1769–1827. Weiler concludes that the "persistent decline in union membership in the United States is to a considerable extent attributable to the stubborn and often coercive resistance by employers that is fostered by the representation process under the NLRA." (p. 1769). See also Richard B. Freeman and Morris Kleiner, "Employer Behavior in the Face of Union Organizing Drives," *Industrial and Labor Relations Review*, Vol. 43, No. 4 (April 1990), pp. 351–365. They "find that management opposition, reflected particularly in the actions of supervisors, is a key component in union inability to organize workers in the United States." (p. 364). See also Gary N. Chaison and Joseph B. Rose, "The Macrodeterminants of Union Growth and Decline," in *The State of the Unions*, edited by George B. Strauss, Daniel G. Gallagher and Jack Fiorto, pp. 1–47, Industrial Relations Research Association. Chaison and Rose point to industrial relations policy and employer opposition as the most important explanations for union density decline. For a more recent analysis of the impact of employer opposition, see Morris Kleiner, "Intensity of Management Resistance: Understanding the Decline of Unionization in the Private Sector," *Journal of Labor Research*, V. XXII, No. 3, Summer 2001, pp. 519–540.

16 Detailed information about the impact of unions on workers' wages and benefits can be found in the AFL-CIO booklet *The Union Difference*, available online at www.aflcio.org/uniondifference/index.htm.

17 For an excellent study of the impact of unionization on cashiers and other workers in the retail food industry, especially women and single mothers, see Institute for Women's Policy Research, "The Benefits of Unionization for Workers in the Retail Food Industry," IWPR Publication No. C351, February 2002.

18 David Card, "The Effect of Unions on the Structure of Wages: A Longitudinal Analysis." *Econometrica*, vol. 64, no. 4 (July 1996): p. 957–979, and "Falling Union Membership and Rising Wage Inequality," National Bureau of Economic Research, Working Paper 6520, April 1998.

19 Thomas C. Buchmeuller, John DiNardo, and Robert G. Valletta, "Union Effects on Health Insurance Provision and Coverage in the United States." Working paper, December 1999.

20 William J. Wiatrowski, "Factors Affecting Retirement Income." *Monthly Labor Review* (March 1993): p. 25–35, and "Employee Benefits for Union and Nonunion Workers," *Monthly Labor Review* (February 1994): p. 34–38.

21 See *Basic Patterns in Union Contracts*, p. 37, Bureau of National Affairs, 14th ed., 1995.

22 See, for example, Barry T. Hirsch, David A. Macpherson and J. Michael Dumond, "Workers' Compensation Recipiency in Union and Nonunion Workplaces," *Industrial Labor Relations Review*, vol. 50, no. 2, (January 1997): p. 213–236; David Weil, "Enforcing OSHA: The Role of Labor Unions," *Industrial Relations*, vol. 30, no. 1 (Winter 1991): p. 2036; and John W. Budd and Brian P. McCall, "The Effect of Unions on the Receipt of Unemployment Insurance Benefits," *Industrial and Labor Relations Review*, vol. 50, no. 3 (April 1997): p. 478–492.

23 See Benjamin Radcliff, "Organized Labor and Electoral Participation in American National Elections," *Journal of Labor Research*, Spring 2001.

24 Sandra E. Black and Lisa M. Lynch, "How to Compete: The Impact of Workplace Practices and Information Technology on Productivity," NBER Working Paper, no. W6120, August 1997.

25 Karl Klare, "The Right to Organize: A Basic Civil Right," unpublished paper, 2002, p. 1.

26 For a sampling of these sources, see the attached fact sheet "The Right to Organize is a Fundamental Human Right."

27 See Roy Adams, "Labor Rights are Human Rights," *Working USA*, July/August 1999.

28 Karl Klare, "The Right to Organize: A Basic Civil Right," unpublished paper, 2002, p. 1.

29 Hoyt Wheeler, "Viewpoint: Collective Bargaining is a Fundamental Human Right," *Industrial Relations*, July 2000.

30 Roy Adams and Sheldon Friedman, "The Emerging International Consensus on Human Rights in Employment," *Perspectives on Work*, Vol. 2, no. 2, 1998.

31 Karl Klare, "The Right to Organize: A Basic Civil Right," unpublished paper, 2002, p. 7.

The Benefits of Strong Unions

Wages and Incomes	10 States Where Unions are Strongest	10 States Where Unions are Weakest
Average hourly earnings, 2000	$15.61	$12.49
Average annual pay, 2000	$36,705	$29,804
Average household income, 2000[i]	$46,378	$38,854
Per capita disposable income, 1999	$25,767	$21,785

Gender Pay Gap	10 States Where Unions are Strongest	10 States Where Unions are Weakest
Women's earnings as a percent of men's[ii]	77%	74%

Worker Safety Net Programs	10 States Where Unions are Strongest	10 States Where Unions are Weakest
Unemployment insurance—maximum weekly benefit, 2002[iii]	$379	$296
Workers' compensation—maximum weekly benefit, 2001[iv]	$675	$486
Number of states with minimum wage law, 2001	All 10 states	Six states
Number of states with minimum wage higher than federal minimum, 2001	Four states	None

Health Care	10 States Where Unions are Strongest	10 States Where Unions are Weakest
Percent of population without medical insurance, 1999-2000[v]	11.8%	15.1%
Physicians per 100,000 population, 1999	297	235
Percent of mothers receiving late or no prenatal care, 1998	3.6%	4.3%
Low-birthweight births as a percent of all births, 1999	7.2%	8%

Health Care (contd.)	**10 States Where Unions are Strongest**	**10 States Where Unions are Weakest**
Infant mortality rate, 1998[vi]	6.9%	8.1%
Infant mortality rate—whites, 1998	5.7%	6.4%
Infant mortality rate—blacks, 1998	9.9%	12.1%
Age-adjusted deaths per 100,000 population, 1998	441	495

Poverty	**10 States Where Unions are Strongest**	**10 States Where Unions are Weakest**
Percent of population in poverty, 1999	10.6%	13.3%
Percent of children in poverty, 1999	12.8%	15.3%
Percent of seniors in poverty, 1999	8.8%	10.9%
Percent of families in poverty, 1999	7.8%	9.1%

Economy	**10 States Where Unions are Strongest**	**10 States Where Unions are Weakest**
Gross state product per capita, 1999	$34,559	$28,521

Education	**10 States Where Unions are Strongest**	**10 States Where Unions are Weakest**
Public education spending per pupil, 2000-2001	$8,265	$5,774
Average teacher salary, 1999	$44,699	$33,744
Percent of population graduated from high school, 2000	87	84

Civic Participation	**10 States Where Unions are Strongest**	**10 States Where Unions are Weakest**
Percent of eligible voters who voted in presidential election, 2000[vii]	55.2%	49.2%

Public Safety	**10 States Where Unions are Strongest**	**10 States Where Unions are Weakest**
Crimes per 100,000 population—1999	4,114	4,694
Violent crimes per 100,000 population—1999	443	489
Murders per 100,000 population—1999	4.8	5.7

10 States with Highest Union Density	***10 States with Lowest Union Density***
New York	North Carolina
Hawaii	South Carolina
Alaska	Virginia
Michigan	Texas
New Jersey	Mississippi
Washington	Arizona
Illinois	South Dakota
Rhode Island	Arkansas
Ohio	Florida
Minnesota	Utah

Sources:

[i] Income of Households by State in 2000 from US Census Bureau.

[ii] Ratio of median annual earnings for women employed full-time and full-year in 1999 to median annual earnings of similarly employed men. U.S. Census Bureau, Census 2000, *Profile of Selected Economic Statistics*.

[iii] Unemployment insurance benefits in 2002 from Ensellem, Maurice, and Jessica Goldberg, Rick McHugh, Wendell Primius, Rebecca Smith and Jeffrey Wenger. "Failing the Unemployed: A state by state examination of unemployment insurance systems," March 12, 2002, Economic Policy Institute, Center on Budget and Policy Priorities, and National Employment Law Project.

[iv] Workers' compensation benefits in 2001 from AFL-CIO, "Workers' Compensation and Unemployment Insurance Benefits Under State Law, January 1, 2001."

[v] Percent of Uninsured, 1999–2000 from Kaiser Family Foundation Health Facts Online: 50 State Comparisons: Population Distribution by Insurance Status, 1999–2000.

[vi] Infant deaths within first year of life per 1,000 live births.

[vii] Voter turnout in 2000 from www.fairvote.org/turnout/preturnstate.htm.

All other data from O'Leary Morgan, Kathleen, and Scott Morgan, *State Rankings 2001*. Morgan Quitno Press, 2001.

Additional Resources

Readings

Human Rights Watch report: in September 2000, Human Rights Watch, one of the world's leading human rights organizations, published a major report on the status of workers' freedom to form a union, bargain collectively and strike in the United States. The report, entitled *Unfair Advantage: Workers' Freedom of Association in the United States Under International Human Rights Standards*, is available online at www.hrw.org/reports/2000/uslabor/.

Symposium on *Unfair Advantage*, edited by Sheldon Friedman and Stephen Wood, *British Journal of Industrial Relations*, December 2001 and March 2001. Contributions by Hoyt Wheeler, Jack Getman, David Brody, Lance Compa, Roy Adams and others.

Kate Bronfenbrenner, "Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages and Union Organizing," report for the U.S. Trade Deficit Review Commission, September 2000. Online at www.ustdrc.gov/research/bronfenbrenner.pdf .

James A. Gross, "A Human Rights Perspective on U.S. Labor Relations Law: A Violation of Freedom of Association," *Employee Rights and Employment Policy Journal*, 1999, Vol. 3, no. 1, pp. 65-103

John J. Sweeney, Remarks to the Labor and Working Class History Association, Washington, D.C. April 12, 2002. Online at www.aflcio.org/publ/speech2002/sp0413a.htm.

Hoyt Wheeler, "Viewpoint: Collective Bargaining is a Fundamental Human Right," *Industrial Relations*, July 2000.

Roy Adams, "Labor Rights are Human Rights," *Working USA*, July/August 1999.

Andy Levin, "What Thirty Million Workers Want But Can't Have," University of Pennsylvania *Journal of Labor and Employment Law*, Spring 2001.

Sheldon Friedman, "Ensuring Respect for Human Rights in Employment," Industrial Relations Research Association presidential address, January 2001. Online at www.irra.uiuc.edu/meetings/NO-2001/PresAddr_2001.PDF.

Martin Jay Levitt and Terry Conrow, *Confessions of a Union Buster*, New York, Crown Press, 1993.

Web Links

Voice@Work Month:
www.aflcio.org/voiceatwork/month.htm

Common Sense Economics:
www.aflcio.org/cse/index.htm

Society for the Promotion of Human Rights in Employment (SPHRE): http://www.mericleinc.com/Sphre/

Jobs with Justice, www.jwj.org. See section of their website that explains Workers' Rights Boards.

National Interfaith Committee for Worker Justice, www.nicwj.org/index.html

The CHAIRMAN. Mr. Roth.

STATEMENT OF KENNETH ROTH, EXECUTIVE DIRECTOR, HUMAN RIGHTS WATCH, NEW YORK, NY

Mr. ROTH. Thank you very much, Chairman Kennedy, for holding this important hearing today, which represents much needed attention to a serious but neglected violation of human rights in this country. My thanks also as well to Senator Wellstone for your leadership on this matter, and to the other Members of the Senate who, in their presence today, recognize the importance of the matters we are discussing.

Let me begin, if I could, with a word about Human Rights Watch. We are neither pro-union nor pro-management. Our work on labor rights stems exclusively from our commitment to the freedom of association and the freedom of individual choice for individual workers. This is a right that we champion around the world. Despite the many freedoms that Americans enjoy, it is a right that here at home is severely in jeopardy.

Human Rights Watch has conducted the first comprehensive analysis of workers' freedom of association in this country under international human rights norms. We published our findings in this 213-page report entitled "Unfair Advantage." The methodology that we followed in investigating this report sought to paint a broad picture of the state of workers' rights in this country. We examined the issue in different States and regions. We looked at different sectors of the economy: services, industry, transport, high-tech. We looked at different types of workers: high-skill and low-skill, blue-collar and white-collar, resident and migrant, women and men, people of all races, ethnicities, and national origins.

Our study included some of the most vulnerable American workers and also many workers who work for employers that are stable and profitable. We included factory workers, shipyard workers, food-processing workers, nursing home workers, computer programmers, and many more.

Human Rights Watch found widespread violation of the right to form labor unions, to bargain collectively across every region, industry, and employment status that we looked at.

We found deficiencies in both law and in practice. Our findings can be grouped roughly in six categories, which I will briefly review in my testimony now.

First, U.S. law allows employers to intimidate and coerce workers when they try to organize. Although it is illegal, each year thousands of workers in the United States are fired from their jobs or suffer other reprisals when they try to organize unions. Indeed, we have gone from hundreds of dismissals on these grounds per year in the 1950s to 23,000 dismissals in 1998. The problem is getting worse, not better.

Workers are spied on, harassed, pressured, threatened, suspended, fired, deported, and otherwise victimized by employers in reprisal for the simple fact that they attempt to exercise their right to freedom of association.

The law allows them to be held in captive-audience meetings in which employers berate them about the dangers of joining a union while unions themselves are denied comparable access to workers.

Though employers cannot formally threaten workers, they have become extraordinarily skilled at predicting terrible consequences should unions organize—should laborers organize, subtly, that is, threatening these consequences to occur. Undocumented workers are especially vulnerable because many employers threaten to turn them in to the INS.

Second, we found that the remedies and penalties for violations of labor rights are woefully inadequate. For example, an employee fired for union activity usually receives a reinstatement order and back pay, less the money that he or she earned on other jobs in the interim. As has been noted by Chairman Kennedy and others, many employers today simply look at these modest penalties as a routine cost of doing business. Indeed, the problem is now much, much worse since the Supreme Court's *Hoffman Plastics* decision, which denies any back pay to an undocumented worker. It represents a misguided decision by the Supreme Court to value legislation governing illegal immigration more highly than legislation protecting the rights of workers, a decision that Congress needs to reverse.

Third, we found that the system allows major delays in enforcing rights. Employers can continue to appeal rulings for years and years before they are finally resolved. There is little added financial penalty because, as noted, most workers have to find another job and their new salary is then offset against any back pay award that they might later be granted. The substantial delays allow employers to sap the spirit of workers and to kill the drive to unionize.

Fourth, we found a major problem that even if workers succeed in creating a union, bad-faith or so-called surface negotiations on the part of an employer lead to an almost useless remedy, an order simply to return to the bargaining table and continue the same practices. New solutions such as first contract arbitration are clearly needed.

Fifth, we found that the right to strike is undermined when employers are allowed to permanently replace workers, as they are entitled to do under U.S. law for any strike that occurs for economic reasons. That power effectively nullifies the right to strike as defined by the International Labor Organization. Allowing permanent replacement workers crosses the line balancing the rights of employers and workers and tips the so-called balance of pain decidedly in favor of the employers.

Finally, we found that too many workers are excluded altogether from the limited protections that U.S. labor laws currently afford. Farm workers, household domestic workers, low-level supervisors, contingent workers, and so-called independent contractors who are really dependent on a single employer—all of these categories of workers are denied basic rights under the NLRA. There is clearly a need to update the law to meet the new employment categories of the new economy, such as temporary workers and independent contractors.

Taken together, these abuses we found constitute a huge obstacle to workers' choices to try to form a labor union. They, of course, are not insurmountable. Unions sometimes succeed. Workers sometimes get their choice. But they have created an unfair playing

field tilted sharply against the free choice of workers. There is an urgent need for Congress to take action to restore fairness in our labor relations and to improve respect for this basic right of our Nation's workers.

Thank you very much.

The CHAIRMAN. Thank you very much.

[The prepared statement of Mr. Roth follows:]

PREPARED STATEMENT OF KENNETH ROTH, EXECUTIVE DIRECTOR, HUMAN RIGHTS WATCH

INTRODUCTION

Nico Valenzuela and his coworkers at a Chicago-area telecommunications castings company voted by a large majority in 1987 to form and join a union. Valenzuela is still working, but collective bargaining proved futile in the face of a management campaign to punish workers for their vote. Despite repeated findings by the National Labor Relations Board (NLRB) that the company acted unlawfully, legal remedies took years to obtain. The workers abandoned bargaining in 1999, 12 years after they formed a union, never having achieved a contract. The delays "took away our spirit," said Valenzuela of the bargaining process. "I don't know how the law in this country can allow these maneuvers."[1]

These midwestern telecommunications workers have much in common with workers across the country who are seeking to exercise their labor rights. In the first comprehensive analysis of workers' freedom of association in this country under international norms, Human Rights Watch found widespread labor rights violations across regions, industries, and employment status. The cases revealed in our research and described in this testimony are not exceptional, but rather are indicative of a systemic failure to ensure the most basic right of workers: their freedom to choose to come together to negotiate the terms of their employment with their employers. The right to associate freely with others—to pursue common goals, to express ideas, to further a shared desire to work in safety and with dignity—is a fundamental freedom of democratic societies and a core American value. America owes it to its workers to respect this right. It also compromises its ability to champion this freedom around the world when it is imperiled at home.

Human Rights Watch is neither pro-union nor pro-management. Our work on labor rights stems from our commitment to freedom of association and freedom of choice for individual workers. Our commitment is to enable workers to exercise their right to organize, bargain collectively, and strike, not to serve the institutional interests of either unions or employers.

Many Americans think of workers' efforts to organize, bargain collectively, and strike solely as union-versus-management disputes. They do not see these disputes as raising human rights concerns that implicate core freedoms. Simply put, if the rights of workers are not respected and protected, then the strength of American democracy and freedom is diminished. Both historical experience and a review of current conditions around the world indicate that freedom of association is a vital element of democratic societies. Human rights cannot flourish where workers']ights are not enforced.

SCOPE OF HRW'S RESEARCH

Our report, released in August of 2000, is entitled *Unfair Advantage: Workers' Freedom of Association in the United States Under International Human Rights Standards.* The report was based on field research undertaken during 1999–2000 in California, Colorado, Florida, Illinois, Louisiana, New York, North Carolina, Michigan, Washington, and other states. Our research includes case studies from a range of sectors—services, industry, transport, agriculture, high tech—in order to assess the State of workers' freedom of association across the economy. We looked at cases that arose in cities, suburbs, and rural areas in different parts of the United States. We deliberately focused on a cross-section of workers—high skill and low skill, blue collar and white collar, resident and migrant, women and men, involving people of different races, ethnicities, and national origins. Many of the cases involved the most vulnerable parts of the labor force. These include migrant farmworkers, sweatshop workers, household domestic workers, undocumented immigrants, and welfare-to-work employees. The report, however, also examines the

[1] Human Rights Watch interview, Chicago, Illinois, July 8, 1999.

rights of U.S. workers with many years of employment at stable, profitable employers. These include packaging factory workers, steel workers, shipyard workers, food processing workers, nursing home workers, and computer programmers.

Our research examines a cross-section of workers' attempts to form and join unions, to bargain collectively, and to strike. Although this hearing focuses largely on obstacles to forming unions, it is important to emphasize that these three rights are inextricably linked.

Freedom of association, of course, is the bedrock workers' right under international law on which all other labor rights rest. In the workplace, freedom of association takes shape in the right of workers to organize, most often by forming and joining trade unions, to defend their interests in employment. Protection of workers' right to organize is an affirmative responsibility of governments to ensure workers' freedom of association.

The right to organize, however, does not exist in a vacuum. Workers organize for a purpose: to give unified voice to their need for just and favorable terms and conditions of employment when they have freely decided that collective representation is preferable to individual bargaining or management's unilateral power. The right to bargain collectively stems from the principle of freedom of association and the right to organize. Protecting the right to bargain collectively guarantees that workers can engage their employer in dialog, exchange relevant information, and debate proposals governing terms and conditions of employment. It is the means by which the right of association shapes the lives of workers and employers.

The right to bargain collectively is compromised without the right to strike. This right also must be protected because without it there cannot be genuine collective bargaining. There can be only collective entreaty. As with collective bargaining, international norms contemplate a greater level of regulation of strikes because strikes can affect not only the parties to a dispute, but others as well. Congress nonetheless should keep these rights squarely within its sights as it focuses on obstacles to forming and joining unions. The right to organize, the right to bargain collectively, and the right to strike, all derive from the basic right to freedom of association. The case studies detailed in our report reflect violations and obstacles that workers encountered in the exercise of these three interrelated rights.

SUMMARY OF FINDINGS

Human Rights Watch found that freedom of association is a right under severe, often buckling pressure when workers in the United States try to exercise it. Violations of this right occur across regions, industries, and employment status because U.S. labor law is feebly enforced and filled with loopholes. Some workers still succeed in organizing new unions, but only after surmounting major obstacles.

According to statistics from the National Labor Relations Board (NLRB), the Federal agency created to enforce workers' organizing and bargaining rights, the problem is getting worse. In the 1950's, workers who suffered reprisals for exercising the right to freedom of association numbered in the hundreds each year. In 1969, the number was more than 6,000. By the 1990's, more than 20,000 workers each year were victims of discrimination that was serious enough for the NLRB to issue a "back-pay" or other remedial order. There were nearly 24,000 such workers in 1998, the last year for which official figures are available. Meanwhile, the NLRB's budget and staff have not kept pace with this growing need.

Freedom of association is a fundamental human right recognized under international law. The International Covenant on Civil and Political Rights (ICCPR), which the United States ratified in 1992, declares: "[E]veryone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests." The ICCPR requires ratifying states "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant" and "to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant." The ICCPR also constrains ratifying states "to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy." These principles have been further developed by the International Labor Organization (ILO), a U.N.-related body with tripartite representation by governments, workers, and employers and nearly universal governmental membership. The ILO's Committee on Freedom of Association has elaborated authoritative guidelines for implementing the rights to organize, bargain collectively, and strike.

The basic provisions of the NLRA comport with international human rights norms regarding workers' freedom of association. The NLRA declares a national policy of "full freedom of association" and protects workers "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representa-

tives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."[2] The NLRA makes it unlawful for employers to "interfere with, restrain, or coerce" workers in the exercise of these rights. It also creates the National Labor Relations Board (NLRB) to enforce the law by investigating and remedying violations.

Despite the law's facial compliance with international human rights principles, Human Rights Watch found in our research that the reality of NLRA enforcement falls far short of these standards. Private employers are the main agents of abuse, but international human rights law makes governments responsible for protecting vulnerable persons and groups from patterns of abuse by private actors. In the United States, efforts to enforce labor law often fail to deter unlawful conduct. When the law is applied, enervating delays and weak remedies invite continued violations.

Violations of workers' freedom of association in the United States fall into five broad categories:

1. Reprisals for Trying to Organize Unions

Each year thousands of workers in the United States are spied on, harassed, pressured, threatened, suspended, fired, deported, or otherwise victimized by employers in reprisal for their exercise of the right to freedom of association. Firing a worker for organizing is illegal but commonplace in the United States. Many of the cases examined by Human Rights Watch reflect the frequency and the devastating effect of discriminatory discharges on workers' rights. An employer determined to get rid of a union activist knows that all that it risks, after years of litigation if the employer persists in appeals, is a reinstatement order that the worker is likely to decline and a modest back-pay award. For many employers, that is a small price to pay to destroy a workers' organizing effort.

Employers also often threaten to call the Immigration and Naturalization Service (INS) to have immigrant workers deported if they form and join a union.

These abuses are facilitated by one-sided rules on communications in the course of a labor dispute. Employers can take advantage of the lack of level playing field regarding communications by waging aggressive campaigns against workers' self-organization through written, oral, and filmed communications, and "captive-audience meetings" while workers are severely limited in their ability to communicate with union representatives at the workplace.

2. Inadequate Remedies

Labor law is so weak that companies often treat the minor penalties as a routine cost of doing business, not a deterrent against violations. Any employer intent on resisting workers' self-organization can drag out legal proceedings for years, fearing little more than an order to post a written notice in the workplace promising not to repeat unlawful conduct and grant back pay to a worker fired for organizing. In one case, a worker fired for 5 years received $1,305 back pay and $493 interest.[3] Many employers have come to view remedies such as back pay for workers fired because of union activity as a routine cost of doing business, well worth it to get rid of organizing leaders and derail workers' organizing efforts. As a result, a culture of near-impunity has taken shape in much of U.S. labor law and practice. Moreover, the recent Supreme Court decision in *Hoffman Plastic Compounds* v. *NLRB* denying back pay to an undocumented worker because he was not legally authorized to work in the United States makes the problem even more severe for undocumented workers. The case, which was decided in March of this year, represents a decision by the Supreme Court to value legislation governing illegal immigration more highly than legislation protecting the rights of workers.

3. Procedural Delays

Employers can resist union organizing by dragging out legal proceedings for years. Workers fired for organizing and bargaining often wait years for their cases to be decided by labor boards and courts, while employers pay no price for deliberate delays and frivolous appeals. Debilitating delays occur in unfair labor practice cases. Most cases involve employers' discrimination against union supporters or employers' refusal to bargain in good faith. After the issuance of a complaint, several months usually pass before a case is heard by an administrative law judge. Then several

[2] 29 U.S.C. §§ 151–169, Section 7.

[3] Under the NLRA, back-pay awards are "mitigated" by earnings from other employment. Employers who illegally fire workers for organizing need only pay the difference, if any, between what workers would have earned had they not been fired, and what they earned on other jobs during the period of unlawful discharge. Since workers cannot remain without income during years of litigation, they must seek other jobs and income, leaving the employers who violate their rights with an often negligible back-pay liability.

more months often go by while the judge ponders a decision. The judge's decision can then be appealed to the NLRB, where 1, 2, or 3 years can go by before a decision is issued. The NLRB's decision can then be appealed to the Federal courts, where again up to 3 years pass before a final decision is rendered. Many of the workers in cases we studied had been fired years earlier and had even won reinstatement orders from administrative judges and the NLRB, but they were still waiting for clogged courts to rule on employers' appeals.

In another example, U.S. law forbids permanent replacement of workers who strike over employers' unfair labor practices, as distinct from "economic strikers" seeking better contract terms. The latter can be permanently replaced; unfair-labor-practice strikers are entitled to reinstatement when they end their strike. However, it often takes years of NLRB and Federal court proceedings before a final decision is made on whether replaced workers have a right to reinstatement.

4. Undermining the Right to Strike

Employers have the legal power to permanently replace workers who exercise the right to strike. This power in the hands of employers effectively nullifies the right to strike. While international norms limit the right to strike, for example exempting members of the military and the police, they do not authorize permanent replacements. Permanent replacement crosses the line balancing the rights of workers and employers and undercuts a fundamental right of workers. With the one-sided pain of a strike marked by permanent replacements, the employer maintains operations, workers who exercised the right to strike are left to languish, and after just 1 year permanent replacement workers can vote to extinguish the strikers' right to representation and collective bargaining. In addition, harsh rules against "secondary boycotts" frustrate worker solidarity efforts. Mutual support among workers and unions recognized in most of the world as legitimate expressions of solidarity is harshly proscribed under U.S. law as an illegal secondary boycott.

5. Exclusion of Workers From Coverage Under Labor Laws

Millions of workers—including farm workers, household domestic workers, low-level supervisors, and "independent" contractors who are really dependent on a single employer—are excluded from labor laws meant to protect workers' organizing and bargaining rights. They can be fired with impunity for trying to form a union, and their number is growing. The H2-A program, for example, grants migrant workers a temporary visa for agricultural work in the United States. They labor at the sufferance of growers who can fire them and have them deported if they try to form or join a union.

Labor laws have failed to keep pace with changes in the economy and new forms of employment relationships, creating millions of part-time, temporary, subcontracted, and otherwise "atypical" or "contingent" workers whose exercise of the right to freedom of association is frustrated by the law's inadequacy. Many workers find themselves caught up in a web of labor contracting and subcontracting, which effectively denies them the right to organize and bargain with employers who hold real power over their jobs and working conditions.

Without diminishing the seriousness of the obstacles and violations confronted by workers in the United States, a balanced perspective must be maintained. U.S. workers generally do not confront gross human rights violations where death squads assassinate trade union organizers or collective bargaining and strikes are outlawed.[4] However, the absence of systematic government repression does not mean that workers in the United States have effective exercise of the right to freedom of association. On the contrary, workers' freedom of association is under sustained attack in the United States, and the government is often failing its responsibility under international human rights standards to deter such attacks and protect workers' rights.

[4] At the same time, Human Rights Watch did find instances in various case studies of interference with workers' rights by government authorities. They included biased intervention by police and local government authorities and government subsidization of workers' rights violators. While these cases do not rise to a level of systemic abuse, they are no less troubling and, if they are not addressed and stopped, such abuses could spread.

SELECTED CASE STUDIES FROM THE HUMAN RIGHTS WATCH REPORT[5]

1. Service Sector Workers

Nursing Home Workers In Southern Florida

At the Palm Garden nursing home in North Miami, managers forged signatures on warning notices against Leonard Williams, a key union activist. They backdated the notices, then fired Williams shortly before a union election in April 1996. The union lost the election 35–32. Soon afterward, the company fired Marie Sylvain, another organizing leader.

The NLRB has ordered Palm Garden to offer Williams and Sylvain reinstatement to their jobs with back pay. The agency also ordered a new election because of management's unlawful conduct. The company had appealed both rulings, and they were tied up in courts. Meanwhile, Williams and Sylvain were obliged to wait.

"Why does it take so long?" asked Marie Sylvain. "I've been fired for more than 3 years. Everything takes too long. Where is the justice? Everything is at the boss's advantage with all these delays. The law gives you something with one hand then takes it away with the other hand." Asked if she would accept reinstatement, Sylvain said, "I would like to come back for 1 week just to show them the union can win."

Workers at the King David Center in West Palm Beach voted 48–29 in favor of union representation in an NLRB election in August 1994. "I had a determination to get respect," said Jean Aliza, the first of several workers fired for organizing activity at King David. "I am a citizen, and I deserve respect." The NLRB ruled that the company proceeded systematically to fire the most active union supporters, including Jean Aliza and Ernest Duval. In 1999, however, the workers had still not been reinstated because of appeals to the courts.

Jean Aliza was "set up" by managers and fired early in the organizing effort, after a year-long "satisfactory" record suddenly became "unsatisfactory" based on warning notices he never saw. The NLRB said that King David "was determined to rid itself of the most vocal union supporter from the beginning," referring to Ernest Duval.

Ernest Duval was still vocal about his union support when he spoke to Human Rights Watch in July 1999, but he was also frustrated. "I see the government protecting management," he said. "It's been 4 or 5 years now, and I've got bills to pay. Management has the time to do whatever they want."

2. Food Processing Workers

Pork Processing Workers in North Carolina

Smithfield Foods hog-processing plant in Tar Heel, North Carolina is the largest hog slaughtering facility in the country. According to NLRB complaints, ten workers were fired between 1993 and 1995 for union activity at the Smithfield plant, and five more organizing leaders were fired in 1997 and 1998. Besides firing key union activists, Smithfield management opposed workers' organizing efforts with interference, intimidation, coercion, threats, and discrimination. These unfair labor practices came so fast and furious that a hearing originally set for 1995 on complaints from the 1994 campaign did not take place until 1998–99 as new complaints were consolidated with earlier ones.

The NLRB complaints describe in detail Smithfield's offensive against union supporters. In dozens of instances cited in the complaints, Smithfield managers and supervisors issued oral and written warnings and suspensions against union supporters; threatened to close the plant, deny pay raises and promotions, fire workers, and blacklist any striking workers from employment at other conlpanies; confiscated union flyers from workers; asked workers to spy on other workers' union activity; grilled workers about other workers' union activities; interrogated workers about their own union sentiments; spied on the activities of pro-union workers; indicated to workers that management was spying on their union activities; applied a gag rule against union supporters while giving union opponents free rein; applied work rules strictly against union supporters but not against union opponents; offered benefits to workers if they would drop support for the union; and assaulted and caused the arrest of an employee in retaliation for workers' engaging in union activity.

[5] The cases detailed in this testimony are described in Human Rights Watch's August 2000 report. Human Rights Watch has not yet done a follow-up investigation to that report. Developments occurring since August 2000 thus are not described in this testimony.

3. Manufacturing Workers

Low-Wage Packaging Workers in Maryland

In the mid-1990s, a new company called Precision Thermoforming and Packaging, Inc. (PTP) employed more than 500 workers in a Federal "empowerment zone" in a Baltimore, Maryland neighborhood called "Pigtown." This company in an urban factory setting, with low-wage workers exercising their right to freedom of association, offers an example of even harsher anti-organizing tactics.

The company received indirect State subsidies worth millions of dollars through a low-cost lease of manufacturing space in a converted warehouse bought by the State in 1994. PTP also received a Federal subsidy of $3,000 for each employee it hired who lived inside the empowerment zone. It hired more than 250 such workers. Thanks to subsidies, the Federal Government's empowerment-zone designation is worth a lot of money to employers who set up operations in a zone. The government, however, does not use this financial leverage to condition empowerment-zone benefits on the fair treatment of workers.

PTP ran a plastic packaging and shipping operation for flashlights, batteries, and computer diskettes. Major customers included Eveready Battery and America Online (AOL). AOL shipped millions of free diskettes to consumers from the PTP plant.

In mid-1995, a group of PTP workers began an effort to form and join a union. A complaint issued by the NLRB finding merit in unfair labor practice charges filed by the union tells what happened next. PTP management fired nine workers active in the union-organizing effort. In addition, PTP managers and supervisors threatened to close the plant if a majority of workers voted in favor of union representation; threatened to move work to Mexico; threatened to move the AOL production line to another country; threatened that Eveready Battery would pull its business from PTP; threatened to fire workers who attended union meetings; threatened to fire anyone who joined the union; threatened to replace American workers with foreigners if the union came in; threatened to transfer workers to dirtier, lower-paying jobs if they supported the union; told workers not to take union flyers from union organizers; told workers that upper management was going to "get them" for supporting the union; asked employees to report to management on the activities of union supporters; stationed managers and security guards with walkie-talkies to spy on union handbilling and report on workers who accepted flyers; interrogated workers about their union sympathies and activities; and denied wage increases and promotions to workers who supported the union.

Charges of massive unfair labor practices by PTP were upheld by the NLRB's regional director, who issued a wide-ranging complaint on the management conduct described above. The NLRB found PTP's conduct so egregious that the regional director announced he would seek a *Gissel* bargaining order, an unusual remedy in U.S. labor law based on a 1969 Supreme Court decision. Under the *Gissel* doctrine, a union that has obtained majority support from workers who sign cards joining the union and seeking bargaining can be certified as the bargaining agent even if it loses an election. The Supreme Court in *Gissel* said that the bargaining-order remedy is not limited to "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices. The court said that a bargaining order can also be applied "in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process." However, in practice, the NLRB and the Federal courts have applied the *Gissel* remedy sparingly, effectively undermining the right of many workers to bargain collectively.

The NLRB also sought reinstatement and back pay ranging from $6,000 to $21,000 for workers fired for union activity. In March 1997, however, PTP shut its Baltimore plant and declared bankruptcy, citing a legal dispute with AOL. With no employer to order to bargain with the union, the NLRB fashioned a settlement of the unfair labor practice case before it went to hearing. Under the settlement, PTP acknowledged the actions outlined in the complaint, promised not to repeat them, and promised back pay to the fired workers in the amounts sought by the NLRB. Thereafter, the fired PTP workers waited in vain to receive the first penny of back pay for their unlawful firings. The Gissel remedy is meaningless when there is no employer with whom to bargain. However, had the NLRB been empowered to act quickly to initiate bargaining, workers might have been able to negotiate over severance pay, continued medical insurance, and other conditions in a bankruptcy-related closing, or indeed to have offered steps to avoid closing.

Steelworkers in Colorado

Oregon Steel Co. permanently replaced more than 1,000 workers who exercised the right to strike at its Pueblo, Colorado steel mill in October 1997. Many of the

replacements came from outside the Pueblo area, drawn by the company's newspaper advertisements throughout Colorado. A company notice declared, "It is the intent of the Company for every replacement worker hired to mean one less job for the strikers at the conclusion of the strike."

On December 30, 1997, 3 months after their strike began, Oregon Steel workers ended the strike and offered unconditionally to return to work. The company refused to take them back except when vacancies occur after a replacement worker left. Some workers returned under this legal requirement, but most of the Oregon Steel workers were still out of work in 2000 because the company permanently replaced them with new hires.

According to a judge who held an 8-month-long hearing on the case, the company was guilty of interference, coercion, discrimination, and bad-faith bargaining. In all, said the judge, Oregon Steel's unfair labor practices "were substantial and antithetical to good faith bargaining."

Under this ruling, workers are entitled to reinstatement, because a company that violates the law loses the right to permanently replace strikers. However, the company appealed the decision and vowed to keep appealing for years before a final decision is obtained in the case. In the meantime, the workers remained replaced and without their chosen means to support themselves and their families.

Joel Buchanan, a worker with twenty-nine years in the Oregon Steel plant, told Human Rights Watch, "Before the strike the company was pushing us for forced overtime. When we asked them to hire new people to give us some relief, they told us they couldn't find qualified workers anywhere in Colorado. But when we went out, suddenly they came up with hundreds of replacements."

Apparel Workers in New York

The resurgence of sweatshops in America reflects a "race to the bottom" on labor rights and labor standards more often attributed to export processing zones in Third World countries. For workers in the United States, as is often the case in Central American or East Asian sweatshops, freedom of association is the first casualty.

Researching violations of workers' freedom of association in U.S. sweatshops posed a sharp challenge. Workers trapped in the sweatshop system are so victimized in every aspect of their working lives that an open exercise of the right to organize and associate is an extraordinary event. Most sweatshop workers are so burdened by the need to make it through another day that forming a union is beyond their energies. Moreover, as Human Rights Watch found in other, non-sweatshop-sector cases, immigrant workers' problems with authorization papers and fear of deportation also prevent efforts to organize in sweatshops.

Sweatshop workers turn to collective action as a last resort, usually when they realize that their employer has no intention of paying them even their sub-minimum wages for weeks of work already performed. Minimum-wage violations, overtime-pay violations, health and safety violations, sexual harassment, and other problems in the garment industry are an accepted fact of working life, especially in the two largest urban regions in the country, New York and Los Angeles.

A 1994 report by the Federal Government's General Accounting Office found that sweatshops were widespread in the garment sector. The report noted declining resources for labor-law enforcement by Federal and State authorities and concluded that "In general, the description of today's sweatshops differs little from that at the turn of the century."[6]

Apparel manufacturing is a multibillion-dollar industry employing more than 700,000 workers in the United States. The garment sector is the biggest manufacturing industry in New York and Los Angeles, where in each region more than 100,000 workers labor in some 5,000 contracting and subcontracting sewing shops. Women who have recently migrated to the United States from Asia and Latin America are a significant majority of the workforce. These small shops compete fiercely for business from the manufacturers. Violating wage and hour laws is the quickest and easiest way to gain a competitive advantage, particularly when workers are not likely to complain or organize for improvements.

Under current law, retailers and manufacturers who profit from sweatshops' race to the bottom on labor standards are not held responsible for labor-law violations committed by contractors or subcontractors, including violations of workers' organizing rights. The large companies are insulated by the hierarchical structure of the industry and the reliance on onejob, quick-turnaround, unpredictable subcontracting arrangements that have largely displaced traditional longer-term, stable contracting relationships.

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[6] See U.S. General Accounting Office, "Prevalence of Sweatshops," GAO/HEHS–95–29, November 2, 1994.

One example illustrates the difficulties faced by workers in the apparel industry. According to UNITE representative Bertha Wilson, employees from a Manhattan sewing shop called YPS came to the union-sponsored workers' center in 1997 because they were owed back wages, even though YPS subcontracted production for brand-name companies such as Lord & Taylor, Ann Taylor, and Express. One of the workers told Human Rights Watch that workers were not being paid on time, that managers mistreated workers, that drinking fountains did not work, and that workers received no rest or lunch breaks. "We were aware that we were illegal," she said, "so we were kind of like slaves." She said that women workers were especially mistreated. "One of the managers would touch the women," she said. "If they complained they were fired. A few women were actually fired, and others just took it. We didn't know what our rights were, so we just accepted things." With four to 5 weeks' back pay owing to workers, "the boss wanted to pay us with clothes. But how were we going to sell them for money?"

In November 1997,YPS employees stopped work and demanded union recognition and 4 to 6 weeks of back pay. According to Bertha Wilson, the owner said he would recognize the union as long as the union did not contact Ann Taylor. In December, the owner signed an agreement calling for an end to sexual harassment, a forty-five-minute lunch break, and incremental back-pay disbursements each week.

The YPS agreement held up only for 2 weeks. The owner again halted back-pay disbursements, and employees stopped work. YPS shut its doors and went out of business. UNITE organized a workers' demonstration at the headquarters of brand-name companies that had contracted for work with YPS. Those companies agreed to make workers whole for lost wages, but by then workers had scattered to other locations. Many failed to collect their pay, fearing to come forward, said Wilson, because they were undocumented and afraid of INS action.

4. Migrant Agricultural Workers

Apple Workers in Washington

Thousands of workers are employed in the warehouse sector of the Washington apple industry. Like apple pickers, many seasonal workers in the warehouses are migrants from Mexico.

Apple-warehouse workers are not defined as agricultural workers. They are covered by the NLRA, which makes it an unfair labor practice to threaten, coerce, or discriminate against workers for union-organizing activity. But when workers at one of the largest apple-processing companies sought to form and join a union in 1997 and 1998, management responded with dismissals of key union leaders and threats that the INS would deport workers if they formed a union.

Here is how one worker described the company's tactics:

> At the meetings they talked the most about the INS. . . . [T]he company keeps talking about INS because they know a lot of workers on the night shift are undocumented—I would guess at least half. . . . It is only now that we have started organizing that they have started looking for problems with people's papers. It is only now that they have started threatening us with INS raids. . . . They know that we are afraid to even talk about this because we don't want to risk ourselves or anyone else losing their jobs or being deported, so it is a very powerful threat. . . .

The union lost the NLRB election even though a majority of workers had signed cards to join the union and authorize the union to bargain on their behalf.

H–2A Farmworkers in North Carolina

About 30,000 temporary agricultural workers enter the United States each year under a special program called H–2A giving them legal authorization to work in areas where employers claim a shortage of domestic workers. H–2A workers have a special status among migrant farmworkers. They come to the United States openly and legally. They are covered by wage laws, workers' compensation, and other standards.

But valid papers are no guarantee of protection for H–2A workers' freedom of association. As agricultural workers, they are not covered by the NLRA's anti-discrimination provision meant to protect the right to organize.

H–2A workers are tied to the growers who contract for their labor. They have no opportunity to organize for improved conditions and no opportunity to change employers to obtain better conditions. If they try to form and join a union, the grower for whom they work can cancel their work contract and have them deported.

More than 10,000 migrant workers with H–2A visas went to North Carolina in 1999, making growers there the leading employers of H–2A workers in the United States. North Carolina's H–2A workers are mostly Mexican, single young men, who

harvest tobacco, sweet potatoes, cucumbers, bell peppers, apples, peaches, melons, and various other seasonal crops from April until November.

At home "there's no work," workers told Human Rights Watch, explaining their main reason for emigrating. Many of the workers come from rural villages in Mexico. In most cases earnings in U.S. dollars from their H–2A employment were the only source of income for their families and for their communities.

Human Rights Watch found evidence of a campaign of intimidation from the time H–2A workers first enter the United States to discourage any exercise of freedom of association. Legal services attorneys and union organizers are "the enemy," they are told by growers' officials. Most pointedly, officials lead workers through a ritual akin to book-burning by making them collectively trash "Know Your Rights" manuals from legal services attorneys and take instead employee handbooks issued by growers.

On paper, H–2A workers can seek help from legal services and file legal claims for violations of H–2A program requirements (but not for violation of the right to form and join trade unions, since they are excluded from NLRA protection). However, in this atmosphere of grower hostility to legal services, farmworkers are reluctant to pursue legal claims that they may have against growers. "They don't let us talk to legal services or the union," one worker told Human Rights Watch. "They would fire us if we called them or talked to them."

5. Contingent Workers

High-Tech "Perma-temps" in Seattle

An example of temporary-agency workers' dilemma is found among workers at the cutting edge of the new economy. At the time of our report, more than 20,000 workers were employed at Microsoft's facilities in the Seattle area. Six thousand of them, however, were not employed by Microsoft. Instead, they were employed by temporary agencies supplying high-tech workers to Microsoft and other area companies. Many had worked for several years at Microsoft, and had come to be known as "perma-temps."

Some Microsoft perma-temps formed the Washington Alliance of Technology Workers (WashTech) in early 1998. WashTech has a "Catch–22"-type problem. By defining perma-temps as contractors employed by various temporary agencies, Microsoft avoided being their employer for purposes of the NLRA's protection of the right to organize. Meanwhile, the agencies told temps that in order to form a union that agency management would deal with, they would have to organize other employees of the agency, not just those working at Microsoft.

"First we asked our Microsoft managers to bargain with us," said perma-temp Barbara Judd, describing an effort by her and a group of coworkers to be recognized by Microsoft. Management refused. Responding to press inquiries, a spokesman for Microsoft said, "bargaining units are a matter between employers and employees and Microsoft is not the employer of the workers."

Attempts to be recognized by the temp agencies were equally unavailing. "'We don't have to talk to you, and we won't' is what they told us," said Judd. "They told us we had to get all the temps that worked at other companies besides Microsoft. We had no way to know who they were or how to reach them. Besides, they had nothing to do with our problems at Microsoft."

Barbara Judd's perma-temp post at Microsoft ended in March 2000 when the company announced it was abandoning the tax-preparation software project that she and her coworkers developed. "We received 2 days notice" before being laid off, Judd told Human Rights Watch. Some workers moved to another tax-preparation software company, but Judd decided to look for full-time employment. "I don't want to be a part of that system," she said. "Workers who take temp jobs do not realize there is a larger impact than just the absence of benefits. You essentially lose the ability to organize. . . . [T]he legal system is just not set up to deal with these long-term temp issues."

UNDERMINING U.S. PROMOTION OF LABOR RIGHTS INTERNATIONALLY

The United States has long been a global leader in promoting human rights and fundamental freedoms. Freedom of association is a basic human right and a bedrock principle of democratic society. The United States, however, cannot champion this right effectively around the world unless it is protected here at home.

Over the past few years, the U.S. Government has periodically endorsed calls for integrating human rights and labor rights into the global trade and investment system. Freedom of association is the first such right cited. To give effective leadership to this cause, the United States must confront and begin to solve its own failings when it comes to workers' rights. Moving swiftly to strengthen labor-rights enforce-

ment and deter labor-rights violations in the United States will advance U.S. concern for ensuring worldwide respect for core labor standards.

CONCLUSION

Our report, *Unfair Advantage*, contains numerous specific recommendations for remedying violations of workers' rights in the United States and promoting workers' freedom of association. I urge the members of the Committee to review these recommendations and give them careful consideration as the Committee formulates its response to the problems detailed in today's testimony.

There is, however, a more overarching point that bears emphasis. Freedom of association occupies a fundamental place in the American legal system and among American values. Beyond the technicalities of administrative regulations, jurisprudence or statutory reforms, a larger reality looms over labor law and practice in the United States. So long as worker organizing, collective bargaining, and the right to strike are seen only as economic disputes involving the exercise of power in pursuit of higher wages for employees or higher profits for employers, change is unlikely. Human Rights Watch took on this issue because it is a human rights issue, and we believed that our involvement could provide an impetus for change by carefully documenting violations and obstacles confronting workers seeking to organize, and analyzing these issues as human rights concerns.

The United States should look to international human rights standards to inform its analysis of the problem and of possible remedies. Such a perspective is critically important for the government, but employers, workers, and unions should also carry out their affairs with a clear recognition that workers' self-organization is a fundamental human right and a core American value. In addition, the United States should ratify ILO Conventions 87 and 98 on worker organizing and protections against anti-union discrimination to demonstrate that it is serious about workers' freedom of association. U.S. Government efforts to stand tall for freedom around the world will be strengthened by supporting freedom of association at home.

In the end, what is most needed is a new spirit of commitment by the labor law community and the government to give effect to both international human rights norms and the still-vital affirmation in the United States' own basic labor law for full freedom of association for workers. The specific findings and recommendations contained in our report should be seen in this broader context. We are hopeful that today's hearing will shine a spotlight on the human rights implications of the obstacles to workers' freedom of association in the United States, and that the Congress will lead an effort to protect and promote this fundamental freedom.

The CHAIRMAN. Mr. Vizier.

STATEMENT OF ERIC J. VIZIER, MARINER, GALLIANO, LA

Mr. VIZIER. Good morning, Chairman Kennedy, Senators, and staff. Thank you for providing me, on behalf of my fellow mariners from the Gulf of Mexico, the opportunity to tell you what we face in the oil industry. Joining me today are Captain Mark Cheramie, who worked for Guidry Brothers, and his wife Sherry, and Captain Michael Cheramie, who works at Trico Marine Services.

My name is Eric J. Vizier. I am a licensed U.S. Coast Guard master of 1,600-ton merchant vessels. I am a third-generation mariner from South Louisiana.

In 2000, Mark and I tried to organize a union at Guidry Brothers, an offshore towing company in the gulf, with about 120 mariners. Our union is Offshore Mariners United, OMU, a federation of four maritime unions: SIU, AMO, MEBA, and MM&P. We knew we needed a union because we are forced to break U.S. Coast Guard rules and forced to break environmental laws. The pay is poor, the benefits aren't good, and there is no respect. The owners think of us mariners as "boat trash."

There was a lot of support among the Guidry mariners for a union, and a majority signed union pledge cards. But Guidry's response was swift and vicious.

Guidry Brothers fired four captains for their union support, including Mark and myself. The owners interrogated the mariners, spied on us, and harassed us. They threatened to blackball union supporters. They told us they would shut the company down if the union came in. Guidry owners tried to run me off the road, and they had me illegally arrested. A Guidry owner walked into a restaurant where he knew there would be folks from the union. He broke a bottle, held up the jagged edge, and said he would use it to cut the throats of union organizers.

But that wasn't enough. Guidry used all the resources of the boat owners and the oil and gas industry that have come together to fight unions in the gulf.

The boat owners' own association, Offshore Marine Service Association, OMSA, set up an anti-union fund getting contributions from every sector of the offshore oil and gas industry. OMSA runs training sessions for the boat companies on every manner of fighting pro-union mariners and the unions.

One OMSA member, a boat company called Edison Chouest Offshore, formed a front group know as the Concerned Citizens for the Community, CCFC, to fright everyone from supporting the union. All the boat owners use CCFC's anti-union procedures and materials.

For instance, my wife, Nikki, who joins me today, was harassed with lewd sexual phone calls and jeers from CCFC supporters. We know this because the phone calls came from Chouest's office.

My mother's boss, another CCFC supporter, told her she could lose her job at a restaurant if I did not stop supporting the union. She was also harassed.

One of the fired pro-union Guidry captains was visited by CCFC. He was given a choice. If he stayed pro-union, his son at Chouest would lose his job. If he became anti-union, then he could go to work at Chouest, too.

My house was broken into, and a dead fish was left on my doorstep. While investigating the break-in, the police received a phone call. They stopped investigating and just left without completing the report.

Further, the dock owners and boat companies make access to the mariners' workplace impossible. To prevent contact between mariners and union staff, the dock owners put up fences, guard shacks, and hired security officers.

The boat companies also use the police to prevent mariners from organizing. For example, police arrested union staff for leafleting. Police in their squad cars followed union organizers. Police detained an international trade union delegation, forced them out of their vans, and told them to turn over their IDs.

Port police told mariners and union staff that Federal laws protecting the right to organize do not apply at Port Fourchon. Boat companies hire police to do anti-union activities in their off-duty time, but under the law, the police can still wear their uniforms, carry their guns, and use their patrol cars.

This anti-union campaign is not just limited to Guidry mariners. For 2 years, Trico's mariners have sat through weekly anti-union meetings. Trico has fired two pro-union captains. Mike Cheramie, the captain from Trico who is here today, will probably be fired and

blackballed by Trico for daring to come to Washington, DC, to tell you what is going on in the oil patch.

To whom do we mariners turn for justice? The National Labor Relations has failed us. The NLRB found that Guidry had illegally fired four captains for union activity, and 40 other violations of the law. It was so bad, the Board recommended bargaining order was the remedy. But then the Board failed to seek a bargaining order either in trial or in settlement, and the Board seemed more interested in just getting rid of the case than in getting justice. For example, the Board attorney told me to take a cash settlement instead of proceeding with the case. A few months later, the Board told me a second time to take a cash settlement, and when I said I needed to talk to the union, the Board attorney told me not to talk to the union.

A few months after that, the Board attorney called me a third time to pressure me to take the settlement, but told me she hadn't read it. A few months ago, I asked the Board attorney what was happening on the case. She said the Board had to pick a side, and they were going with the company. Today, Mark and I are still not back at work at Guidry.

It shouldn't be this hard to form a union. Mariners shouldn't have to fight their own company, the other boat companies, their customers, the big oil and drilling companies, the dock owners, and the police just to have the right to choose to be represented by a union.

We ask this committee to investigate this situation in the oil fields. We will provide more detailed information for the record. Come to south Louisiana where the industry is based. Talk to all the parties involved. Together, let's figure out a way that mariners in the oil and gas industry can win their rights, their rights to freedom of association and freedom of speech.

Thank you all for your time, Senators.

The CHAIRMAN. Thank you. I have difficulty in understanding how a person would break a bottle and come and threaten you, but we will talk about it. You look like you are able to handle yourself, quite frankly, no matter what they have in their hand.

[The prepared statement of Mr. Vizier follows:]

PREPARED STATEMENT OF ERIC J. VIZIER, MARINER, GALLIANO, LA

Good morning, Chairman Kennedy, Senators and staff.

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• A few months ago, a Board attorney contacted me about my back wages. I asked her what was happening on the case. She said the Board had to pick a side and that they were going with the company.

• And, today, Mark and I are still not back at work at Guidry.

The OMU also has an access charge against two companies—Trico and Seacor. That case has been before the NLRB for a year-and-a-half. The Board hasn't even taken the first step and issued a complaint.

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Thank you.

The CHAIRMAN. Mr. Yager.

STATEMENT OF DANIEL V. YAGER, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, LABOR POLICY ASSOCIATION, WASHINGTON, DC

Mr. YAGER. Thank you, Mr. Chairman. It is a pleasure to be here this morning.

As I think was reflected by some of the statements by the Members of the committee, this is a long-running debate. I have been doing labor policy issues in Washington for about 20 years now, and I have seen a lot of other issues come and go, but it seems like this one we have been talking about for a long, long time.

For that reason, I think the best statement our association has ever given on this issue was before the Dunlop Commission in 1994. I have attached to this testimony our testimony from that. I took a look yesterday. I think some of the numbers have changed, but I did some spot checks on them, and they really haven't changed a whole lot. Obviously, in the question and answer period, I would be happy to take any questions and any discussion on that.

What I would really like to talk about in my limited time is an issue that is, I think, the most pressing concern to our Members in this area, and that is what they see as an erosion of employee choice in the issue of selection of a collective bargaining representative, and essentially a turning away from the secret ballot election process. Now, that is a process that has been widely endorsed. The Supreme Court, no less than Justice William Douglas, has said that that is the procedure that should be favored under the statute. The AFL–CIO, in an amicus brief on the issue of whether or not there should be a secret ballot election when the employees choose to get rid of an unpopular union, said that the secret ballot election system provides the surest means of avoiding decisions which are the result of group pressures and not individual decisions.

I also noted even in the Human Rights Watch report, they indicated that secret ballot elections still have a moral primacy. I think that is a good phrase that I will probably embrace myself as I talk about this issue.

The reality is, though, as organized labor's market share has declined in recent years, it has embraced a new tactic which really goes at, instead of organizing employees, organizing employers. The process is getting employees to sign a card. Now, this card, unlike a secret ballot election, is signed in the presence of an interested party—a union organizer, a pro-union coworker. It does not—which in and of itself means at a minimum the employee who is being

asked to sign this card is going to be subjected to peer pressure, but oftentimes it is a lot worse than that. We have attached to our testimony a number of cases, court cases over the years that have documented some of the tactics that have been used to get employees to sign these cards.

Once a majority of the workers have signed these cards, the union then can go to the employer and ask them to recognize the union. At that point, on the basis of those cards, it is legal for an employer to basically say, OK, we will do it this way, we won't have an election.

The law has tolerated that over the years, I think because of an assumption that since an employer can ask for an election, they—the only reason they would agree to something like this would be if they would believe that an election would be superfluous, because obviously the union does enjoy the support of their workers. So let's forget the election, let's, you know, start bargaining and get that going.

Unfortunately, that assumption can no longer be made because today's tactic of getting employers to agree to card check recognitions is through something called a corporate campaign. You are going to hear a taste of that from one of the witnesses in the next panel, so I won't really walk through the tactics other than just to give a couple quotes on some descriptions.

For example, the number two person at the AFL–CIO, Rich Trumka, has described a corporate campaign as "a death of a thousand cuts." A UFCW official indicated—characterized it as "putting enough pressure on employers, costing them enough time, energy, and money to either eliminate them or get them to surrender to the union." In this Law Review article, he described how, in fact, his local had eliminated a grocery concern that had refused to agree to a card check recognition. A variety of tactics are used, and I would refer you to my testimony to see what some of those are.

I just want to talk about one instance where this happened, and this was a situation involving MGM Grand in Las Vegas, where there was about—after the hotel opened, there was a 3-year corporate campaign to get the company to agree to a card check recognition. Finally, the company capitulated, agreed to the card check, and at that point a lot of employees got very angry because they had not been given a chance to vote on this issue. In fact, there were stories about coercion tactics being used by the hotel workers union to get them to sign it. So, in fact, a majority of the workers—that is 3,000 workers. A majority of those workers on three different occasions took a petition to the National Labor Relations Board asking for a secret ballot election, and the Board refused that over the course of year, saying, no, the law is we give the employer and the union a reasonable period for bargaining before we will have an election on this issue.

Ultimately, at the end of the year, a collective bargaining agreement was reached. At that point, because of the contract bar rule, the employees were forbidden from having an election for the life of that contract.

Essentially what happened in that situation was, since the employees never got to, in a confidential, uncoerced manner, register their views, it was really a decision made by the employer. It was

really a deal between the employer and the union that the union would represent that employer's workers. So we would encourage the committee to consider—there is legislation pending in the House on this issue, H.R. 4636. We would encourage this committee to consider a ban on card check organizing, making it an unfair labor practice for the employer and the union to enter into these kinds of arrangements. We would urge you to take that under advisement.

I appreciate the opportunity to appear, and I am happy to take any questions.

[The prepared statement of Mr. Yager follows:]

PREPARED STATEMENT OF DANIEL V. YAGER, SENIOR VICE PRESIDENT AND GENERAL COUNSEL LPA, LABOR POLICY ASSOCIATION

Mr, Chairman, and Members of the Committee: I am pleased to appear before you today to, present the views of LPA, the Labor Policy Association, regarding "Workers' Freedom of Association: Obstacles to Forming a Union." My name is Daniel V. Yager and I serve as Senior Vice President and General Counsel for LPA. As I will discuss in this statement, we believe the most serious problem in union organizing today is the erosion of employee choice through so-called card check/neutrality agreements.

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; policymakers, 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's members are employers—with both represented and non-represented workforces—covered by the National Labor Relations Act. LPA has played an active role over the years in congressional consideration of statutory changes in the labor laws. We also seek to help shape the law through *amicus* curiae briefs filed with the National Labor Relations Board and the courts. In addition, we report extensively on labor law developments through our newsletter *NLRB Watch* and other publications.

The issue of whether the current American labor laws impose unacceptable obstacles to union organizing is assuredly not a new one. Since organized labor began experiencing a decline in its market share of the workforce in the latter part of the previous century, there have been calls for dramatic changes in those, laws which have been consistently rejected or ignored by the U.S. Congress. Early in the 1990's, this issue was fully aired before the Commission on the Future of Worker-Management Relations (the so-called Dunlop Commission). At a Dunlop Commission hearing in September 1994, Howard Knicely, Executive Vice President, Human Resources & Communications for TRW, Inc., and Chairman of LPA at the time, delivered a comprehensive statement addressing the various aspects of.this debate. I have attached a copy of Mr. Knicely's statement to my testimony as it continues to represent our views on these issues [see Appendix A]. If anything, since Mr. Knicely delivered his testimony, the law has become more favorable toward union organizing as a result of 8 years of consistently pro-labor rulings by the National Labor Relations Board during the Clinton administration.

I would like to direct my testimony to a practice that LPA believes, in recent years, has seriously undermined the basic protections of our labor laws. One of the cornerstones of American labor policy has been that unionization is a matter of employee choice. Yet, because in recent years fewer employees have chosen to elect unions in traditional secret ballot elections, organized labor has adopted a different approach called card check organizing.[1] Using this approach, employers are pressured—typically through a strategy called a "corporate campaign"—into recognizing unions on the basis of union authorization cards signed in the presence of a union organizer. These agreements are often accompanied by the employer's agreement to remain neutral while the union seeks the employees' signatures. Where a union is recognized on the basis of a card check, the result may be viewed as a deal between the employer and the union that the latter will represent employees who have never had an opportunity to declare their position in a confidential manner. LPA strongly supports legislation that has been introduced in the House—H.R. 4636, the "Workers' Bill of Rights"—which would ban card check recognition.

HOW CARD CHECK ORGANIZING WORKS

Historically, under the National Labor Relations Act, the decision as to whether a union will serve as a collective bargaining representative of a group of employees is made through a secret ballot election. The election typically takes place after the union has made a required showing of sufficient interest among the employees—at least 30 percent of those it is seeking to represent—in having an election. This interest is usually demonstrated by signed union authorization cards that indicate a desire by the employee to be represented by the union or to have an election to determine that issue. When the election is held, it is supervised by the National Labor Relations Board, which ensures that employees cast their ballot in a confidential manner with no coercion by either management or the union.

However, the law has allowed an exception in situations where an election may be superfluous because it is clear to the employer that the union enjoys the support of a majority of the employees. Thus, under current law, when presented with union authorization cards signed by more than 50 percent of the employees, the employer may voluntarily recognize the union. This has been tolerated under the law despite the absence of numerous safeguards in the so-called card check process compared to those that exist in an NLRB representation election [see Chart I].

HOW UNIONS GET EMPLOYEES TO SIGN CARDS

Unlike a secret ballot election, union authorization cards are signed in the presence of an interested party—a pro-union co-worker or an outside union organizer—with no governmental supervision. There is no question that this absence of supervision has resulted in deceptions, coercion, and other abuses over the years. Even in the best of circumstances, an employee is likely to be subject to peer pressure from other pro-union employees to sign the card. At worst, the employee may be subjected to deception and threats by organizers to get them to sign the cards. The card-signing process is loosely regulated and almost always escapes the attention of authorities. However, on occasion, a courageous employee has brought to the attention of the NLRB or the courts coercive activity, which has been documented in numerous decisions over the years [see Appendix B].

For example, in *HCF, Inc. d/b/a Shawnee Manor,*[2] an employee testified that a co-employee soliciting signatures on union authorization cards threatened that, if she refused to sign, "the union would come and get her children and it would also slash her tires." Incredibly, the Clinton Board refused to find the union responsible for the misconduct of the employee card solicitor. While acknowledging that workers assisting a union in card solicitations are typically acting as union agents, the Board concluded that "alleged threats of violence, even when made in the course of card solicitation, cannot be construed by any reasonable person as representing 'purported union policies.'"

CHART 1: PROCEDURAL SAFEGUARDS: ELECTION V. CARD CHECK

The following side-by-side comparison explains some of the procedural safeguards found in the NLRB election process along with any counterpart card check protections:

Election: An NLRB-approved notice that explains the workers' rights must be posted by the employer at least 3 days prior to the election.

Card Check: Workers are informed of their rights only to the extent articulated by the union organizer.

Election: "Captive audience" speeches within 24 hours of the election are prohibited.

Card Check: Employees are subject to unrebutted, pro-union speeches up until the time they sign an authorization card.

Election: The election is conducted by an agent of the NLRB in conjunction with an equal number of observers selected by the union and employer.

Card Check: Union authorization cards are solicited in the presence of union organizers.

Election: The election ballot box is physically inspected and sealed by the NLRB agent immediately prior to voting.

Card Check: The union maintains control over signed authorization cards.

Election: The names of prospective voters are compared against a previously established eligibility list before they may cast their ballots.

Card Check: Anyone may sign union authorization cards. Although forgery of authorization cards is prohibited, there is no safeguard that prevents forgeries before the fact.

Election: The NLRB agent retains positive control over the ballots at all times.

Card Check: The union retains control over authorization cards at all times.

Election: The ballots are secret: no name or other identifying information appears on the ballot to indicate how an employee voted.

Card Check: Both the employer and the union know which employees signed authorization cards.

Election: Employees may not be assisted in casting their votes by agents of the union or employer.

Card Check: Union organizers may fill out and, sign authorization cards on behalf of the workers with their express or implied permission, regardless of whether they have read the cards.

Election: Electioneering near the polls is prohibited.

Card Check: Solicitation of authorization cards may be accompanied by any pro-union propaganda that does not rise to a material misrepresentation regarding the consequences of signing the card.

Election: Neither the employer nor the union may engage in coercive or threatening conduct prior to the election:

Card Check: The union may not use threats or coercion in order to obtain signed cards nor may the employer use threats or coercion to prevent cards from being signed.

Election: Neither the employer nor the union may grant or promise benefits prior to the election.

Card Check: The union may not promise or grant benefits in order to obtain signed cards nor may the employer make promises or grant benefits to prevent cards from being signed.

Election: The ballot box is opened, and the votes are counted by the NLRB agent in the presence of the employer and union observers.

Card Check: The employer may, but is not required to, request that a neutral party compare the names on authorization cards to the employer's payroll list.

Yet, even where abuses such as those in Shawnee Manor do not occur, union authorization cards are an inadequate method for determining employee choice, as the U.S. Supreme Court has acknowledged:

> The unreliability of the cards is not dependent upon the possible use of threats. . . . It is inherent, as we have noted; in the absence of secrecy and the natural inclination of most people to avoid stands which appear to be nonconformist and antagonistic to friends and fellow employees.[3]

Thus, the Court, in an opinion authored by Justice William O. Douglas, concluded that "in terms of getting on with the problems of inaugurating regimes of industrial peace, the policy of encouraging secret elections under the Act is favored."[4]

Indeed, even organized labor has sung the virtues of secret ballot elections when the issue has been whether or not a union should continue to represent a group of employees who apparently no longer support it. In recent brief, the AFL–CIO, quoting the U.S. Supreme Court, asserted to the NLRB:

> A representation election "is a solemn . . . occasion, conducted under safeguards to voluntary choice," . . . other means of decisionmaking are "not comparable to the privacy and independence of the voting booth," and [the secret ballot] election system provides the surest means of avoiding decisions which are "the result of group pressures and not individual decision[s]."[5]

USE OF CORPORATE CAMPAIGNS TO GET EMPLOYERS TO AGREE TO CARD CHECKS

Historically, card check recognition has been tolerated because of an assumption that, with a legal right to refuse card check recognition, an employer would only agree to forego an election if it was clear to the employer that such an election would be superfluous because of the strong employee support for the union. This assumption may have been valid in previous years but, in recent years, employers are more likely to be forced into recognition by a strategy called a "corporate campaign."[6]

Although there is no simple definition for the term "corporate campaign;" the substance of the strategy is now well documented by academics, the courts, and the unions themselves.[7] The U.S. Court of Appeals for the District of Columbia Circuit summed up the term well when it stated that a corporate campaign:

> "encompasses a wide and indefinite range of legal and potentially illegal tactics used by unions to exert pressure on an employer. These tactics may include, but are not limited to, litigation, political appeals, requests that regulatory agencies investigate and pursue employer violations of State or Federal law, and negative publicity campaigns aimed at reducing the employer's good will with employees, investors, or the general public:"[8]

The AFL–CIO likewise explains the process as follows:

> A coordinated corporate campaign applies pressure to many points of vulnerability to convince the company to deal fairly and equitably with the union. In such a campaign, the strategy includes workplace actions, but also extends beyond the workplace to other areas where pressure can be brought to bear on the company. It means seeking vulnerabilities in all of the company's political and economic relationships—with other unions, shareholders, customers, creditors and government agencies—to achieve union goals.[9]

A more graphic description of a corporate campaign has been provided by AFL–CIO Secretary-Treasurer Richard Trumka:

> Corporate campaigns swarm the target employer from every angle, great and small, with an eye toward inflicting upon the employer the death of a thousand cuts rather than a single blow.[10]

Corporate campaigns can involve a seemingly unlimited number of individual pressure tactics. For example, one common tactic is the use of legal and regulatory harassment, as described in *A Troublemaker's Handbook*—a veritable how-to manual for corporate campaigns:

> Private companies are subject to all sorts of laws and regulations, from the Securities and Exchange Commission to the Occupational Safety and Health Act, from the Civil Rights Act to the local fire codes. Every law or regulation is a potential net in which management can be snared and entangled. A complaint to a regulatory agency can cause the company managerial time, public embarrassment, potential fines, and the cost of compliance. One well-placed phone call can do a lot of damage.[11]

One UFCW official; in an article about how his union drove a grocery concern out of business, explained this strategy as "putting enough pressure on employers, costing them enough time, energy and money—to either eliminate them or get them to surrender to the union."[12]

Yet, when an employer seeks to defend itself against corporate campaign tactics, it often finds that its hands are tied. For example, despite the availability to the union of harassment through litigation and regulatory complaints, employers that take legal action to defend themselves against the union will often be found by the NLRB to have retaliated against protected activity and will be ordered to reimburse the union for its legal expenses.[13]

MGM GRAND AND NEW OTANI EXAMPLES

There are numerous examples in recent years of unions using, corporate campaigns to try to coerce employers into granting card check recognition. Two in particular—MGM Grand and the New Otani Hotel & Garden—are noteworthy because they highlight how the law is currently tilted against employee choice in this area.

In the case of the MGM Grand Hotel, the hotel had opened for business in December 1993 and, for nearly 3 years, operated nonunion while the Hotel Employees & Restaurant Employees International Union (HERE) waged an extensive corporate campaign against the company demanding that it agree to a card check recognition. The tactics HERE used to pressure MGM Grand included negative reports issued to investment analysts, opposition to MGM's planned expansion into other locations, a sit in of 500 people in the hotel's lobby, and numerous public demonstrations.[14]

Ultimately, on November 15, 1996, the company voluntarily recognized HERE as the exclusive collective bargaining representative of its employees on the basis of a card check. At that time, there were approximately 2,900 employees. This number increased to approximately 3,100 employees by October 1997.

The hotel's recognition of the union was not well received by the employees. Many believed that their co-employees had been coerced into signing the cards, including threats of being fired or deported. One employee was reportedly even told that if management learned she was gay, she would be fired by the company if she didn't sign a card so that the union could protect her.[15] Events soon made it clear that a majority of the employees did not support the union. Petitions for an election—signed by over 60 percent of the employees—were filed by the employees with the NLRB regional office on April 17, 1997, September 16, 1997, and November 6 1997. These were dismissed on the basis that a "reasonable time to bargain" had not elapsed.

Finally, on November 8, 1997, 2 days after the employees filed the third petition, the company announced to its employees that it had reached a tentative collective-bargaining agreement with HERE and on November 13, 1997, 2 days before the 1-year anniversary of the company's recognition of HERE, the union held a ratification vote at its headquarters. Although the voting was open to all employees, fewer

than, one-third of the bargaining unit employees participated in the ratification vote, and the collective bargaining agreement was approved by a vote of 740 to 103.

Eventually, a divided National Labor Relations Board upheld the decisions by the regional office to deny the employees a secret ballot election.[16] Under the law, the employees could not appeal the Board's decision, because Federal courts are barred from considering appeals from employees in cases involving NLRB election processes. Furthermore, once the hotel and the union signed a collective-bargaining agreement, the employees were barred by the so-called contract bar doctrine from seeking an election for the life of the contract.

The case of the New Otani Hotel and Garden in Los Angeles provides an example of an employer who stood its ground on insisting that unionization be a matter of employee choice but was unable to secure a secret ballot election to resolve the matter. Unfortunately, this insistence was not cost-free to either the employer or the public. HERE Local 11 brought the full force of the L.A. political community to bear in seeking card recognition of the union by the hotel.[17] The union, which was rejected by 88 percent of the New Otani workers in an election in 1982, had no interest in reprising its defeat. With the ultimate goal of ensuring there were no nonunion hotels in downtown L.A., another large election loss would be devastating. Thus, the union's strategy was to apply sufficient pressure on the company until it capitulated and agreed to a card check.

For 4 years, the union focused its efforts on pressuring the hotel itself. It enlisted the support of the AFL–CIO at, the highest levels, with personal participation by President Sweeney, who led a demonstration of 2,000 supporters in downtown Los Angeles, characterizing the effort as "a fight between a valid international labor movement and a multinational law breaker."[18] After a continuing lack of success, the union tried a new approach in 1997. In addition to pressuring the hotel, the union also began attacking the hotel's parent company, Kajima Corp., a construction company that performs a substantial amount of work in Los Angeles. The vulnerability of construction companies with regard to government agencies is well known, particularly in a highly regulated market like Los Angeles.

Thus, when the L.A. City Council was considering bidding procedures for a $1 billion section of a high speed railway, many of the city council members expressed concerns about the possibility of Kajima being awarded the contract. Councilman Mike Hernandez stated: "Companies like Kajima that we have other issues with will be bidding on these contracts. . . . What do we do if we have a company that, for example, we don't want to work with?" The "other issues" were an apparent reference to the fact that 10 of the 15 council members had endorsed a boycott of New Otani. After the discussion, it was decided that the council would play a stronger role in fashioning the bidding standards. As it turned out, Kajima decided not to submit a bid.

In another instance, HERE was able to demonstrate its ability to punish those politicians who failed to join its crusade against New Otani/Kajima. L.A. School Board Member Victoria Castro voted to award Kajima a large contract for development of a learning center in a largely immigrant community in her district. In response, the local unions poured money into the campaign of her opponent in the primary for a State assembly seat. That contributed to an upset victory for her opponent, former county employees' union official Gil Cedillo.

The union's efforts also influenced nongovernmental entities. When the union learned that the Japanese-American National Museum was considering using Kajima for an expansion project, a letter-writing campaign was organized within the civil rights community, including one activist who had been honored by the museum. The letters called into question the propriety of associating the museum with a company accused of using Chinese slave laborers during World War II. In response, the museum opened the process to bidding and Kajima did not submit a bid.

Throughout this brutal assault on the hotel and its parent company, what was the employer's response to the union's demand that it agree to a card check? Rather than making the decision for its employees, the hotel insisted that the matter be resolved by a secret ballot election conducted by the NLRB, and filed an employer petition with the Board's regional office seeking an election. Once again, a divided NLRB trumped employee choice when it ruled that such elections are only available to an employer where the union demands recognition. The Board held that, in this situation, the union had simply demanded that the employer agree to a process that could ultimately lead to recognition.[19] Yet using the secret ballot election to resolve this matter would not only have spared the employer and its employees from the turmoil being created by the union's continuing pressure tactics, it, also would have spared the Los Angeles taxpayers from having critical political decisions made on the basis of a labor-management battle that few of them cared about.

WHY ORGANIZED LABOR PREFERS CARD CHECKS

Organized labor has made no secret about its pursuit of card check organizing. Recently, in his maiden speech as the new President of the UAW, Ron Gettelfinger reportedly pledged that the union "would use its leverage whenever possible to pressure employers to remain neutral during union recruiting drives and [agree to] so-called 'card checks'. . . ."[20] Meanwhile, HERE claims that 80 percent of the 9,000 workers the union organized last year never cast a ballot.[21]

A 1999 study undertaken for the AFL–CIO's George Meany Center for Labor Studies, entitled "Organizing Experiences Under Union-Management Neutrality and Card Check Agreements," shows why card checks are so important to organized labor. Using a traditional NLRB secret ballot election, unions only win about half the time (53.6 percent in 2001). The study, which examined union organizing experiences under 114 card check/neutrality agreements, found that unions scored victories in 78 percent of the campaigns where card checks were used and 86 percent where this was coupled with employer neutrality.

SECRET BALLOT SUREST MEANS FOR ENSURING EMPLOYEE CHOICE

The decision by a unit of employees regarding representation by a union is a decision that should be made by those individual employees after hearing views on as many sides of the issue as possible. The American industrial relations system is founded on this principle. While not without flaws, the best way for resolving the question of representation continues to be by employees expressing their opinion in a secret ballot election conducted by the National Labor Relations Board. The secret ballot election process, which in the vast majority of situations occurs within 60 days after it commences, guarantees confidentiality and protection against coercion, threats, peer pressure, and improper solicitations and inducements by either the employer or the union.

Unfortunately, this system is being threatened by an alternative procedure, known as card check recognition, which lacks these same protections. On the critical issue of union representation, employers should not be allowed to substitute their own judgment for that of their employees. There is simply no acceptable alternative to secret ballot election for assessing those employees' views. If the employer and the union ignore those procedures, union representation becomes nothing more than a deal between the employer and the union that the latter will represent the former's employees. Ideally, the law should prohibit such agreements, and we would encourage this committee to consider legislation, to provide this prohibition.

Thank you for giving me the opportunity to express our organization's position on these issues and I will be happy to answer any questions.

ENDNOTES

1. For a more thorough discussion of card check organizing and its implications, see Daniel V. Yager, Timothy J. Bard, Joseph L. LoBue, Employee Free, Choice. It's Not in the Cards (1998).

2. 321 N.L.R.B. 1320 (1996)

3. *NLRB* v. *Logan Packing Co.*, 386 F.2d 562, 566 (4th Cir. 1967), cited in *NLRB* v. *Gissel*, 395 U.S. 575, 602 n.20 (1969).

4. *Linden Lumber* v. *NLRB*, 419 U.S. 301, 307 (1974).

5. Joint brief of the AFL–CIO et al. in *Chelsea Industries & Levitz Furniture Co. of the Pacific, Inc.,* Nos. 7–CA–36846, *et al.* at 13 (May 18, 1998), quoting *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575,602 (1969) and *Brooks* v. *NLRB*, 348 U.S. 96, 99, 100 (1954).

6. For a comprehensive study of corporate campaigns, *see* Jarol B. Manheim, The Death of a Thousand Cuts. (2001).

7. *See, e.g., Diamond Walnut Growers* v. *NLRB*, 113 F.2d 1259 (D.C. Cir, 1997), *cert. denied*, 118 S. Ct. 1299 1998) (generally discussing union corporate campaign tactics); *Food Lion* v. *United Food & Commercial Workers Int'l Union*, 103 F.3d 1007, 1014 n.9 (D.C. Cir. 1997) (defining the term "corporate campaign"). *See also* Industrial Union Department, AFL–CIO, Developing New Tactics: Winning With Coordinated Corporate Campaigns (1985); Dan La Boltz, A Troublemakers Handbook (1991); Service Employees International Union, Contract Campaign Manual (1988); Herbert R. Northrup, *Union Corporate Campaigns and Inside Games as a Strike Form*, 19 Empl. Rel. L.J. 507 (1994); Herbert R. Northrup, Corporate Campaigns: The Perversion of the Regulatory Process, 17 J. Lab. Research 345 (1996).

8. *Food Lion*, 103 F.3d at 1014 n9.

9. Industrial Union Department, AFL–CIO, *supra* note 7, at 1.

10. "Union Officials Stress International Scope of Organizing, Bargaining Campaigns," Daily Lab. Rep. (BNA), A–5 (Nov. 16, 1992).
11. La Botz, *supra* note 7, at 127 (emphasis in original).
12. Joe Crump, *The Pressure is On: Organizing Without the NLRB*, 18 Lab. Relations Rev. 33, 35–36 (1991) (emphasis added).
13. *See BE & K Const. Co.*, 329 NLRB No. 68 (1999), *aff'd*, 246 F.3d 619 (6th Cir. 2001)., The Supreme Court has granted *certiorari* in *BE & K* (No. 01–518) and is considering the issue of whether liability may be imposed simply because the employer filed a losing suit—as is the Board's current rule—or whether it should also find the lawsuit to be "objectively baseless." LPA has filed an *amicus curiae* brief with the Supreme Court on behalf of the employer.
14. Michelle Amber, "First Pact Between HERE, MGM Grand Calls for On-site Child Care Facility," Daily Lab. Rep. (BNA), No. 225, A–1 (Nov. 21, 1997); Aaron Bernstein, "Sweeney's Blitz," Business Week, Feb. 17, 1997, at 56; Steven Greenhouse, "Unions, Bruised in Direct Battles With Companies, Try a Roundabout Tactic," N.Y. Times, Mar. 10, 1997, at B–7.
15. Lisa Kim Bach, "MGM Workers Seek to Oust Culinary," Las Vegas Review Journal, Apr. 23, 1997, at D–1.
16. *MGM Grand Hotel, Inc.*, 329 NLRB No. 50 (Sept. 30, 1999).
17. *See* Ron Kipling, The New Otani Hotel & Garden: A Corporate Campaign Case Study (1998); Ted Rohrlich, "Union's Eight with Hotel Reverberates Across L.A.," Los Angeles Times, Dec. 5, 1997, at A1.
18. Patrick J. McDonnell & Stuart Silverstein, "AFL–CIO Chief to Press L.A. Case in Japan," Los Angeles Times, Feb. 20, 1997, at D1.
19. *New Otanl Hotel & Garden*, 331 NLRB No. 159 (2000).
20. "Auto Union Chief Vows to Bolster Ranks," Reuters, June 8, 2002.
21. David Wessel, "Aggressive Tactics by Unions Target Lower-Paid Workers," Wall Street Journal, Jan. 31, 2002, at A–1.

APPENDIX A

PREPARED STATEMENT OF HOWARD V. KNICELY, CHAIRMAN, BOARD OF DIRECTORS, LABOR POLICY ASSOCIATION

My name is Howard Knicely. I am Executive Vice President of TRW, and I am appearing before the Commission this morning as the Chairman of the Board of Directors of the Labor-Policy Association. Appearing with me is Rex Adams, Vice President of Administration for Mobil and a member of the Association's Executive Committee. As Stephen Darien testified at the August 10 hearing, the comments LPA is presenting during this final set of hearings are the product of considerable discussion of the *Fact Finding Report*[1] by the members of the Association in a series of meetings specifically called for this purpose.

At the outset, we would like to express our appreciation to Secretary of Labor Robert Reich and Secretary of Commerce Ronald Brown for assembling this Commission to begin not only improving our nation's employment policies, but also the process by which those policies are formulated. Work systems, work design and work relationships are in a constant State of evolution with each century bringing new attitudes, expectations, and forms of association. The present one is no exception. Before the industrial revolution, the concepts of union representation and collective bargaining as we know them today were not even being discussed in a theoretical sense. As the workplace changed in the late 19th century with the introduction of systems of mass production, however, collective bargaining and third party representation of rank-and-file employees became the dominant system of labor-management relations in large enterprises. That system reached a peak during the middle part of this century, but since then, the workplace and work practices continued to evolve, and with it worker-management relationships. Traditional forms of collective bargaining now cover only 10 percent of the employed private sector workforce. The system of industrial relations that guided employment policy in the 1940's, 1950's, and 1960's is now exemplified by millionaire baseball owners and millionaire baseball players having shut down a sector of the U.S. economy by a strike that may not be resolved for several months to come. The baseball strike is instructive because it involves one of the few remaining American industries that is still shielded from competition, thus giving the two sets of millionaires the luxury of pursuing what many non participants view as ethereal demands. The vast majority of American companies, however, no longer operate in sheltered markets. Rath-

[1] Hereinafter referred to as the *Report*

er, we are constantly pressured by a host of highly competitive forces which have led front-line employees, managers, and unions to seek more cooperative ways of working with one another to ensure the long term viability of our organizations.

It is for these reasons that the members of the Labor Policy Association, the NAM and hundreds of other business organizations were pleased that the Commission in its Report recognized the existence of these new forms of work relationships, generically described as employee participation or employee involvement. While, as expressed in our testimony on August 10th, LPA members are still not certain whether the Commission understands the full significance of employee involvement in today's workplace, you have made an invaluable contribution to the continued progress of employment policy by ensuring that any future discussion of changes in those policies will deal with this new reality. In our August 10th statement, we detailed our concerns with the conclusions reached and the suggestions made in Chapter II, but on the whole we believe that its findings provide the necessary factual basis on which substantive discussions of policy changes can proceed.

We would additionally point out that Chapter II asks whether these new forms of employee involvement are little more than "temporary fads that will ebb and flow."[2] No one has yet discovered the perfect workplace, and we fully expect that the progressive organizational designs that have been described to you will eventually be replaced by even better ones. In the year 2094 when the Department of Labor (or whatever it is called by then) convenes a commission similar to this one, we are certain that its findings of fact will include descriptions of late 21st century work systems that are fundamentally different than the ones that were commonly prevailing in the mid-20th century.

We were also pleased with Chapter IV of the Report because it acknowledges perhaps the most important employment policy development since the 1960's—the shift in employee power in worker management relations from unions to plaintiff attorneys. The chapter breaks new ground in dealing with the legal gridlock that this shift has generated by again providing the necessary factual basis for substantive discussions. Regarding Chapter I of the Report, LPA has not offered a detailed economic analysis of its portrait of gloom nor do we intend to do so. Granted, the U.S. has significant economic and social problems that cry out for improvement. We would only say that, accepting your picture as correct, it is surprising that:

1. Our borders are being overrun by so many people desperately seeking entry into the good life of the United States,

2. Our rate of joblessness is so much lower than in Canada, Europe and other countries that have what the Commission may believe to be far more progressive employment policies, and

3. American business is competing so well with countries whose workers don't earn in a day what U.S. employees earn in an hour.

That brings us to Chapter III of the Report, the subject of today's hearing. In our opinion, it can be described most charitably as a disappointment. Not only does it present a decidedly one-sided view of the issues of union representation and collective bargaining, it perpetuates a number of myths about labor-management relations. As long as policymakers continue believing in these myths, which are only reinforced by Chapter III's findings, any serious attempt at improving worker-management relations in this particular arena will be frustrated. Unlike Chapters II and IV of the Report, we do not feel a good faith attempt has been made in Chapter III to establish a set of facts that could bring the parties together to begin serious policy discussions, nor do we accept several of your findings as facts.

The findings the Commission has either explicitly made or strongly implied in Chapter III can be summarized as follows:

I. American workers have a strong preference for traditional union representation and collective bargaining that is being frustrated by employer hostility to unions.

2. This hostility is the primary, if not the sole, reason for the decline in union representation in America.

3. The principal manifestation of this hostility is employees seeking union representation who are intimidated into voting against the union by employers who routinely fire anyone sympathetic to such representation.

4. If a majority of employees in a bargaining unit has the courage to overcome this hostility and vote in favor of union representation, one-third of the workplaces desiring such representation will never be able to negotiate their first contract because employers will do everything in their power both inside and outside the law to frustrate agreement.

5. There is a "dismal side" to labor relations in that some employers break the law to resist unionization.

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[2] *Report*, 48.

We would like to deal with each one of these "findings" in turn.

EMPLOYEE PREFERENCES

Regarding the question of employee preference for union representation, the Report attaches great significance to surveys which show that 30 percent of the non-union workforce wishes to be represented by a union. We attach greater significance to the fact that 70 percent do not wish to be represented. A number of recent surveys reinforce this finding. Three surveys conducted in the mid-1980's, including one specifically for the AFL–CIO, found that 65–75 of all non-union workers would reject union representation in a secret ballot election.[3] These percentages are matched by the percentage (64,9 percent) of votes cast against union representation in all NLRB elections.[4] Attitudes have not changed since, as was shown in a 1991 Penn + Schoen poll conducted for the Employment Policy Foundation which found that 73 percent of all employees do not favor having a union in the workplace.

We would bring to the attention of the Commission a survey conducted by the AFL–CIO's Department of Organization and Field Services that was released in February 1989, a copy of which is attached to our statement. In a cover letter to AFL–CIO affiliates, Ms. Vicki Saporta, then Director of Organizing for the Teamsters, said the survey summarized interviews with union organizers involved in 189 NLRB elections in units over 50 held, between 1986 and 1987. The survey itself states:

> In order to obtain this data, lengthy interviews were conducted with the lead organizers in these campaigns, during which questions were. asked concerning the union's tactics, the company's tactics, and characteristics of the workforce.[5]

This survey, we would submit, may help the Commission determine the accuracy of the facts contained in its *Report* that it now desires to become the basis for discussions of policy changes.

Interestingly, the survey found that the northeast, particularly New England, is the most inhospitable for union organizing with the win rate there only 32 percent. We would point out that states like Connecticut, Massachusetts and Rhode Island constitute an area with a large percentage of workforces represented by unions. At the same time, the survey found that the greatest percentage of organizing success was in the west/southwest, a region in which union representation is much less prevalent. There the organizers enjoyed a 51 percent rate of victory. One would assume that if unionized working relationships were as successful as Chapter III makes them out to be, then the.areas of the country with the heaviest unionization rates would be those with the highest union win rates, yet that is not the case. An inference that may reasonably be drawn from these statistics is that the more employees know about the actual operation of unions in the workplace, the less likely they may be to vote in favor of union representation. This same inference can also be drawn from another statistic in the AFL–CIO survey in the section entitled, "Prior Union Exposure" which came to the following conclusions:

> Familiarity and prior experience with unions has an ambiguous effect on the ability of unions to win NLRB elections. If former union members make up a small portion of the workforce, the win rate rises slightly. However, if former members made up more than half the workforce, the win rate is only 29 percent.[6]

As the Commission undertakes an examination of government policies to determine how they might be altered to increase unionization of the workforce, we would suggest that this particular, statistic be given very careful consideration.

We would also direct the Commission's attention to Part A of Chapter III which gives the Commission's perspective on "Experience Under the National Labor Relations Act." In Section 1, the NLRB certification election process is described in great detail. Part A, however, contains no description of the NLRB decertification election

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[3] 75 percent—"The Lifeline for Unions: Recruiting," *Washington Post*, Sept. 13, 1987, H1; 65 percent—Louis Harris and Associates, Inc., *A Study on the Outlook for Trade Union Organizing* 63 (Nov. 1984) (survey conducted for the AFL–CIO); 67 percent—Institute for Social Research, *Quality of Employment Survey* (University of Michigan, 1977), cited in James L. Medoff, *The Public's Image of Labor and Labor's Response* (National Bureau of Economic Research, Harvard University, 1984), 10.

[4] Leo Troy, "Will An Interventionist NLRA Revive Organized Labor?," 13 *Harvard Journal of Law & Public Policy* 583, 599 (1990).

[5] Department of Organization and Field Services, *AFL–CIO Organizing Survey: 1986–1987 NLRB Elections*, (AFL–CIO, Washington, DC:, February, 1989), 46 [hereinafter, *AFL–CIO Survey*].

[6] *AFL–CIO Survey*, 52.

process—the process by which employees represented by a particular union disaffiliate themselves from that union—nor is there mention of that process anywhere else in the Report, even though about 15 percent of all elections conducted by the NLRB are decertification elections. In addition to the 100,000 or so employees who annually vote against becoming unionized in a certification election, almost 15,000 vote to get rid of a union that is already in place. Moreover, while employees choose not to be represented in about one out of every two elections, in decertification elections, they choose to no longer be represented in seven out of ten.

The lack of discussion of the decertification process raises another significant issue. We are surprised that despite the Commission's own data that 70 percent of the workforce has a preference against union representation, not one of the 354 witnesses brought before you was a rank-and-file employee who testified why they had voted against the union either in a certification or a decertification election. We find it inexplicable that a Federal commission with the mandate this one has would choose to ignore completely the views of the majority of the American workforce. In contrast, the Commission did hear from a number of employees who were brought forth by organized labor to portray the so-called "Human Face of the Confrontational Representation Process." In doing so, the Commission apparently accepted at face value everything it was told by these witnesses without seeking testimony from employees in the same workplace that might have had a different point a view.

A close look at the story of one of these witnesses—Judy Ray of Peabody, Massachusetts—is telling. Ms. Ray testified that she had been fired by Jordan Marsh Stores on the day after Thanksgiving solely because she was a union organizer. She labelled the "harassment" she had suffered from the company a "disgrace." The Report reprints Ms. Ray's account as one of the "facts" the Commission had found. The day before the June 10th election, however, the local paper published a letter from 29 Jordan Marsh employees characterizing Ray's actions against the company as a "personal vendetta" and specifically refuting Judy Ray's statement that "she speaks for us:" Her attempt to divide a staff that works well as a team, despite her recent public statements and condemnations, are offensive and ineffective.[7]

Apparently, a solid majority of the employees agreed more with the sentiments expressed in the letter than with Ms. Ray. The union was rejected by a 4 to 1 margin (155 to 39) on June 10. Employees who voted against the union claimed to be "absolutely thrilled. . . . We did not want the union in our store, and everyone stuck together on that."[8]

Later this month, an NLRB administrative law judge will conduct a hearing to determine whether Ms. Ray, a commission-paid sales person, was fired for union activity or, as the store claims, because she stole a sale of a television set from a fellow employee. We would point out that an attempt by the NLRB on July 29, 1994, to obtain an injunction ordering her reinstatement was thrown out by a Federal district court.[9]

If the Commission is truly interested in establishing a set of facts on which substantive policy discussions can proceed regarding the direction of unions and the workplace, it will need to do far. more digging into organizing campaigns such as the one at Jordan Marsh in order that all the facts, and not just a select few, are on the table. Business groups would have been pleased to provide "real people—American employees",[10] as the Commission describes them, who would have represented the 70 percent of the workforce that public opinion polls show prefer to represent themselves in the workplace. Had we done so, however, our strong suspicion is that the business community's production of such witnesses would have been viewed as self-serving by the Commission. Indeed, the surprisingly hostile reception the Commission accorded Chester McCammon, a non-union welder from Universal Dynamics who addressed the Commission on August 10th as part of the management panel, is illustrative.

DISCHARGE OF UNION ACTIVISTS

With regard to the Commission's conclusions on illegal discharges, the *Report* as well as studies published by certain Commissioners have painstakingly attempted to demonstrate that illegal discharges occurring in an organizing campaign have increased considerably in recent years and that those discharges are a primary cause

[7] Letter to the Editor, *The Peabody Times*, June 9, 1994.

[8] Andrew D. Russell, "Jordan Marsh Employees Reject Union," *The Salem Evening News*, June 13, 1994, (quoting employee Mary O'Leary).

[9] *Rosemary Pye and the National Labor Relations Board* v. *Jordan Marsh Stores Corporation*, No. 94–11509EFH (D. Mass. July 29, 1994).

[10] *Report*, 76.

of union decline in America. We do not intend to continue splitting hairs over the proper measurement of this activity using the available data. Rather, we challenge the underlying premise of the Commission's use of the data; i.e., that the alleged increase has been a major cause of organized labor's decline. The notion that employers can stifle organizing drives by firing union supporters has been pounded into the American consciousness so thoroughly and for so long that no one, including this Commission, has apparently thought it necessary to challenge it.

Testimony was presented to the Commission by former Solicitor of Labor, William Kilberg, that management attorneys invariably advise their clients *not* to terminate any employees during an organizing drive who have any identification with the union because, more often than not, such discharges can have a galvanizing effect on the employees. We couldn't help but notice the skepticism with which this testimony was received, by the Commission during the February 24, 1994 hearing, and because of that we were not surprised that there was no acknowledgement of it in the *Report*. However, Mr. Kilberg's testimony was recently echoed in a July 28, 1994, letter to the editor of the *Philadelphia Inquirer* by John Morris, President of the Pennsylvania Conference of Teamsters:

> Employers actually make a mistake when they fire employees during a Teamsters organizing. drive. In effect, they create martyrs that strengthen the solidarity of the employees when they see the support the Teamsters give to the discharged workers.[11]

The AFL–CIO survey described above bears this out. In the section headed, "Discharges," the union organizers polled came to the following conclusion: "Interestingly, unions seem to have a higher success rate (46 percent) where there is a firing than where there is not a firing (41 percent)."[12]

This statistic may explain why, notwithstanding any alleged increase in discharges, unions file objections in only 6 percent of all elections, with 2 percent of all election results being overturned, percentages that have remained relatively constant over the years. This point was made to the Commission by another witness, former NLRB Chairman Edward Miller, but the Commission chose to relegate this important piece of information to a footnote.[13]

These facts clearly demonstrate that unions are losing elections because of employee choice, not employer illegalities. Therefore, despite the hyperbole to the contrary that we have heard repeatedly throughout these proceedings, it should come as no surprise that very few employees list fear of employer reprisals as a factor in their decision to remain non-union. According to a 1991 Penn+Schoen poll conducted for the Employment Policy Foundation that was submitted to the Commission, only 1 percent of all non-union employees who opposed having a union did so out of fear of employer reprisal.

EMPLOYER HOSTILITY AS SOLE CAUSE OF UNION DECLINE

Turning to the implied finding that employer hostility is the sole cause of union decline in America, while the Commission does not speak directly to the causes of this decline, it does detail the statistics regarding that decline and then devotes the bulk of Chapter III to a lengthy discussion of employer violations of the National Labor Relations Act, creating the strong implication that those violations are the sole cause of diminished representation. We believe that it would have been more conducive to serious discussion of possible changes in the NLRA if the Commission had tried to look behind these statistics to develop a more complete picture of the causes of union decline. For example, changes in human resource practices, union organizing deficiencies, expansion of statutory employment protections, market forces, employee attitudes and labor's confrontational style are all factors deserving exploration, as discussed briefly below.

Changes in Human Resources Practices. As several employer witnesses like myself have testified to the Commission, if thirty years ago my peers and I had espoused to our managements the kinds of workplace practices that we routinely do today, we would have been summarily dismissed. Hierarchial work systems are being abandoned as employers recognize that employees are an intellectual resource that must be tapped if the organization is going to survive in the new economic environment. We believe that the best way to attract a competitive workforce is to offer an attractive workplace, not just in terms of wages and benefits, but also in the extent to which employees become integrally involved in the operation of the worksite, problem solving and dispute resolution. If, in the process, employees are gaining a

[11] John P. Morris, Letter to the Editor, *The Philadelphia Inquirer*, July 28, 1994.
[12] *ALF–CIO Survey*, 53.
[13] *Report*, 70, footnote 5.

"voice" in that workplace, it should not make any difference to the Commission that it may lead to a decline in the union win rate.

Expansion of Statutory Employment Protections. As Chapter IV of the *Report* describes so eloquently, the declining trend in union density has been matched by an ascending trend in new workplace laws at the Federal, State and local level, not to mention the liberal trend in common law developments. Indeed, during the past year Congress has been debating whether to legislate one of the most basic components of any collective bargaining agreement-a health care plan. As more and more components of collective bargaining are superseded by employment legislation, the less meaningful a collective bargaining agreement becomes, and the less attractive a union is to employees.

Union Organizing Deficiencies. On this point, the unions, when talking amongst themselves, have been their own harshest critics. A 1991 survey conducted in cooperation with the AFL–CIO Organizing Department concluded: "[T]he results from this study clearly show that union tactics, taken as a group, play a greater role in explaining the election outcome than any other group of variables in the model, including employer tactics, organizer background, and unit demographics.[14]

Market Forces. Finally, there are a panoply of market forces-both domestic and international-that have had a dramatic impact on American unionism. For example, much of the decline can simply be attributed to extensive downsizing by unionized companies, particularly during the 1980's. The growth in international competition—boosted by appreciation of the dollar during the 1980s—has been a major contributor. Imports into the United States grew to 13 percent of the GNP in 1990, almost three times the percentage in 1960. This outside competition has made it more and more difficult for organized labor to capture an entire industry and remove labor cost competitioft through pattern bargaining. The inability of a number of companies in traditionally unionized industries to match the competition resulted in a decline in union membership in the manufacturing sector by about 2.3 million during the 1980s.[15]

The impact of deregulation on four of our major industries—communications, airlines, public utilities and trucking—has had a similar impact. Previously, these sectors were wellinsulated against cost competition by a regulatory structure that set prices and limited participation by newcomers. With the entry of new cost-competitive players into these industries; high labor costs can no longer be easily passed on to the customer, and new nonunion competitors have captured a good share of these markets. The result was a decline of about 625,000 in union membership in the 1980s in these sectors alone.[16]

Further, the significant areas of job growth in the United States, going back to the 1950s, have occurred in the service sector, which has traditionally been less organized than the manufacturing sector. Beginning in the 1950s—at the same time union membership was peaking—the United States shifted from a predominantly manufacturing to a predominantly service economy. This shift has occurred with growth in advertising, computer software, data processing, temporary personnel, management; business consulting, legal, accounting, engineering and architectural services. Even within manufacturing, there has been a substantial growth in "in-house" services, which has contributed to the decline in manufacturing union density from 32 percent at the beginning of the 1980s to 22 percent at the end.[17]

Of course, none of these new market realities touched the American public sector to any significant degree, where union representation has increased in recent years. That sector's insulation from cost competition is a much more relevant explanation for union growth than the absence of employer opposition cited in the *Report*.[18]

We would also point out that the decline in unionization is far from a uniquely American phenomenon. Had this panel been able to hear from Professor Leo Troy of Rutgers University, he could have explained how the deunionization of America is being mirrored in Canada and the countries of Western Europe as they also shift to a service-based economy, even though the labor laws of those countries are far

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[14] Bronfenbrenner, *Successful Union Strategies for Winning Certification Elections and First Contracts: Report to Union Participants*, Part 1: Organizing Survey Results, (1991).

[15] Leo Troy, "Will a More Interventionist NLRA Revive Organized Labor?," 13 *Harvard Journal of Law & Public Policy* (1990), 583, 615.

[16] *Ibid*., 616.

[17] *Ibid*., 615.

[18] *Report*, 78.

more favorable to union organization. The shift in Canada, for example, produced a 20 percent decline in private sector union density from 1975 to 1985.[19]

FIRST CONTRACTS

On the subject of the Commission's findings regarding first contracts, the *Report* points to data addressing the difficulty the parties have reaching agreement in first contract situations. The Commission implies that this is a result of employers flouting their duty to bargain under the law by either engaging in surface bargaining or refusing to bargain altogether. The Commission then suggests that stronger remedies would correct this.

Although the Commission has reached an unequivocal conclusion regarding this trend, the fact of the matter is that there is no universal time-series data available to test whether first contract failures are any more widespread today than they ever were. As is noted by the Commission, it has only been since 1986 that the FMCS has received notice and copies of new certifications. Studies conducted before 1986 were limited to sample populations with no tracking of those populations over any significant period of time. The 1966 study by Ross cited in the *Report* was based on a sample drawn from only six of thirty NLRB regional offices.

Because no one knows with any degree of certainty whether first contract failures have increased, let us assume for purposes of discussion that they have. As Prof. William Gould IV, a former member of this Commission and current Chairman of the NLRB, has written in *Agenda for Reform: The Future of Employment Relationships and the Law*:

> The fact is that employers have been able to convince workers not to join unions by providing them with benefits comparable in most respects (and sometimes superior to them) to those contained in collective bargaining agreements negotiated by unions. Thus . . . a kind of benevolent paternalism has helped to succeed in making workers disinterested in unions.[20]

We would hardly describe competitive pay and benefits in modern companies as "benevolent paternalism," but Chairman Gould is correct in saying that companies spend a considerable amount of time ensuring both internal and external equity in their compensation programs. They do so, however, for reasons that have nothing to do with warding off organizing drives and much to do with ensuring fairness and minimizing turnover. One byproduct of this attention to equity is that in order to win an election a union may find it necessary to promise the employees an economic package that the employer is not capable of delivering. We would remind the Commission that there has never been a "duty to agree" under the National Labor Relations Act, only a duty to bargain in good faith. Thus, neither the employer who can only go so far in stretching labor costs to remain competitive—nor the union—which has to bring back an attractive wage/benefit package to justify its election victory—is breaking the law by engaging in hard bargaining.

We would also point out that it has been the experience of many LPA members that once union organizers successfully complete a campaign, they often move on to the next site. No experienced negotiator may be left behind to coach the employees on a day-to-day basis through their first negotiation. As a result, a first contract situation often involves a group of employees with very high expectations, but with little experience working with one another to achieve a contract. Under these circumstances, the fact that two out of every three first contract negotiations may result in an agreement (assuming that figure is correct) should be viewed in a positive light. Further, should the employer break the law and fail to bargain in good faith, the union has more at its disposal than simply going to the Board to get a bargaining order. It can call a strike. This particular strike will have even greater potency because, being an unfair labor practice strike, the employer is barred from hiring permanent replacements.

THE "DISMAL SIDE"

In Exhibit III–8, the Commission devotes four full pages to depicting "The Human Face of the Confrontational Representation Process," describing it as the "dismal side" of labor relations. We would suggest that it should come as no surprise to the Commission that most things in the human experience have a dismal side and that the field of labor relations is no exception. We do not deny that there are some employers who, no matter how tough the labor laws are written, will make every at-

[19] Leo Troy, "Is the U.S. Unique in the Decline of Private Sector Unionism?," 11 *Journal of Labor Research*, (Spring 1990), 111, 127.

[20] William Gould, *Agenda for Reform* (Cambridge: MIT Press, 1993), 42.

tempt to undermine them using illegal behavior. The same is true, however, on the union side. For that reason, we do not see how the Commission expects there to be a serious debate regarding how worker-management relations are to be improved by turning a blind eye to union misconduct.

It was union corruption and violence that led to enactment of the Labor Management Reporting and Disclosure Act of 1959, yet a cursory review of recent NLRB decisions indicates such conduct is still very much a part of worker-management relations. For example:

• In *Swing Staging*, Inc. (29-CA–15756, August 5, 1994), an election was set aside by an NLRB administrative law judge because of union misconduct. During the course of a 1990 organizing drive by Teamsters Local 282 of Brooklyn, the Judge found that a hangman's noose was placed on the president's car and a nail driven through the radiator; the brakes of a company truck were damaged; the line io the company's.oil tank was cut; an employee was told he would lose his pension from another union if he voted against the Teamsters; employees were told that the "union boys" would beat up whoever didn't vote for the union and break the windows of an employee's car if he made waves with the union; and, employees were told that the union was connected to John Gotti who would "take care of the president if he gave the union a hard time. The reference to Mr. Gotti apparently was not a hollow threat. The ALJ pointed out that Mr. Gotti had been named as an unindicted co-conspirator with various officials of Local 282 for allegedly participating in a scheme to extort payoffs and kickbacks from various construction industry employers[21]

• In *Cedar Grove Manor Convalescent Center*, 314 NLRB No. 106 (July 29, 1994), the employer refused to negotiate with District 1115, (H. E. R. E.), which had ousted the incumbent union in an election. The employer raised as an affirmative defense the union's conduct, claiming that it rendered the election meaningless. The record indicated that District 1115 originally offered $1,500,000 in cash under the table to the incumbent union to buy the unit. Later, the director of District 1115 threatened the incumbent union's business agent with bodily harm in order to dissuade the business agent from continuing to give testimony before the Board. The director and the business agent had the following conversation over the phone: "Why don't you stop this nonsense with the Labor Board or else." "Or else what?" "You will get your legs broken . . . Listen, people like you wind up in wooden boxes." Although the case revealed that this was not the first time Local 1115 agents had engaged in such conduct, a three-member panel of the Board (Gould, Devaney and Stephens) voted unanimously to require the employer to bargain with District 1115.

Often, union violence is not easily detected. In *A Troublemaker's Handbook: How to Fight Back Where You Work and Win!*[22], a publication by the Labor Education and Research Project, the authors describe a so-called "in-plant strategy" that uses illegal on-the-job practices to apply pressure to an unnamed employer without having to engage in a strike. We would call the Conunission's attention to one passage that describes the kinds of activities engaged in:

One of the key departments [the "solidarity committee"] identified was the foundry, the heart of the entire production operation. At the center of the foundry was a large forging machine that turned bar stock into coil springs. If a piece of bar stock got.caught sideways in the machine, it would melt and immobilize the machine. For one reason or another, that began to happen more and more frequently.[23]

Often, violence occurs when a particular company is on labor's "hit list" as is the case . with BE&K, a non-union construction company. The Eighth Circuit Court of Appeals ruled in *BE&K Construction* v. *NLRB* against a Michigan Ironworkers local in which was implicated in a 1989 riot protesting the use of BE&K for a paper mill expansion in International Falls, Minnesota.[24] The riot involved 450 people who burned the BE&K workers' campsite and injured a number of people while causing $2 million in damages. Fear of a similar outbreak was the cause of BE&K losing a contract to perform construction on a pulp and paper plant near McGehee, Arkan-

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[21] The procedural history of this case demonstrates the NLRB's lack of concern with union violence. The union won the elections at the two worksites by votes of 11–5 and 6–3. Despite all this evidence of misconduct, the Regional Director, after an investigation, recommended that the employer's objections be overruled and the union certified, The Board agreed, but the employer, refused to bargain. The Board ordered the employer to bargain with the union, but the D.C. Circuit refused to enforce the Board's order and remanded the case in order for a hearing to be held. Finally, almost 4 years after the election, the AU is now ordering that the election be set aside. The company, meanwhile, has gone out of business.

[22] Daniel LaBotz, *A Troublemakers Handbook: How to Fight Back Where You Work and Win!* (Detroit: Labor Notes Handbook, 1991).

[23] *Ibid.,* 119.

[24] *BE&K Construction Co.* v. *NLRB, 23 F.3d 1459, (8th Cir. 1994).*

sas, following an illegal boycott by the United Brotherhood of Carpenters and the United Paperworkers. This boycott wound up costing the unions $20 million as a result of a Federal jury award.

In the last few years alone, the national electronic and print media have reported in detail the violent strikes that occurred in the Greyhound, New York Daily News, Pittsburgh Press and similar bitter controversies. The United Mine Workers was fined $52 million by a Virginia State court for the violence that swept through the coal fields during the Pittston strike. The "human face" of labor relations in certain worksites is exemplified by Eddie York who was shot to death in November, 1993, for crossing a picket line. Mr. York was a backhoe operator, an independent contractor who was cleaning a reclamation pond in Logan County, West Virginia. This was work that was not performed by the union, but after he had been escorted off the property by two security vehicles and was driving along a public road, strikers began hurling rocks and then shots were fired from a wooded area. Mr. York's truck was hit at least three times, the third shot being fatal.[25]

In the 163 pages of the Commission's *Report*, there is no mention of union violence nor its impact on collective bargaining and worker-management relations. Accordingly, we are submitting to the Commission a copy of a comprehensive study of workplace violence, entitled *Union Violence: The Record and The Response by Courts, Legislatures and the NLRB*[26], by Professors Armand J. Thieblot and Thomas R. Haggard, published by the University of Pennsylvania in 1984.

By refusing to acknowledge the on-going presence of violence in collective bargaining and labor relations in a review of the current State of workplace relations, it can be said that the Commission is impliedly condoning its continued use to achieve collective bargaining objectives. In our opinion, it is incumbent upon the Commission to use its "bully pulpit" to repudiate the belief that a certain amount of violence is acceptable in labor disputes. Acceptance of violence is seldom found in public discussions of any other ideological conflicts. For example, while there are far more beatings and murders on picket lines in labor disputes than those surrounding abortion clinics, Congress recently enacted the Freedom of Access to Clinic Entrances Act (Public Law 103–259) that makes violence, intimidation or obstruction which interferes with persons entering abortion clinics a Federal crime. During consideration of that law, attempts were made in both the House and Senate to broaden the proscription to cover labor violence. Rep. Stenholm (D-TX), for example, argued:

> [I]f it is not appropriate for an abortion protester to intimidate a woman seeking her legal choice to reproductive health services, then I believe it should also be inappropriate for a striking worker to intimidate another worker attempting to cross the picket line to exercise his or her right to work.[27]

The leadership in the House and Senate, however, prevented a vote on these amendments.

In addition to proposing'enactment of a measure similar to Public Law 103–259 applicable to labor dispute violence, the Commission should consider other worker protections as well. Currently, violence *per se* is not an unfair labor practice under the National Labor Relations Act. We urge the Commission to propose making the use or threat of violence by either a union or an employer to accomplish collective bargaining goals an unfair labor practice with injunctive relief similar to that available against secondary boycott activities. In addition, individuals engaged in violence aimed at furthering either the employer's or the union's goals could be rebuttably presumed to be acting as their agents, thus eliminating the problems inherent in establishing the necessary "chain of command" to obtain relief. At a minimum, individual employees who are victims of union violence should be able to obtain "make whole" relief from the union in the form of back pay for any wage losses caused by the violence. Surprisingly, the Board has refused to provide even this remedy.[28]

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[25] *Congressional Record* 103d Cong., 1st sess., 1993. Vol. 139, H 10066–617 (statement by Rep. Stenholm).

[26] Armand J. Thieblot, Jr. and Thomas R. Haggard, *Union Violence: The Record and the Response by Courts, Legislatures, and the NLRB* (Philadelphia: Industrial Research Unit, University of Pennsylvania, 1984).

[27] *Congressional Record*, 103d Cong., 1st sess. . 1993. Vol. 139, H10065 (statement by Rep. Stenholm).

[28] *Teamsters Local 901 (Lock Joint Pipe & Co.)*, 202 NLRB 399 (1973).

CORPORATE CAMPAIGNS

In addition to ignoring the dismal side of labor relations caused by union violence, the Commission's *Report* made no mention of the growth of the "corporate campaign" and the negative impact it has had on collective bargaining. Because certain aspects pf corporate campaigns raise serious public policy questions, no thorough study of collective bargaining in America today would fail to examine this new phenomenon in labor relations. Given the Commission's deep concern about the tensions involved in and the level of resources devoted to organizing campaigns, it is surprising that the Commission chose not to focus on this area.

A definition of the corporate campaign can be found in the AFL–CIO guidebook entitled *Developing New Tactics: Winning With Coordinated Campaigns* which describes how a coordinated. campaign applies pressure to a target company:

> It means seeking vulnerabilities in all of the company's political and economic relationships—with other unions, shareholders, customers, creditors and government agencies—to achieve union goals.[29]

Unlike traditional labor-management disputes, corporate campaigns go outside the company to generate public hostility and antagonisms toward the target corporation. In addition, they seek to manipulate Federal regulatory agencies such that the target becomes enmeshed in enforcement actions. According to the AFL–CIO guidebook:

> Businesses are regulated by a virtual alphabet soup of Federal, State and local agencies, which monitor nearly every aspect of corporate behavior. . . . Regulatory agencies exist to protect citizens, and unions can use the regulators to their advantage. An intransigent employer may find that in addition to labor troubles, there are suddenly government problems as well.[30]

A Service Employees International Union Manual provides similar guidance.

Moreover, even if the violations are completely unrelated to bargaining issues, your [union's] investigations may give management added incentive to improve its relationship with you. Management officials may find that . . . the employer now is facing . . .

- Extra expense to meet regulatory requirement or qualify for necessary permits and licenses.
- Cost delays in operations while those requirements are met.
- Fines or other penalties for violating legal obligations.
- Damage to the employer's public image, which could jeopardize political or community support, which in turn could mean less business or public funding.[31]

It is not an uncommon experience for unionized companies about to enter collective bargaining negotiations to have a slew of charges filed against them at OSHA, wage-hour, EEOC and other Federal. agencies. There are more dramatic examples, however. In a July 26, 1994, decision by the Ninth Circuit Court of Appeals, *USS-Fosco Industries* v. *Contra Costa County Building and Construction Trades Council*, No. 92–15497, the court found very troublesome the activities undertaken by a group of California construction unions to wipe out non-union construction in northern California. Again, the unions' target was the aforementioned BE&K, which had entered into a contract involving 800 jobs to update a steel facility. The company was subjected to numerous lawsuits, protests against permits, lobbying at the local level for new environmental ordinances requiring more permits, and encouragement of subcontractors to protest nonexistent safety violations. Despite its concerns over the legitimacy of the union's activities, the court found that the union was protected against an antitrust action by an exemption for those petitioning the government for redress of grievances. Whale the exemption does not apply to so-called "sham petitioning," the court noted that fifteen of the twenty-nine filings of complaints with the government had proven successful. The fact that those complaints never would have been filed but for the. unions' desire to harass the company was irrelevant.

We are also submitting to the Commission a copy of a book published in 1987 by the University of Pennsylvania entitled *Union Corporate Campaigns* by Prof. Charles R. Perry that provides several case studies of corporate campaigns and their impact on labor-management relations.

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[29] Charles R. Perry, *Union Corporate Campaigns* (Philadelphia: Industrial Research Unit, University of Pennsylvania, 1987), 1.

[30] *Ibid.,* 6.

[31] Service Employees International Union, *Contract Campaign Manual*, (1988), 3–21, footnote 38.

To summarize our concerns with the findings in Chapter 111, the Commission states on page 78 of the *Report* that:

> The Commission has not sought to determine the role of particular campaign tactics, legal or illegal, on the outcome of NLRB elections nor the reasons for the decline in the proportion of workers covered by collective bargaining in the United States.

That statement notwithstanding, the Commission did in fact reach certain conclusions, either explicitly or impliedly, about the role of particular tactics and the reasons for the decline. The problem that we have with the Report is that only one side of the story is presented, the story written by organized labor. Unlike Chapters II and IV, Chapter III makes no serious attempt at giving the American public a complete picture of the facts involved in contemporary worker representation and collective bargaining.

ANOTHER VIEW OF THE FINDINGS

While Chapter III provides mostly a one-dimensional view of collective bargaining in the United States, a reader willing to pick carefully through its paragraphs and footnotes will eventually be able to cobble together a much different set of facts than the ones adopted by the Commission, ones that lead to very different conclusions regarding where reforms in the National Labor Relations Act are needed. These alternative findings are as follows:

1. *Collective bargaining, where it exists, is working very well.* The *Report* states: "In most workplaces with collective bargaining, the system of labor-management negotiations works well."[32] We agree with this statement, but it is troubling that it was buried in the text of the *Report* and not adopted as one of the principal findings. We recognize that commissions tend to (and should) focus on problems that need to be corrected, but in view of the apocalyptic statements elsewhere in the *Report* about the State of collective bargaining in America, today, we believe this. conclusion should have been elevated to the status of a major finding.

2. *The National Tabor Relations Act is being administered in a timely effective manner by the National Labor Relations Board.* Despite the inclusion in the *Report* of considerable statistical data to prove this point, the *Report* bends over backwards to avoid drawing this conclusion, including relegating to a footnote its own assessment that the Board's regional offices settle charges and issue complaints within 45 days, "a track record that just about any other labor or employment agency would be proud to have. "[33] (See Chart I).

Because approximately 80–85 percent of all meritorious cases are settled, this "track record" merits more than a footnote. (See Chart II).

[32] *Report*, 64.
[33] *Report,* 71, footnote 7.

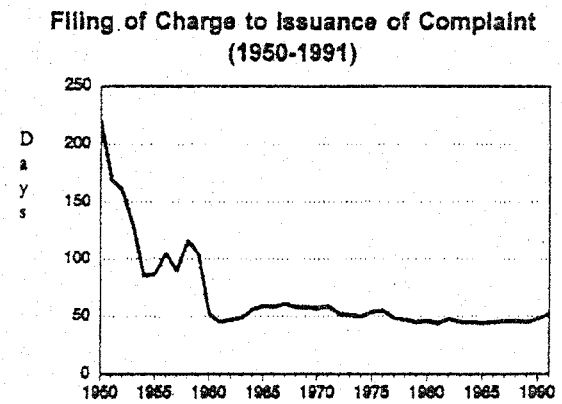

Chart I

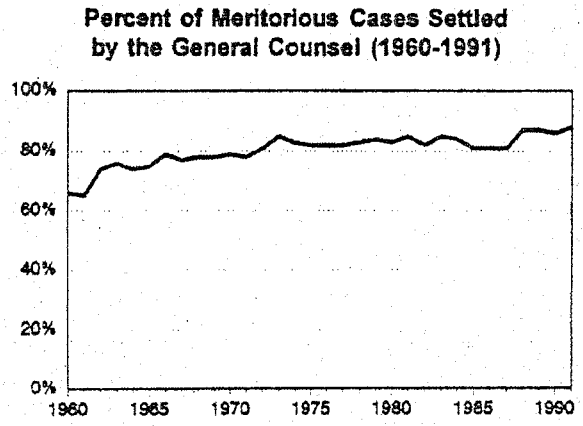

Chart II

The *Report's* data regarding the Board's conduct of representation elections are no less impressive. A constant refrain by organized labor for the past two decades has been that employers have successfully manipulated NLRB procedures to ensure that the representation election occurs long after the certification petition is filed—sometimes years later. The Report attempts to bolster this complaint by asserting that 20 percent of elections take more than 60 days.[34] Of course, this also means that 80 percent take less than 60 days, compared to 68.9 percent in 1975. (See Chart III). Moreover, Exhibit III–2 at page 82 of the Report shows that, in 1993, 94.7 were conducted within 90 days as contrasted with 89 percent in 1975, and that only 1.2 percent went beyond 6 months while 2.9 percent did so in 1975. In other words, the processing of elections by the Board has improved during the past 20 years.

More significantly, as the Commission, observes (once again in a footnote), the data demonstrate that the NLRB is able to conduct those elections in a fair manner with 97–98 percent of all elections being free of any sustainable objections from either party. (See Chart IV).

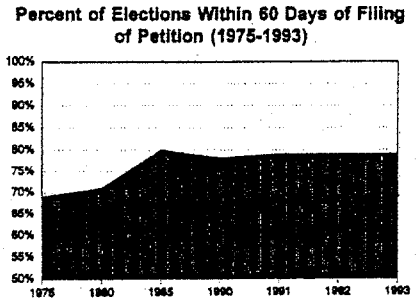

Chart III

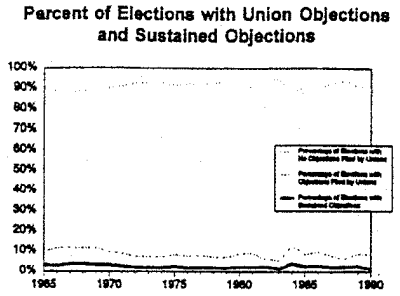

Chart IV

[34] *Report*, 68.

In addition, the credibility of the Board with the Federal courts has soared in recent years, with its success rate climbing from 70–80 percent in the 1960s to 80–90 percent in the 1970s, 1980s and 1990s. The only notable exception was during the Carter Administration when, in 1979 and 1980, the rate slipped to 77 percent and 76 percent respectively. (See Chart V). We note that in 1968, the AFL–CIO testified to Congress that appellate court affirmance of NLRB decisions is the "only measurable and objective test" of the Board's interpretation of the statute.[35] Using that yardstick, the Board's interpretations have steadily improved since the Carter Administration.

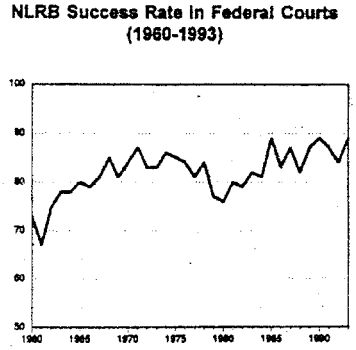

Chart V

We would, however, point out one area regarding the administration of the NLRB that does deserve the Commission's attention. While there has been considerable discussion of NLRB delays during the past two decades, the fact is that these delays involve about 2 percent of the cases. The case backlog has improved in recent years—declining from 1,400 in, 1983 to just over 300. However, the median time for a Board decision—17 months—would indicate a problem lies at the Board member level. One of the reasons for this delay is the constant turnover in board members and difficulties the White. House has in clearing new Board member appointments through the Senate confirmation process. In fact, since 1978 the NLRB has been at its full, five-member strength only 58 percent of the time. One of the principal reasons for this occurrence has been organized labor's opposition to certain candidates proposed by Presidents Reagan and Bush, and the business community's opposition to particular persons nominated by Presidents Carter and Clinton. When labor or management become concerned with the balance on the Board, their only remedy is to block the confirmation until such time as an accommodation can be worked out between the parties. The Commission could perform a valuable service in suggesting a better method for the selection and confirmation of Board members than the system currently in place.

Rep. Major Owens (D-NY) has offered a proposal worth considering H.R. 1466—which would alternate Board memberships by allowing organized labor and business to each select a Board member in succession. While the Owens bill may not be the perfect solution, it suggests a direction that would expedite the process considerably while ensuring balance at the Board. We strongly recommend that you take a close took at the Owens bill or any similar proposal that would achieve the same improvements over the current system.

[35] Senate Subcommittee on Separation of Powers of the Committee on Judiciary, Congressional Oversight of Administrative Agencies (National Labor Relations Board), 90th Cong., 2d sess. 1968, 321 (statement of Thomas E, Harris, Associate General Counsel, AFL–CIO).

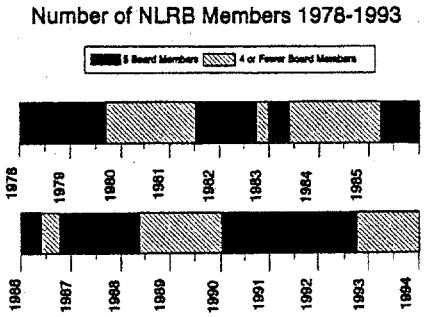

Chart VI

3. *The efficient administration of the National Labor Relations Act would be jeopardized by major changes in enforcement, including the remedics available.* The *Report* clearly implies that the remedies available under the National Labor Relations Act are too weak, comparing them to the compensatory and punitive remedies available under other employment statutes. However, the likely result of expanding those remedies can be seen in Chapter IV, which demonstrates the effect of tort remedies on the judicial system. Clearly, the efficiency of any enforcement scheme is closely tied to its remedies. The success of the current NLRA process which we have just, outlined could only be jeopardized by a move toward more punitive remedies. As the stakes are raised, the willingness of the parties to enter into settlement decreases. That is the principal reason disputes at the NLRB where back pay is the remedy are settled so much more quickly than disputes before the EEOC where up to $300,000 in punitive and compensatory damages, over and above any backpay that might be awarded, for each claim of discrimination is available. Further, if. punitive or compensatory damages were to be authorized under the NLRA, it would entail a right to a jury trial, thus eliminating the current system of adjudicating matters before an administrative law judge.

4. *"Outsiders" frequently play an active role in union representation elections.* The Report attaches great significance to the "fact" (unsubstantiated) that management hires a consultant in 70 percent of all elections.[36] These outsiders (who often are labor law attorneys hired to make sure that the employer complies with the highly technical provisions of the NLRA) seem to be viewed by the Commission as somehow "tainting" the election process. We would point out that "outsiders" in the form of union organizers are present in nearly 100 percent of all campaigns and are usually on the scene long before the management consultants are brought in.

RESPONSE TO QUESTIONS POSED BY THE COMMISSION

On pages 79 and 80 of Chapter III the Commission poses a series of questions for further discussion. Our response to these is as follows:

1. *"How might cooperation in mature bargaining relationships be increased?"* Given the *Report's* conclusion that "the system of labor-management negotiations works well" where collective bargaining is already in place—a conclusion with which we wholeheartedly agree—we are not sure how a mature relationship can be made more mature. If the question is directed at how a cooperative relationship can be instituted in an environment which has historically been characterized by an adversarial relationship of traditional collective bargaining, the experience of LPA members indicates that change in such circumstances may be possible only where, both labor and management come to the realization that it is in their worst interest to continue dealing with one another on a confrontational basis. There are numerous examples in which the catalyst, for positive change to a cooperative relationship was the parties being pushed to the brink, such as by a dire economic threat to the organization's business, or a bitter strike over an issue that could have been easily resolved had the parties been willing to deal with one another on a basis of trust at the outset.

[36] *Report*, 68. The source for this finding is not provided in the *Report*. Curiously, immediately after citing this statistic, the *Report* states: "There are no accurate statistics on consultant activity." *Id.*

It will be very difficult to increase cooperation, however, so long as the leadership and policy departments of international unions actively encourage their members in the field to resist cooperative workplace ventures. There are, dozens of examples within the LPA membership of union locals desiring to adopt more collaborative work systems, but the international is strongly opposed. The Teamsters, for example, teach courses to their field personnel on how to prevent the growth of employee involvement programs in the workplace. There are a number of union publications laying out strategies and tactics for dismembering employee involvement.[37] As long as cooperative programs like employee involvement and employee participation are seen as a threat instead of a protection, it will be difficult to increase cooperation in traditional union work settings.

2. *"Should the labor law seek to provide workers who want representation but who are a minority at a workplacc a greater option for non-exclusive representation?"* We can think of few recommendations that could be made by this Commission that would be more counterproductive to improving worker-management relations. The experience of our companies in other countries where minority representation is standard practice has shown that it can become very disruptive, with the potential for considerable confusion as to who speaks for whom.

As was noted by the Warren Court in *Ladies' Garment Workers* v. *NLRB (Bernhard-Altmann Texas Corp.)*,[38] freedom of choice and majority rule are the very "premise of the Act" as it is now written. An employer only has a duty to bargain with a union which has been certified by the National Labor Relations Board after being elected by a majority of the employees in the unit. An employer may also voluntarily recognize and bargain with a union, but only if the employer has objective evidence that a majority of the employees support that union. Proposals to expand employer obligations to include unions which represent less than a majority contradict this premise.

In his August 10 testimony, AFL–CIO Labor Law Task Force Director David Silberman contended that there was adequate precedent for the concept of minority representation, citing Executive Order 10988 signed by President Kennedy in January 1962. This Executive Order provided for "formal recognition" where a union in the Federal employee workplace represented at least 10 percent of the, employees and "informal recognition" if it represented less. Unfortunately, Mr. Silberman failed to mention that those provisions of the Executive Order were abandoned in 1969 following a report submitted by Labor Secretary George Shultz, among others, which came to the following conclusions:

> [Formal recognition] has produced problems which hinder the development of stable and orderly labor relations. It has contributed to excessive fragmentation of units, confusing and overlapping relationships, and difficulties in maintaining an appropriate difference in the rights and obligations under this form of recognition compared with those prescribed for exclusive. For these reasons, the majority of agencies have indicated that formal recognition should be discontinued.[39]

The report did observe that labor unions favored retention of "formal recognition" because they regarded it "as a significant form of assistance in further organizing the work force, particularly because it makes possible obtaining dues withholding privileges.[40]

If the majority of the employees in a bargaining unit has voted against third party representation, it would seem important to honor the will of the majority. Honoring that will has certainly been the doctrine organized labor adamantly pursued when private sector representation percentages were far higher earlier this century, and it should still be the case. We would note that while expressing support for a new form of minority "rights" in the area of union representation, labor still continues to oppose the right of the minority to decline to pay dues to a union which has been elected by the majority, but which the minority does not support.

From the standpoint of human resource practitioners, there are a number of practical problems with minority. representation as well. First, it is much simpler to administer human resource policies when all employees can be treated similarly. We

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[37] Chapter 5 of A *Troublemaker's Handbook: How to Fight Back Where You Work, Inside the Circle: A Union Guide to Quality of Work Life,* and *Choosing Sides: Unions and the Team Concept.*

[38] 366 U.S. 731, 738–9 (1961).

[39] Study Committee (composed of Department of Labor Secretary George P. Shultz, Department of Defense Secretary Melvin R. Laird, Civil Service Commission Chairman Robert E. Hampton, and Bureau of the Budget Director Robert P. Mayo), *Report and Recommendations on Labor-Management Relations in the Federal Service*, (August 1969), 13.

[40] *Ibid.*

are not certain precisely what the AFL–CIO is proposing, but it appears to be a sliding scale of third party representation obligations depending on the level of interest in a particular workplace in such representation. Questions then arise as to how the employer is to know which group of employees fit into which category. For example, a union may claim to be representing 100 employees for purposes of informal consultation, but the employer may not know for sure without polling each of those employees—an action that may be considered an illegal coercive tactic under the labor laws. Further, without some clear determination regarding employee preference, some employees may vacillate between being represented by the union 1 month and not the other, depending on how they feel about its actions at the time.

The situation would be further complicated where more than one union was present. What if the employer is receiving conflicting signals regarding such important issues as work schedules, discipline, methods of payment, transfers, and the like from two or more minority unions in what would otherwise be a single bargaining unit. For example, one union may represent the more senior employees and be pushing for stronger seniority rights while another may be pushing for merit-based policies. The workplace may start looking more like the parliament of a Third World country than the cooperative environment which should be our objective.

3. *"Should unions be given greater access to employees on the job during organizational campaign percent, and if so how?"* With respect to union organizers being given greater statutory rights to enter a workplace for the purpose of persuading employees to join a union; we believe that current law is already weighted in favor of unions by their legal right to contact employees in their homes, a right not accorded management. Indeed, the AFL–CIO survey cited above found this to be among the most effective organizing techniques available to unions. According to the survey:

> In cases where the organizer house called between 60 and 75 percent of the unit, the win rate was 78 percent. If the organizer made no home visits, the win rate was 41 percent.[41]

In contrast, where the use of mass meetings was the primary campaign tactic, the win rate was only 25 percent.[42]

Thus, there appears to be little justification to warrant the disruption of a company's operations that would be created by requiring companies to open their doors to organizing rallies at the worksite. Moreover, if there is a genuine desire for unionization on the part of the workforce, what should be the most effective organizers—*i.e.*, the pro-union members of the unit—are already working on the site and have all the access that is needed.

4. *"How can the level of conflict and the amount of resources devoted to union recognition campaigns be de-escalated?"* The solution to this will be difficult to achieve in a system which is premised on the belief that labor and management have fundamentally different interests that can only be reconciled through the adversarial process of collective bargaining. It will also be difficult to achieve as long as labor's approach to an unorganized workplace is to identify the areas of disagreement between management and labor and then seek to exacerbate those disagreements. Commissioner Kreps may have phrased the issue best in her question to the head of the AFL–CIO Organizing Institute on August 10th when she said, "We're being asked to conclude, then, that most employers are bad guys because of the low percentage of unions, right?"

The *Report* suggests that one way of resolving these tensions is for management and international labor unions to agree between themselves that the employees will be represented by the international and that the employees covered by that agreement should be denied a voice in that decision. While some companies have entered into such agreements, as an Association we cannot support the elimination of the necessary element of democratic choice that forms the critical foundation for healthy labor-management relations in this country. Indeed, notwithstanding our complaints regarding *Electromation*, if there is anything in section 8(a)(2) that should be retained, it should be the prohibition against a company choosing a labor union for its employees.

5. *"What new techniques might produce more effective compliance with prohibitions against discriminatory discharges, bad faith bargaining, and other illegal actions?"* Since most organizing activity is now focused on smaller companies who often do not have the resources to obtain quality legal advice, and since most of the violations are now occurring in those companies; we believe there is a greater need today for education, training and counseling of employers of their rights and obliga-

[41] *AFL–CIO Survey*, 49.
[42] *AFL–CIO Survey*, 50.

tions under the law. A small employer who cannot afford to be counseled by a labor lawyer regarding the intricacies of the National Labor Relations Act is at a disadvantage with the union, which has the legal resources of the union's lawyers as well as the NLRB General Counsel operating at public expense. We do not question this system. Indeed, we believe NLRB enforcement data and timetables have proven. it to be effective. However, we think it is time to eliminate the "surprise" factor from this process for the small employer and provide early intervention to prevent violations, rather than punish them after they have already occurred.

One solution may be to for the NLRA to be amended to provide an "Office of Employer Counsel" at the NLRB that could conduct training programs and offer advice to employers regarding their rights, liabilities and obligations under the Act. We do not believe that adding expensive penalties to the NLRA is the solution because the problems of excessive litigation discussed in Chapter IV can be attributed in large part to the availability of these remedies. The potential for significant monetary damages simply makes litigation more attractive to the parties, ultimately triggering more delays in the system overall. We note the absence of any discussion in Chapter IV of NLRB remedies being inadequate.

Clearly, the Board has at its disposal severe remedies that may be used against a recalcitrant employer. In the classic case of J.P. Stevens, the Board was not limited to back pay and bargaining orders. The company was also ordered to reimburse the union for its bargaining expenses, including clerical costs and salary and mileage expenses incurred during the violation period. Further, the company was ordered to reimburse the union and the Board for litigation costs and, in the case of the union, even its organizing expenses. In addition, the Board issued company-wide orders that applied to all locations where the union was present and not just those involved in the immediate litigation.[43]

Finally, where swift measures are necessary, the Board has the power to seek an injunction. Although the *Report* states that NLRB section 100) injunctions are "pursued infrequently each year," the Board has significantly increased the use of these injunctions in recent months. According to Chairman Gould, the Board has sought 50 injunctions in the past 5 months, compared to 42 for all of last year. Moreover, he claims a success rate of 87 percent.[44]

6. *"What, if anything, should be done to increase the probability that workers who vote for representation and their employers achieve a first contract and on-going bargaining relationship?"* Both labor and management have long proclaimed the virtues of "free collective bargaining"—*i.e.*, bargaining without governmental involvement—and we consider any efforts to abandon this approach unwise. Our system of collective bargaining was never set up in a way that would guarantee that bargaining would always produce an agreement nor should it be amended to do so. If it were, it would no longer be free collective bargaining. Sometimes, "hard bargaining" by both sides results in no agreement as seen in recent years in a number of highly visible strikes (*e.g.*, Caterpillar, Massey, Phelps Dodge) that have been triggered by the union's unyielding demand that the employer sign the same agreement as all other employers in the industry. When the union refuses to discuss any variations from the pattern, one could reasonably argue that, in these cases, it is the union's insistence that leads to the impasse. Is this "hard bargaining" or is it "surface bargaining?"

CONCLUSION

The Commission on the Future of Worker/Management Relations provides a unique opportunity for the development of a balanced set of recommendations regarding improving Federal policies governing relationships among employees, employers and unions. In Chapters II and IV of its *Fact Finding Report* the Commission has prepared the necessary factual foundation on which substantive discussions of policy changes can be built. Both Chapter lI dealing with employee involvement and Chapter IV addressing the need for improved dispute resolution systems represent a good faith effort to describe the present situation in such a manner that all persons with a stake in the outcome of the Commission's deliberations can be assured that its final recommendations are likely to address their concerns fairly.

Unfortunately, the same cannot be said of Chapter III. The Commission's treatment of union representation and collective bargaining lays out a biased set of facts that only represents organized labor's point of view. Unless the Commission is willing to look at both sides of the worker-management equation on these critically im-

[43] *J.P. Stevens & Co.*, 244 NLRB No. 407 (1979).

[44] William B. Gould, "Changes in Labor Law: Here and Now and the Future," Spokane, August 22, 1994 (speech reprinted in the *Daily Labor Report*, August 25, 1994).

portant issues, its forthcoming recommendations in this area almost certainly will not provide the basis for a meaningful dialog on proposed policy changes.

CONFIDENTIAL

INTERNATIONAL BROTHERHOOD OF TEAMSTERS
CHAUFFEURS • WAREHOUSEMEN & HELPERS
OF AMERICA
25 LOUISIANA AVENUE, N.W. • WASHINGTON, D.C. 20001

May 5, 1989

Dear Affiliates:

I have enclosed the results of a survey completed by the AFL-CIO in which they interviewed organizers involved in 189 NLRB elections in units over 50, which were held from July 1986 through April 1987. The interviews concentrated on the unions' tactics, the employers' tactics and characteristics of the involved workforce. It is clear from the results of this survey that certain factors in the unions' and employers' campaigns, as well as the nature of the industry and workforce, determine the likelihood of union success in organizing. These findings should be helpful in planning your organizing strategies.

I have also enclosed the schedule of organizing courses offered at the George Meany Center for 1989 and 1990. Many locals have inquired about organizing courses being offered, and the week-long sessions at the Meany Center would be beneficial for beginning as well as more experienced organizers.

Please do not hesitate to contact me, if I can be of any assistance in your organizing efforts.

In solidarity,

Vicki Saporta
Director of Organizing

VS/kmp

Enclosures

AFL-CIO ORGANIZING SURVEY

1986-87 NLRB ELECTIONS

Department of Organization and Field Services

February 1989

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INTRODUCTION AND OVERVIEW

This report summarizes the findings of a study by the AFL-CIO Department of Organization and Field Services of 189 NLRB elections in units over 50 that took place during July 1986 through April 1987. In order to obtain this data, lengthy interviews were conducted with the lead organizers in these campaigns, during which questions were asked concerning the union's tactics, the company's tactics, and characteristics of the workforce.

This study is similar to a survey of elections held in 1982-83, and, where relevant, comparisons are made to the results obtained from this earlier survey.

Overview

Unions had an overall win rate of 43% in units over 50. This is identical to the win rate in the 1982-83 survey. It is slightly lower than the overall percentage of election victories during this time period, because this survey excluded units under 50 in size. With units of all sizes included, unions won 48% of the NLRB elections held in 1986 and 49% of the elections held in 1987.

Unions clearly have a problem organizing larger units. As the unit size increases, the win rate declines considerably. In units of 75 and under, unions win 51% of the elections. When the size increases to 75-150, the win rate drops to 47%. For units with between 150 and 250 eligible employees, the union success rate is 32%. And for units between 250 and 500, the win rate is 21%. There were no victories in units over 500 in this sample.

The manufacturing sector is the most difficult to organize, according to both this survey and the earlier survey. The union win rate in manufacturing units is 40%, as opposed to 50% in the non-manufacturing sector, which includes services, health care, and retail. In health care, the win rate is 55%, and in retail the win rate is 56% (although the latter sample was very small.)

The northeast, particularly New England, is the most inhospitable region for union organizing. The win rate in the northeast is 32%. The greatest percentage of organizing success is in the west/southwest, where there is a 51% rate of victory. In the southeast, the win rate is 42%, and in the midwest the rate is 46%.

Unions were able to obtain a contract after winning an election in 73% of the cases. This is an improvement over the 63% rate of achieving first contracts observed in the earlier survey. However, in units over 150, the success rate in achieving first contracts is only 40%.

It is clear that certain factors in union and employer conduct, as well as in the nature of the industry and workforce, correlate to a greater likelihood of union success in organizing. The following chapters of this report summarize some of the conclusions which can be drawn from the survey data.

UNION CAMPAIGN TACTICS

There is a clear correlation between certain features of the union's campaign strategy and the union's ability to win NLRB elections in units over 50.

Committee

The most significant factor leading to union success, according to the organizers, is active campaigning by an effective, representative committee. In the absence of an effective committee, the win rate is only 10%. Where the organizing committee does engage in active campaigning, the win rate is 62%.

It appears that a larger committee is required than was indicated by the 1982-83 survey. A committee should be optimally 15% of the unit or more. A committee of less than 5% of the unit correlates to a win rate of only 27%.

Cards

There appears to be a negative impact when organizers release authorization cards prior to the formation of this committee. Where cards are released prior to forming a committee, the win rate is only 30%.

The number of authorization cards obtained has a direct relationship to the likelihood of the union prevailing. It is not until the union obtains signatures from 75% or more of the unit that the union has more than a 50% likelihood of winning the election. This is higher percentage than was required in the 1982-83 survey, where the union had an even chance of winning if 65% of the unit signed cards. This may be indicative of increasing intensity or sophistication in employer campaigns. According to the current survey, if less than 40% of the unit signs cards, the union wins only 8% of the time. Where the union obtains cards from 40-50% of the unit, the union wins 33% of the campaigns. If 50-60% of the unit sign authorization cards, the union wins 45% of the elections. When 60-75% of the unit sign cards, there is a victory rate of 49%. With 75% or more of the unit signed up, unions win 60% of the campaigns.

Personal Contact

The survey provides some clear indicators of the importance of personal face-to-face contact between organizers and the employees as the preferred method of communication during the union campaign.

The most frequently cited reason for losing campaigns is a lack of sufficient personal contact with employees, and insufficient staff. In 26% of the campaigns, there was no full-time organizer. In 55% of the campaigns studied, there was one organizer or less.

House calls are an effective means of establishing personal communication. In cases where the organizer house called between 60 and 75% of the unit, the win rate was 78%. If the organizer made no home visits, the win rate was 41%.

Attempts to communicate with employees through means other than personal contact seem to impact unfavorably on the ability to win union campaigns:

- In campaigns where the union mailed letters as a primary means of campaigning, the win rate was only 39%, as opposed to a win rate of 55% when the union did not campaign through the mail.
- When organizers used the telephone as a primary means of campaigning, the win rate was only 40%. If the telephone was not used in this manner, the win rate was 52%.
- The use of videotapes by organizers was correlated to only a 36% win rate. Use of the mass media as part of the campaign was associated with 46% rate of victory, although both of these involved small samples.

Mass Meetings

General or mass meetings offer opportunities as well as dangers, according to the survey. There is a direct correlation between average attendance at the general meetings and the victory rate. If less than 25% of the unit attends mass meetings, the win rate is 29%. If attendance is between 25-40%, the win rate is 33%. If the average attendance is between 40-50% of the unit, the win rate rises to 55%. If 50-60% attend the mass meetings, the win rate is 67%. And more than 60% attended the mass meetings on average, the win rate is 72%. This would suggest that unless the organizer expects to have at least 40% of the unit in attendance at a mass meeting, it may be harmful to call the meeting. This is consistent with other studies which suggest the importance of the employees' perceptions about the level of union support among their co-workers as a factor in their decision about whether to vote for the union. The use of mass meetings as the primary campaign tactic was related to a win rate of only 25%.

Issues

Where wages are the primary union issue, the win rate is only 33%. Other issues are associated with a much higher rate of victory. The three most effective union issues are:

- Working Conditions - Where working conditions are a top union issue, the win rate is 69%.
- Grievance Procedure - Where the desire for a procedure to achieve fairness on the job is a top issue, the win rate is 67%.
- Dignity - Where dignity on the job is a key issue, unions have win rate of 55%.

Timing

Unions do not seem to benefit from long, drawn-out pre-petition periods. Where there is 15 days or less from the date of the first contacts to the filing of the petition, the win rate is 55%. The win rate then drops, but if the petition is filed from 60-90 days after the first contract, the win rate goes up again to 65%. If the length of time from the initial contacts to the filing of the petition extends beyond 90 days, the win rate drops dramatically to 41%. If the pre-petition period lasts more than 6 months, the win rate drops even further to 33%.

CHARACTERISTICS OF THE WORKFORCE

There are certain features of the workforce that appear to be associated with a higher probability of union success.

As stated in the introduction, union success is greater in the service sector than in manufacturing. The highest win rates are in health care and retail establishments (55% and 56% respectively.)

Low Wage Workers

Low wage employees are more likely to vote to form a union, than higher paid employees. Unions win 58% of the elections among workers earning $5 an hour or less. (This is despite the fact that when wages are the primary issue the win rate is very low.)

There does not seem to be a clear connection between the quality of the company's benefit package and the ability of the union to win the election.

Women

The presence of a large proportion of female workers significantly increases the union's chance of success. In units where women comprise less than half of the workforce, the win rate is only 33%. Where women make up more than 75% of the unit, the union's win rate is 57%. More than half of the union election victories feature a workforce with a majority of women.

It is interesting to note that this support for unions by women occurs despite the fact that organizing is an overwhelmingly male profession. Only 9% of the organizers in this survey are women. However, the success rate for women is 61%, as opposed to a 41% success rate for male organizers.

Minorities

Unions have the greatest chance of success if the workforce is more than 75% minority. In such cases, the win rate is 65%. In units where less than 25% of the workers are minorities, the win rate is only 38%. Similarly, where only a slight majority of the workers are minorities, the win rate is only 37%. This may point to the employer's ability to divide a workforce along racial lines where there is a fairly even division by race or ethnic group.

Younger Workers

A workforce with a substantial number of younger workers is more likely to be organized. If the average age is 35 or less, the win rate is 48%, as opposed to a win rate of 30% if the workforce is over 35. However, an extremely young workforce, where more than 75% of the workers are under 25, is associated with a win rate of only 29%.

Immigrants

The presence of undocumented immigrants in the workforce indicated a strong likelihood of success. Such units had a win rate of 63% (although the sample was small).

Prior Union Exposure

Familiarity and prior experience with unions has an ambiguous effect on the ability of unions to win NLRB elections. If there are no former union members in the unit, the win rate drops to 39%. If former union members make up a small portion of the work force, the win rate rises slightly. However, if former members made up more than half of the workforce, the win rate is only 29%.

It is harmful to have another unit organized at the same site. In such cases, the union has a win rate of only 36%. On the other hand, an organized unit at another facility of the same company brings the win rate up to 47%. In communities where union density is only moderate, the win rate is very low -- 25%. Unions fare better in communities with either very high union density or very low unionization levels.

Prior campaigns at the facility seem to have a negative impact on the union's ability to win, particularly if the campaign does not go to an election. Where the workforce has experienced a union campaign without an election, the win rate is 30%. If there was a previous election, the win rate was 39%.

Rural/Urban

The union victory rate is lowest in rural areas (39%). Small towns have the highest rate of success (57%), and urban areas have a win rate of 43%.

THE EMPLOYER ANTI-UNION CAMPAIGN

The degree of employer resistance is a major factor in the ability of unions to win NLRB elections. If the employer does not wage a significant campaign against the union, the win rate is 80%. Even a moderately serious campaign by the employer is associated with a 63% union success rate. But where the employer wages an intense campaign against the union, the win rate is 35%.

In the vast majority of campaigns, the employer hires an anti-union consultant (76%). The absence of a consultant is related to 55% union victory rate.

Management's arsenal contains a variety of effective tactics -- both of a positive and negative nature.

On the positive side:

- If the company makes promises to improve conditions, the win rate for unions is 34%, as opposed to 56% if such promises are not made.
- Changes in management are associated with a union win rate of only 38%.
- If employees receive a wage increase during the campaign, the win rate is 31%.
- The presence of quality of work life programs are disastrous for unions; only 17% of elections were successful where such programs are present.

Discharges

The discharge of at least one union activist occurs in 29% of the elections. Interestingly, unions seem to have a higher success rate (46%) where there is a firing than where there is not a firing (41%). This might indicate that companies resort to firings where they are fearful of losing the campaign.

The likelihood of the employer firing a union activist increases substantially as the percentage of minorities in the unit increases. If there are no minorities present in the unit, the likelihood of discharge is only 22%. But as minorities approach 50% of the unit, the likelihood of a discharge goes up to 46%. This likelihood remains approximately the same as the percentage of minorities rises above this point.

Issues

The three most powerful company issues, in order of effectiveness, are:

1. Asking for another chance
2. Predicting lay-offs or company closings
3. Warning of the likelihood of a strike

Delay

Delay is an effective tactic on management's part. In campaigns where the election took place within 60 days or less of the filing of petition, the union win rate was 50%. If the election took place within 60-90 days, the win rate was only 31%.

CONCLUSION

In the vast majority of cases, unions face stiff resistance from management during NLRB election campaigns. These anti-union campaigns feature both "sweet talk" -- promises, raises, etc. -- and scare tactics about strikes and closings. These two sides of management's campaign are equally effective, and indeed complement each other.

In order to be successful, the union organizer must establish ongoing personal contact with a representative organizing committee. This committee should consist of optimally 15% or more of the unit, and must actively campaign to win the support of 75% of the workforce. House calls are an effective means of communicating with employees; where organizers rely instead on letters or phone calls to communicate with employees, the campaign suffers. This need for personal communication implies that for unions to be successful at organizing larger units, there must be an increase in current staffing levels.

Unions will find the greatest success in working with people who most want to organize -- low wage workers, women, minorities, immigrants, young workers. The issues that serve union organizing the best are the desire to improve working conditions, have a fair procedure for resolving problems, and dignity on the job.

Appendix B
NLRB Cases Involving Union Deception and/or Coercion in
Obtaining Authorization Card Signatures

Case Name	Issues Involved
American Beauty Baking Co., 198 N.L.R.B. 327 (1972)	pressure
American Can Co., 157 N.L.R.B. 167 (1966)	forgery
American Metal Climax, Inc. v. NLRB, 413 F.2d 191 (6th Cir. 1969)	misrepresentation
Area Disposal, Inc., 200 N.L.R.B. 354 (1972)	misleading statements
Bauer Welding & Metal Fabricators, Inc. v. NLRB, 358 F.2d 766 (8th Cir. 1966)	misrepresentation
Ben Duthler, Inc. v. NLRB, 395 F.2d 28 (6th Cir. 1968)	pressure, misleading statements
Bookland, Inc., 221 N.L.R.B. 35 (1975)	misrepresentation
Boyer Bros., Inc., 181 N.L.R.B. 401 (1970)	peer pressure
Briggs IGA Foodliner, 146 N.L.R.B. 443 (1964)	coercion, misrepresentation
Burlington Indus., Inc. v. NLRB, 680 F.2d 974 (4th Cir. 1982)	misrepresentation
Calplant Constr., 279 N.L.R.B. 854 (1986)	promised benefits
Camvac Int'l, Inc., 288 N.L.R.B. 816 (1988)	misleading statements
Case, Inc., 237 N.L.R.B. 798 (1978)	misrepresentation
City Welding & Mfg. Co., 191 N.L.R.B. 124 (1971)	pressure
Claremont Polychem. Corp., 196 N.L.R.B. 613 (1972)	promised benefits
Columbia Broad. Sys., Inc., 125 N.L.R.B. 1161 (1959)	forgery, fraud
Cooper-Hewitt Elec. Co., 162 N.L.R.B. 1148 (1967)	pressure
D.H. Overmyer Co., 170 N.L.R.B. 658 (1968)	promised benefits
Dan Howard Mfg. Co. v. NLRB, 390 F.2d 304 (7th Cir. 1969)	misrepresentation, peer pressure
Dayco Corp. v. NLRB, 382 F.2d 577 (6th Cir. 1967)	misrepresentation
Dayton Hudson Dep't Store Co., 314 N.L.R.B. 795 (1994)	forgery
Dexter IGA Foodliner, 209 N.L.R.B. 369 (1974)	pressure
Dresser Indus., Inc., 248 N.L.R.B. 33 (1980)	misrepresentation, misleading statements
DTR Indus., Inc., 311 N.L.R.B. 833 (1993)	misleading statements
Eagle-Picher Indus., Inc., 171 N.L.R.B. 293 (1968)	misrepresentation
Eckerd's Mkt., Inc., 183 N.L.R.B. 337 (1970)	misrepresentation
Ed's Foodland of Springfield, Inc., 159 N.L.R.B. 1256 (1966)	misleading statements
Eng'rs & Fabricators, Inc. v. NLRB, 376 F.2d 482 (5th Cir. 1967)	misrepresentation
Englewood Lumber Co., 130 N.L.R.B. 394 (1961)	misrepresentation
Evergreen Healthcare, Inc. v. NLRB, 104 F.3d 867 (6th Cir. 1997)	pressure
Findlay Indus., Inc., 323 N.L.R.B. No. 139 (May 22, 1997)	forgery
Fort Smith Outerwear, Inc. v. NLRB, 499 F.2d 223 (8th Cir. 1974)	misrepresentation, promised benefits
Freeport Marble & Tile Co. v. NLRB, 367 F.2d 371 (1st Cir. 1966)	misrepresentation

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Case Name	Issues Involved
G & A Truck Line, Inc. v. NLRB, 407 F.3d 120 (6th Cir. 1969)	misleading statements
Gaylord Bag Co., 313 N.L.R.B. 306 (1993)	promised benefits
General Steel Prods. Inc., 157 N.L.R.B. 636 (1966)	misleading statements
Golub Corp., 159 N.L.R.B. 503 (1966)	misrepresentation
HCF, Inc., 321 N.L.R.B. 1320 (1996)	coercion
Heck's Inc. v. NLRB, 386 F.2d 317 (4th Cir. 1967)	pressure
Hedstrom Co., 223 N.L.R.B. 1409 (1976)	misleading statements
Hicks Oils & Hicksgas, 293 N.L.R.B. 84 (1989), enf'd, 942 F.2d 1140 (7th Cir. 1991)	misleading statements
Holiday Inn of Perrysburg, 243 N.L.R.B. 280 (1979)	misleading statements
I. Posner, Inc., 133 N.L.R.B. 1573 (1961)	coercion
Imco Container Corp., 148 N.L.R.B. 312 (1964)	forgery
Insuler Chem. Corp., 128 N.L.R.B. 93 (1960)	pressure
ITT Semi-Conductors Inc., 165 N.L.R.B. 716 (1967)	misrepresentation, misleading statement
J.M. Machinery Corp. v. NLRB, 70 L.R.R.M. 3355 (5th Cir. 1969)	misrepresentation
J.P. Stevens & Co., 244 N.L.R.B. 407 (1979)	misrepresentation, pressure, misleading statements
John Kinkel & Son, 157 N.L.R.B. 744 (1966)	pressure, misleading statements
L'Eggs Prods., Inc., 236 N.L.R.B. 354 (1978)	misrepresentation
Lake Butler Apparel Co. v. NLRB, 392 F.2d 76 (5th Cir. 1968)	misrepresentation
Lenz Co. v. NLRB, 396 F.2d 905 (6th Cir. 1968)	misrepresentation
Lerner Shops of Ala., Inc., 91 N.L.R.B. 151 (1950)	coercion
Levi Strauss & Co., 172 N.L.R.B. 732 (1968)	misleading statements
Medline Indus., Inc. v. NLRB, 593 F.2d 788 (7th Cir. 1979)	pressure, misrepresentation
Merrill Axle & Wheel Serv., 158 N.L.R.B. 1113 (1966)	peer pressure
Mid-East Consol. Warehouse, A Div. of Ethan Allen, Inc., 247 N.L.R.B. 552 (1980)	peer pressure
Montgomery Ward & Co., 253 N.L.R.B. 196 (1980)	misleading statements
Montgomery Ward & Co., 288 N.L.R.B. 126 (1988)	misleading statements
Morris & Assoc., Inc., 138 N.L.R.B. 1160 (1962)	misrepresentation
Mutual Indus., Inc., 159 N.L.R.B. 885 (1966)	misleading statements
Nashville Lumber Co., 162 N.L.R.B. 1027 (1967)	coercion, misrepresentation
Nichols-Dover, Inc. v. NLRB, 380 F.2d 438 (2d Cir. 1967)	misrepresentation
Nissan Research & Dev., Inc., 296 N.L.R.B. 598 (1989)	misrepresentation
NLRB v. Cumberland Shoe Corp., 351 F.2d 917 (6th Cir. 1965)	misleading statements
NLRB v. Gorbea, Perez & Morrell, 328 F.2d 679 (1st Cir. 1964)	promised benefits

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Case Name	Issues Involved
NLRB v. Horizon Air Servs., Inc., 761 F.2d 22 (1st Cir. 1985)	misleading statements
NLRB v. James Thompson & Co., 208 F.2d 743 (2d Cir. 1953)	coercion
NLRB v. Koehler, 328 F.2d 770 (7th Cir. 1964)	misrepresentation
NLRB v. Rohtstein & Co., 266 F.2d 407 (1st Cir. 1959)	pressure, misrepresentation
NLRB v. Roney Plaza Apartments, 597 F.2d 1046 (1979)	peer pressure, misrepresentation
NLRB v. Sanford Home for Adults, 669 F.2d 35 (2d Cir. 1981)	coercion
NLRB v. Savair Mfg. Co., 414 U.S. 270 (1973)	promised benefits
NLRB v. The Catalyst, 99 L.R.R.M. 3022 (9th Cir. 1978)	misleading statements
Olin Conductors, Olin Mathieson Chem. Corp., 185 N.L.R.B. 467 (1970)	promised benefits
Olympic Villas, 241 N.L.R.B. 358 (1979)	forgery, pressure
Ottenheimer & Co., 144 N.L.R.B. 38 (1963)	promised benefits
Paul Distributing Co., 264 N.L.R.B. 1378 (1982)	promised benefits
Pembrook Management Inc., 296 N.L.R.B. 1226 (1989)	misleading statements
Peoples Serv. Drug Stores, Inc., 154 N.L.R.B. 1516 (1965)	peer pressure, promised benefits, misrepresentation
Pizza Prods. Corp., 153 N.L.R.B. 1265 (1965)	peer pressure, misrepresentation
Polyclinic Medical Ctr. of Harrisburg, 315 N.L.R.B. 1257 (1995)	misrepresentation
Potomac Elec. Power Co., 111 N.L.R.B. 553 (1955)	promised benefits
Puerto Rico Food Prods. Corp., 111 N.L.R.B. 293 (1955)	coercion
Pulley v. NLRB, 395 F.2d 870 (6th Cir. 1968)	coercion
Republic Corp., Advanced Mining Group, 260 N.L.R.B. 486 (1982)	misleading statements
Rowand Co., Inc., 210 N.L.R.B. 95 (1974)	coercion
Salvation Army Williams Memorial Residence, 293 N.L.R.B. 944 (1989)	misrepresentation
Sandy's Stores, Inc., 163 N.L.R.B. 728 (1967)	misrepresentation
Schwarzenbach-Huber Co. v. NLRB, 408 F.3d 236 (2d Cir. 1969)	misrepresentation
Scotts IGA Foodliner, 223 N.L.R.B. 394 (1976)	promised benefits
Sea Life, Inc., 175 N.L.R.B. 982 (1969)	promised benefits
Serv-U-Stores, Inc., 234 N.L.R.B. 1143 (1978)	misrepresentation
Shapiro Packing Co., 155 N.L.R.B. 777 (1965)	peer pressure, coercion
Silver Fleet, Inc., 174 N.L.R.B. 873 (1969)	misrepresentation
Somerset Welding & Steel Inc., 304 N.L.R.B. 32 (1991)	misleading statements
Southbridge Sheet Metal Works, Inc. v. NLRB, 380 F.2d 851 (1967)	pressure
Southern Cal. Associated Newspapers, Inc. v. NLRB, 415 F.2d 360 (9th Cir. 1969)	misrepresentation
Southland Paint Co. v. NLRB, 394 F.2d 717 (5th Cir. 1968)	misrepresentation

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Case Name	Issues Involved
Stanley M. Feil, Inc., 250 N.L.R.B. 1154 (1980)	misrepresentation
Stride Rite Corp., 228 N.L.R.B. 224 (1977)	misrepresentation, promised benefits
Suburban Drugs, Inc., 138 N.L.R.B. 787 (1962)	forgery, misrepresentation
Swan Super Cleaners, Inc. v. NLRB, 384 F.2d 609 (6th Cir. 1967)	misrepresentation
Taylor's IGA Foodliner v. NLRB, 407 F.3d 644 (7th Cir. 1969)	misrepresentation
The Holding Co., 231 N.L.R.B. 383 (1977)	promised benefits, misleading statements
Tipton Elec. Co. v. NLRB, 621 F.2d 890 (8th Cir. 1980)	misleading statements
Top Mode Mfg. Co., 97 N.L.R.B. 1273 (1952)	coercion
Trend Mills, Inc., 154 N.L.R.B. 145 (1965)	misrepresentation
Twin County Trucking, Inc., 259 N.L.R.B. 576 (1981)	misrepresentation, pressure
W&W Tool & Die Mfg. Co., 225 N.L.R.B. 1000 (1976)	misleading statements
Walgreen Co., 221 N.L.R.B. 1096 (1975)	misleading statements
Wylie Mfg. Co., 170 N.L.R.B. 122 (1968)	coercion
Zellerbach Paper Co., 4 N.L.R.B. 348 (1938)	coercion

The CHAIRMAN. Could I just ask, with regard to the card checks, the employers have to agree to that, don't they?

Mr. YAGER. Yes.

The CHAIRMAN. Well, I don't know what your problem is then.

Mr. YAGER. It is a corporate campaign——

The CHAIRMAN. But, I mean, all of these kinds of—we will move on.

Mr. Sweeney, can you sort of give us some sense about what you hear from the state of workers in terms of these, or what is your own sense about the growth of these companies that go on out and are available to companies about how to really destroy a union or how to block the organizing process? That is a relatively new phenomenon that has grown over the period of the last 25 years, at least that is my impression. I don't remember that being a factor or force. But it certainly is now. We hear a lot about, well, the threats from workers and all the rest when we have, on the other hand, these companies that are going out there, they wear with pride the number of instances that they blocked workers from being able to be successful.

I would be interested if you would comment about it. What this hearing is about is trying to see if workers in America through their own kinds of efforts can form, by following the laws, a union and see if they can have free choice in making those judgments and decisions. Now we have these companies that are absolutely committed to destroying that process. Your comment?

Mr. SWEENEY. Sure. Before that, if I might just respond to Mr. Yager, I am really surprised at the example that he cites, MGM Grand, which is an organized hotel with a collective bargaining agreement in place. There was an attempt at one point to decertify the union, and those who supported decertification couldn't meet the threshold of 30 percent who were interested in doing that. I am not aware of the petitions that he cited, but it is a company that is highly organized and it is a company that presently has a good collective bargaining agreement.

In response to your question, Senator, the growth of union-busting consultants is probably one of the fastest-growing industries in the country. While it started mostly in the health care industry in its earliest stages, it has now spread to just about every industry. The examples and the tactics and some of what you have heard and will hear on the second panel are just indications of what these consultants are advising employers to do in an anti-union or in an attempt to defeat a union-organizing campaign with all the harassment and all the intimidation and all the violations of law as well as extending some of the law in directions that it was never intended to apply to.

I am sure after the second panel you will really have a more comprehensive view from different industries, from workers from different industries who have had these experiences, and it is just disgraceful what is happening in this day and age with workers trying to have a voice at work.

When we look at the hearings on the Enron situation and so on, these workers whom we have supported since they were all terminated from their employment—we have provided them with legal help and other assistance—didn't have the benefit of any kind of

association or any kind of organization to represent them and realize today how important it would have been for them to have a voice even in the discussions of their options on pension coverage and have a seat at the table representing the voice of workers.

The CHAIRMAN. The administration spends a good deal of time talking about those fire fighters in New York, and all Americans will never look at a fire fighter or rescue worker the same—never—after their courage and bravery. Have they ever explained why they are so strongly opposed to those fire fighters being able to bargain collectively? Could you tell us what you have heard about the administration's position about firing the air traffic controllers that ensure the safety of America's skies on that tragic day? It seems that we not only have companies that are committed to try to deny the workers their free rights, but what is behind that? What is your sense about—what do they tell you, or don't they tell you?

Mr. SWEENEY. Well, we saw on September 11th and following everybody recognizing the heroism of workers who were involved at the World Trade Center, here at the Pentagon, and all of us were singing the praises of workers and their contribution. These are the same heroes who are doing that work every day of the year, who did it long before September 11th, and for them to be denied collective bargaining with the fire fighters in the Federal sector is a classic example of efforts to prevent workers from organizing, from having a voice in their job and on their living conditions.

Firing of the air traffic controllers was the most despicable situation I guess that we saw in the 1980s. It was really a blatant attempt to break the union and to break the lives of those workers. We recognize that the workers made some decisions that they probably shouldn't have, but firing them and what it caused them and their families and their lives is the most horrible situation in terms of how it affected those workers.

There are folks, as you well know who do not want to see workers represented by unions, who do not want to see a level playing field when it comes to labor-management relations and the ability of workers to have a say on the job and to have the basic rights that we—we support ILO declarations and we support ILO basic freedoms and rights, but we don't carry it out in our own country.

The CHAIRMAN. Senator Hutchinson.

Senator HUTCHINSON. Thank you, Mr. Chairman.

Mr. Yager, assuming that the alleged abuses the other witnesses have related are accurate—and I assume they are—do you believe these represent typical cases that are handled by the NLRB?

Mr. YAGER. Absolutely not. I think actually the NLRB and the procedures for protecting employee rights are about as employee-friendly as can be in terms of enforcement. Typically, most people who have a claim under almost any other law have to go out and hire a lawyer and get that lawyer to bring their case. As we have heard on some of the cases of the NLRB, those cases drag out in the courts and it takes several years for those individuals to get their remedies.

Under the NLRB, an employee simply has to go down to the regional office, file a charge, and at that point basically the general counsel of the National Labor Relations Board becomes their law-

yer, becomes the union's lawyer, prosecutes that case on their behalf.

The employer, on the other hand, or the union if the union is being accused, has to retain their own attorney. In fact, according to data provided by the former general counsel at the National Labor Relations Board, Fred Feinstein, in fact, about 90 percent—or, I am sorry, most charges are resolved within 45 days. Typically, when the general counsel goes to the employer and says we think that you have probably committed a violation here, more often than not that employer settles that case. It is really only a very small percentage of cases that work their way up through the processes. Yes, in fact, those cases do take a long time to get resolved, and it is unfortunate. I would be the first one to say if we could think of a way to make those quicker in a judicious, fair manner, let's do it.

But in that respect, they really are no different than most other claims in our legal system.

Senator HUTCHINSON. Now, I notice that union membership in recent years has been static in our country. In fact, as a percentage of the overall workforce, union membership has declined. We heard Mr. Sweeney's take on why that is the case. What other reasons might there be that union membership is not as desirable as it once may have been?

Mr. YAGER. A lot of people will give you a lot of reasons. I think the two that I think are probably the strongest are: one, just the plethora of laws that have been passed since the 1940s, a lot of situations where an employee in the 1940s would have gone to a union shop steward or an organizer saying I need protection, now they will go to a plaintiff's lawyer or a government agency and get the protection that is already there under the laws.

I think the other, though, is I think employers' human resources practices are very competitive right now. The number one problem for our members is recruitment and retention of good employees. So they offer them good benefit packages; they offer them good compensation packages. They listen to what they have to say. They give them more of a voice in the workplace on how the business is being run. I think that has taken a lot of the arguments away from organized labor.

Senator HUTCHINSON. Thank you.

Mr. Sweeney, I strongly support the right of people to organize and to form a union, and I find the cases of intimidation, violence, threats, those kinds of things outrageous. But I think, some of the so-called organizing tactics that are used today are also outrageous.

In our second panel, we are going to have a witness who will testify, Bob MacDaniels, president of the ONCORE Corporation, which has been the victim of a law-breaking union-organizing campaign. The NLRB found this month in this case, that there is reasonable cause to believe that the respondent has trespassed, improperly demonstrated, assaulted persons, blocked ingress and egress, physically disrupted work, threatened neutral employers contracting with ONCORE who have no dispute with the union, all in violation of secondary boycott prohibitions.

Then they get specific about a string of incidents in April 2002 at a number of construction sites where ONCORE was the subcon-

tractor. In one incident on April 9th on property owned by Lincoln where ONCORE was the subcontractor, 50 to 60 hostile and angry union members allegedly came on the construction site. The facts of the incident were, in fact, admitted by the union, trespassed without permission, refused to leave. ONCORE's foreman attempted to retreat up a ladder to the second floor of the building under construction but was told he wasn't going anywhere, was restrained by individuals holding his arms, shoulders, and back while another individual wrapped tape around his throat and attempted to choke him. Until police arrived, the union members disrupted work for approximately 20 minutes, and as they left they changed, "We will be back."

Over the next few days, similar incidents of trespass and threats by the union occurred at construction sites owned by the companies where ONCORE was the subcontractor. That from the NLRB.

Do you find that outrageous?

Mr. SWEENEY. With all due respect to the case that you are referring to—and I guess we will hear more in the second panel—I understand that there is a legal—that there is some dispute with the facts, and there is a legal process where there has been an injunction and a temporary restraining order, I believe. But I would like to get more familiar with the facts.

Senator HUTCHINSON. Well, I can read you that there is a concession to the facts, but apart from whether the facts are accurate or not, do you find, if that were the case, that kind of behavior outrageous?

Mr. SWEENEY. Well, I have been known to trespass myself once in a while.

[Laughter/applause.]

The CHAIRMAN. Order, please.

Senator HUTCHINSON. Thank you, Mr. Chairman——

Mr. SWEENEY. But I do not support any illegal activities. I do not support——

Senator HUTCHINSON. Trespassing is illegal.

Mr. SWEENEY [continuing]. Any violence, no matter what the situation what might, and the labor movement as a whole has never supported any violent activities.

Senator HUTCHINSON. I have a letter here from the International Brotherhood of Electrical Workers. "Dear Brothers and Sisters: I'd like to thank all of you that responded to my last letter. Now, for what you can do to assist your local union, we're in desperate need for Members to volunteer for the following tasks"—and most of these tasks I understand, hand billing, picketing, surveillance, volunteer organizing, and then it says "overt salts and covert salts." Could you define for me what a "covert salt" is?

Mr. SWEENEY. I think you will have to ask the IBEW what they describe, but that is a part of their organizing activities. It has been part of organizing in the building/construction trades.

The CHAIRMAN. Mr. Yager, can you define what a "covert salt" is?

Mr. YAGER. A covert salt is—I am not sure, but I would guess an overt salt is a salt who applies for a job and says, "I am a union organizer, and if you refuse to hire me, I am going to say you discriminated against union activity." A covert would probably be one

who applies for a job, does not indicate that to the employer, and then once on the job begins filing complaints and creating harassment in the workplace. That is my guess based on those terms, but I don't know for sure.

Senator HUTCHINSON. Thank you. My time has expired.

Thank you, Mr. Chairman.

Mr. SWEENEY. What is your problem with that?

Senator HUTCHINSON. Well, it is deceptive and the goal is not to organize but to destroy the company, and I think that that is a very, very egregious practice.

Thank you, Mr. Chairman.

Mr. SWEENEY. I disagree.

The CHAIRMAN. The whole issue on salting, we have had hearings, the right in terms of salting has been upheld by the Supreme Court by 9 to nothing.

Senator HUTCHINSON. Overt or covert?

The CHAIRMAN. Well, the Supreme Court. You read the opinion. You read the opinion on it. But that is a way of organizing, and it has been recognized.

So I think I would like, I think all of us want to see, if people are going to violate the law, whether it is—they understand the consequences. They should understand the consequences. I wish we were as much concerned about Mr. Vizier, what has happened to him, as we are with regards to other circumstances.

Senator Wellstone.

Senator WELLSTONE. Thank you, Mr. Chairman. That is a good bridge to some of the questions I have which deal with, first of all, the National Labor Relations Act. I will first start with Mr. President, and I will move right along because I would like to get to all of you.

The NLRA says, "Employees shall have the right to self-organization, to form, to join, or assist labor organizations," and it sounds good. Then I heard you, President Sweeney, talk about a variety of different campaign tactics: captive-audience meetings, one-on-one meetings, hiring outside consultants, threatening to close facilities, bribes or special favors, illegally firing workers, surveillance, refusals to bargain for first contracts. How prevalent are these practices?

Mr. SWEENEY. I would say that probably somewhere around 75 to 80 percent of all campaigns have seen employers exercising those tactics.

Senator WELLSTONE. Seventy-five to eighty percent of the organizing campaigns. So thinking about the NLRA and, again, the right of organizers, the right to self-organization, in general terms what do you think needs to be changed, your own priorities? What are some of the things that you are thinking about as president that would assure that workers have this basic, I would argue, democratic right, with a small "d"?

Mr. SWEENEY. Well, our hope is that coming out of this hearing there would be a higher focus on addressing the labor law issues. It is a rather extensive and comprehensive agenda, but if we look at some of the labor laws in countries like Canada and see how they deal with workers' expression of choice in terms of joining or forming a union and the expeditious process that they have, I dis-

agree with Mr. Yager on the pending cases at the NLRB. The numbers are horrendous and have been for the past several years.

But we should certainly be able to enforce a labor law that gives workers a level playing field for expressing themselves in terms of whether or not they want to join a union or to form a union.

Senator WELLSTONE. So the whole question——

Mr. SWEENEY. We should have an expeditious process for discriminatory discharges and other such penalties. But the list is long in terms of what provisions of the labor law must be addressed.

Senator WELLSTONE. But the general principle is the right to organize, the right to bargain collectively.

Mr. SWEENEY. Yes.

Senator WELLSTONE. Mr. Roth, the NLRA on its face complies with international human rights principles-you say that in your testimony—but it falls short in reality. I wanted to ask: Do you think the problem is that the law is not being adequately enforced or that the enforcement itself is not effective or both?

Mr. ROTH. It is a little bit of each. A lot of the tactics that are now standard procedure because of these union-busting consultants that are so prevalent are actually permitted under the NLRA. On things such as captive-audience meetings, on forced one-on-one meetings with supervisor, barring union access, predictions that are very close to threats but not quite threats, interrogations of workers—all of that is legal; it is permitted under the NLRA. That creates a legalized unlevel playing field which needs to be changed.

There are other problems which are illegal, such as firing workers or dismissing workers because of their union activities, and there the problem is more the token sanctions rather than the state of the law. But, again, that is an area that needs to be fixed.

Then, of course, there are broad categories of workers who are simply excluded from NLRA rights altogether, and a lot of this is because the NLRA was drafted, what, 80 years ago and the economy has changed.

If I could, maybe, while I have the floor, just say one word in response to Mr. Yager's——

Senator WELLSTONE. That would be fine. I do want to get to both of them, but, please, if you——

Mr. ROTH. It will just be a moment. In challenging the use of card checks over secret ballot elections, Mr. Yager is attacking the remedy rather than the problem. Clearly, in an ideal world, secret ballot elections would be superior. But in an environment in which coercion is the norm, in which workers do not really have a free choice, it is quite natural for unions to look to card check methods as a way of quickly identifying worker preferences before the employer can rev up with various coercive mechanisms.

I think if we want to move toward the ideal world of secret ballot elections really being preferable, we need to attack the coercion, not the response to the coercion that unions have, of necessity, adopted.

Senator WELLSTONE. Thank you. That might be a bridge to the question for Mr. Vizier. Mr. Yager—and I want to try to get a question to you or give you a chance to respond—has challenged, you know, the union, "corporate campaigns card check recognition".

But, Mr. Vizier, what you describe in your testimony seems like a campaign by the boat owners that you were dealing with to stop workers from forming a union no matter what. Am I correct? Is that what you were facing?

Mr. VIZIER. Yes, sir, Senator Wellstone. It was a compilation of all the companies and the oil and gas industry to stop this campaign that was going on in the Gulf of Mexico. Like I said before, I am a third-generation marine from the gulf. I was brought up into the industry. I was raised into the industry. I was once a boat owner myself. I know the industry inside and out. These companies tried everything. They threatened me with murder. They threatened me with every—they chased me off the road, like I said before. The mariners at Guidry started organizing themselves. In 3 months we had 68 percent of the employees that signed the cards. In that third month, the company caught on to what was going on, and they started an anti-union campaign that was so hellacious it was unreal.

They sent employees how to bust a union, and one of these employees was—he refused to take a Federal drug test and alcohol test, so they bribed him. Against Federal regulations, you have to fire this employee, and they did not fire him. They sent him to union bust-up school, showed him how to bust the union, made him go around to the whole fleet with a petition and said, Sign this petition that you don't want the union, and we are going to give it to the NLRB. The mariners who did not want to sign, the owners came around and said, You are either with us or you are not. The next thing you know, they would be terminated if they wouldn't sign, or they were harassed or they would quit their job.

Something needs to be done. The labor laws aren't being enforced. We need new labor law reform. Like Mr. Yager says, we do have labor laws, but the labor laws are not being enforced and something needs to be done about it.

Senator WELLSTONE. Thank you.

Mr. Yager, I apologize. I have run out of time. I will have some questions for you that I would love to get your response, and I know you want to go on the record.

Thank you, Mr. Chairman. I just want us to stay within our time frame because there are other panelists as well.

The CHAIRMAN. Senator Harkin.

Senator HARKIN. Thank you, Mr. Chairman. I apologize for being late. I would just ask that my opening statement be made a part of the record.

The CHAIRMAN. It will be a part of the record.

[The prepared statement of Senator Harkin follows:]

*******PLEASE SUPPLY STATEMENT******

Senator HARKIN. Listening to all this stuff, those of us who have had family members—I understand Mr. Edwards talked earlier about some of his family members. I can remember when my brother worked for this company for 23 years. It was owned by an individual, Mr. Delevin, a manufacturing company, small manufacturing company in Iowa. He worked there for 23 years, a member of the UAW. They never had one strike. They never had one walkout. They never had any labor problems. When the contract was

up, Mr. Delevin would sit down, negotiate, they would have a contract, and they would move ahead. They had good employee benefits. They had a good workplace, safe workplaces. Mr. Delevin made quite a bit of money, as a matter of fact.

Then he decided that he was going to sell his company. He got to the age he wanted to sell it and get out of the business. They employed about 250 people in manufacturing. The new people came in. In fact, one of the new owners openly bragged how—he said, "If you want to see how to bust a union, come to Delevin's".

So for the first time, now it was 24 years, they wouldn't negotiate with the bargaining unit. Then they forced them out on strike. Then, of course, when they couldn't get a contract, they went, the first time ever, on strike. The first time my brother ever walked a picket line. Then they brought in the replacement workers. Once they brought in the replacement workers, that was the end of it.

Then they got the union decertified, and that was the end of it.

It is just as you said, Mr. Roth. You said in your statement, which I read, you said that if you don't have the right to strike, then you really don't have the right to organize and bargain collectively. It is just ephemeral without that right. Workers don't like to strike, but it is the only last back tool that they have to do that.

Well, ever since I saw that happen to my brother—and the whole thing has changed over the years, and more and more of these people are bringing in these replacement workers, and so really they don't really have a right to bargain collectively, do they?

Mr. ROTH. That is exactly right, Senator Harkin. In fact, if you mention to members of other democracies around the world that in the United States an employer is entitled to permanently replace a striking worker, they look at you like you must be crazy, that that is inconceivable to them to be compatible with the right to strike. We are an anomaly in this country, and this is a major defect in our law which must be changed.

Senator HARKIN. It has to be changed, and we have been trying to do it, but we have not been successful in doing it. But ever since I saw that happen to my brother, I said this is not right what they are doing. It seems to me that whole issue of striker replacement has to be addressed in this country. I don't know, Mr. Yager, if you have got any views on striker replacements or not.

Mr. YAGER. Well, I would be less than honest if I told you that I didn't think that striker replacement situations create a lot of pain and anguish, such as you saw in your situation. But I think the other thing that I can tell you from my own experience, sort of watching what has been happening with my members over the last 10 years, it has really become a very rare occurrence because it is a crapshoot for an employer to do that. You have only to look at the Kaiser Aluminum situation where they are looking at a potential back-pay liability of $180 million.

Granted, an employer can hire permanent replacements if it is an economic strike. But the reality is you never know whether or not it might become an unfair labor practice strike. Because it takes so long to resolve that issue, sometimes they may be looking at 5, 6 years of a back-pay liability, which essentially means they have to pay twice what they paid for that workforce during that period.

We teach courses on collective bargaining. We tell our companies more often than not this is not a smart thing to do, you need to think twice about doing it. But there are situations where it is really the only available alternative to the employer.

Senator HARKIN. It happens all the time in my State of Iowa. It happens all the time where they bring in these replacement workers.

You know, it is examples like what happened at Mercy Hospital in Iowa City. December 13, 2001, just last year—and I was somewhat involved in this, watching it happen. Mercy Hospital wanted everyone who had ever written a medical or treatment order to be classified as management and, therefore, not eligible to be in the union. Well, of course, every nurse at one time or another has written a treatment order.

They had to go in front of the NLRB. That caused a long delay. Mercy held captive-audience meetings to speak against the union, transfers out of regular jobs to different shifts. What got me is they hired this firm out of Kansas City to run an anti-union campaign. What has happened is that, quite frankly, when the SEIU tried to organize, they lost.

Now, interestingly enough, at the University of Iowa Hospital—and this is the one that galled me—Government money was used to hire a consultant to break the organizing efforts at another hospital there.

The machinists' union in Sioux City, Iowa, organized the Omaha Line Hydraulics. The election was held July 13, 2000. The NLRB certified the election July 20, 2000. Well, Omaha Line Hydraulics has refused to negotiate a contract. They refused to talk economics. The biggest sticking point, I understand, is that Omaha Line Hydraulics wants the right to assign work, transfer employees, et cetera, et cetera. So the local went on strike a year later, May 3, 2001; they have been out ever since.

What happens—I think there may be an agreement here that we need to really beef up the NLRB. We need to give them the resources in which to cut down the length of time.

I have another example of a young man, a friend of mine from Mason City, Iowa, who was discriminated against, and he filed an NLRB action. It took him I think about 3 years before it finally wound through. But he was a young man, he was single, he didn't have a family, and, by gosh, he was determined he was going to win.

What usually happens in these cases is people are married, they have kids to take care of, they have families, they have mortgages to meet. They can't hang in there. So they go off and they find another job, and they move on with their lives. Sometimes they move on out of town. That just discourages anyone else from ever doing that.

This young man is the only one I know who ever really won one, and he has hung in there. Like he said, "I don't have any mortgages, I don't have any—so I'm going to hang in there." He won. He got quite a bit of back pay and stuff, but as he said, most people can't do this.

So, hopefully, maybe that is the one thing that—we may disagree on a lot of things, but the one thing that we have got to be able

to agree on is that the NLRB needs more funds. It needs more personnel. It needs to shorten its time period, and the appeals process ought not to drag on year after year after year after year because it is do discouraging. So maybe we can get the business community, Mr. Sweeney, to agree with us to ask for more money and more resources from this administration to put into the NLRB. I happen to chair the Appropriations Committee that funds it. Now we are finding that the administration downtown wants to cut the funds. As long as it takes now, they want to cut the money for it. It seems to me we need the business community to step up and say we need more funds for the NLRB.

Mr. YAGER. I don't think it is a funding issue. I think it is a structural issue, Senator, and we, in fact, recommended a few years ago in testimony before this committee, one way you can really speed things up is to take, really take the interpretation of the law function away from the five-member NLRB and take it right to the courts, because that is where the delays occur. The vast majority of the cases happen within about a 45-day period. It is when you start to get the appeals up through the NLRB. Then it takes them a year or a year-and-a-half to decide your case. Then it goes to the Federal courts. Then it takes them 2 or 3 years to decide a case.

That is only about 1 percent of all cases. But I think you have got to figure out a way of expediting that process, and part of the problem is just the fluctuation we have seen at the Board over the years, just, as you all know, grappling with the nominations and having a Board that is a fully confirmed Board and not, you know, two or three recess appointments or whatever. I mean, those are the problems, and I don't think more funding is going to fix them.

Senator HARKIN. Mr. Roth.

Mr. ROTH. I completely disagree. Back in the 1950s, ancient history, the NLRB had 3,000 full-time employees. Since then, the number of cases filed has tripled. The number of employees at the NLRB has been cut to 2,000 from 3,000. We clearly need more resources if we are going to have effective enforcement of our laws.

Senator HARKIN. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Murray.

Senator MURRAY. Mr. Chairman, thank you very much for having this hearing today. I really appreciate your efforts in this direction, and I appreciate all of our witnesses who are here today. There is a lot going on in Congress, but certainly this is an important subject that impacts the lives of many, many workers.

Mr. Sweeney, I am especially delighted to see you here today. I know you are going to be in my home State this summer. The members of our AFL–CIO are very excited about your participation in there convention and are really looking forward to it. So I appreciate your coming out there.

I especially want to extend a welcome to the individual workers who have risked their personal economic security and that of their families' for the sake of organizing workers for a safer workplace and a better tomorrow. Many of the benefits that American workers across our country enjoy today came because of individuals like you who stood up and fought for other families, and I just really

appreciate your being here today and having the courage to come and talk to this committee.

Mr. Chairman, I apologize. I won't be able to hear the second panel. We have a number of hearings going on today, but I wanted all of you to know how important your testimony is and how important it is for you to be here, not just for yourselves but for so many people who can't be here today.

Mr. Sweeney, let me start with you. There was a recent survey at Cornell University by a scholar by the name of Kate Bronfenbrenner, who found that in workplaces with undocumented workers employers threatened to call Immigration and Naturalization Service in more than half of all the union-organizing drives. I wonder if you could comment on that issue and the difficulties confronting legal and illegal immigrants who seek to organize a union.

Mr. SWEENEY. It is a very common occurrence for employers in non-union industries to call in the INS when they hear that their workers are attempting to organize. I think that it is a clear example of how our laws have to be enforceable for immigrant workers as well as all workers in our country. I think that we have to address this issue not just with our labor laws but also with immigration reform. These immigrant workers are being exploited in so many different ways, and it is all across the board in all the industries, whether it is manufacturing or textiles or service or health care and hotels and restaurants.

I have been working on organizing campaigns myself in different cities where I have gone to meet the workers and meet them as they get off their shift at work, and the employers call the INS, the INS shows up while we are there sometimes in some of these cases. The workers, of course, scatter off as fast as they can to avoid any confrontation.

Senator MURRAY. It is a problem we need to address, Mr. Chairman, for sure.

Mr. Roth, many of the people on this committee have supported Senate action on the Convention to Eliminate All Forms of Discrimination Against Women, the CEDAW treaty. Could you take a moment and comment on CEDAW's relationship to the topic we are discussing today? I would just say it is my belief that passing the CEDAW treaty would really send a strong message abroad that women in the workplace are important, and if you could just comment on where you see that in this debate.

Mr. ROTH. I think there is very little excuse for why this country has not ratified the women's rights treaty already. This is a treaty that is widely recognized around the world as being essential for guaranteeing the rights of women. At a moment when we have overthrown the Taliban regime, one that is notorious for its repression of women, the fact that we are not willing to stand up and recognize that women deserve equal rights in the workplace and every place else is something that most of the rest of the world just doesn't understand. This is being portrayed as some kind of radical attack on the family, but if you just sit down and read the treaty, it enshrines the basic rights about equality of women that all of us believe in, that has been a basic part of this society for a long, long

time. It is shameful that America cannot stand up and join virtually the rest of the world in embracing this treaty.

If I could say also, just with respect to your question about immigrants, I think that there are a number of things that could be done to improve the ability of immigrants to exercise the right to freedom of association. The INS already has a discretionary policy of not conducting raids during elections themselves. That could be helpfully extended to the entire period in which unionization is at issue, including a reasonable period afterwards where there would be forbearance on the part of the INS.

I think it would also be helpful in the case of unfair labor practices against undocumented migrants if a new visa category were established comparable to the S category for witnesses of crime or the T category for trafficking victims, so that workers would be able to enforce their rights.

Similarly, the NLRB should adopt a policy of never questioning a worker about his or her immigration status since that is a very important way of discouraging undocumented workers from exercising their rights.

It would also be helpful if the ban on Legal Services representation of undocumented migrants were lifted so that, again, they could have the basic representation that they needed.

Senator MURRAY. Thank you very much for those comments.

Mr. Chairman, I am out of time, and I know you have got a number of witnesses. I just wanted to comment. Mr. Yager mentioned Kaiser Aluminum, which is in my home State. It was egregious actions on that company's part, and this was a company that had a wonderful relationship with the community. It was a great union-organized company, a great reputation. Those employees stood up to a lot of pressure, and now Kaiser is having to pay a fine. I think, you know, we will continue to work with the union and with everybody there, but I think that is an example of some pretty great employees who stood up for the rights of workers across the country. It is a wonderful example we should all follow, although it has really torn apart our communities.

Thank you, Mr. Chairman.

The CHAIRMAN. I want to thank all of you very much for your very helpful testimony. We are very grateful. You have given us a lot of good information and a lot to think about.

Thank you all very much.

Senator WELLSTONE [presiding]. We are now going to turn to the next panel with Sherri Buffkin, Nancy Schweikhard, Mr. Vidales, and Mr. MacDaniels.

Thank you. We want to make sure that we are not interrupted by votes so we will move forward.

Sherri Buffkin is from Bradenboro, NC. In 1992 she began working at Smithfield Foods in Tar Heel, NC. Smithfield Foods is the largest, as Senator Harkin knows, hog slaughter and processing plant in the world. Ms. Buffkin began as an hourly employee in the plant's box room and received numerous commendations and awards for her hard work. Within 2 years Ms. Buffkin became supervisor and was then promoted to division manager in charge of Smithfield Foods, and it is a very, very compelling story. I think I'll introduce each one of you individually.

Ms. Buffkin.

STATEMENT OF SHERRI BUFFKIN, FORMER SUPERVISOR, SMITHFIELD PACKING COMPANY, TAR HEEL, NC

Ms. BUFFKIN. Thank you. I would like to say that it is a pleasure to be here. I am saddened at the moment that Senator Hutchinson cannot be here, because I would really appreciate that for him to see from a supervisor management viewpoint what actually happens, but that is a personal feeling.

You already went through my background, so I do not need to go over that again. I have an 11-year-old daughter who is with me today, and the fact that I have an 11-year-old daughter——

Senator WELLSTONE. Why do you not introduce your daughter?

Ms. BUFFKIN. She just stepped out. I am sorry.

Senator WELLSTONE. She might have got a little bored for a while. No offense to anybody. [Laughter.]

Ms. BUFFKIN. But I have an 11-year-old daughter, and I committed some egregious acts against hourly employees during my tenure as a management personnel at Smithfield. On several occasions I would come home. My daughter was 6, 7 at the time. I would come home crying. The first thing my daughter would ask me when I walked into the house. She would notice I was upset. The first thing she asked me was, "Mom, who did you have to fire today?"

I am not affiliated with any union. I am here today to stand up for workers' rights and for what they believe in, and for the fact that they can have a better work environment, but they cannot do it by themselves. They need a voice. They do not need to leave their self respect and their dignity at the door when they walk into the plant, which is what happens to them each and every day.

Smithfield Foods asked me to lie on a affidavit, and I had to make a choice between my job and telling the truth. At that point, I am sorry to say—but I am human—I chose my job and supporting my family, and I did so at that time. Smithfield Foods sought out and had management, such as myself—I was in the top echelon of the hierarchy at the plant; I was fourth in charge—and we would seek out employees that were pro-union.

As you stated, I received numerous recommendations. I got the highest raise in the plant for 3 consecutive years. I had a very good working relationship with my employees. I understand that family, in my view, comes first. As long as you do not abuse that, then if you allow a little bit of leeway for your employees, because if they have a family problem or a child is sick or something of that nature, they are going to work that much harder for you the next day, the next week, the next month.

In 1997 the UFCW started handing out pamphlets and standing by the roadside outside the plant talking to workers. The company brought in attorneys and we had mandatory meetings in which we would sit down in closed-door sessions and meet with the attorneys, who told us that their only reason for being there was to make sure that the UFCW did not get into the Smithfield Packing Tar Heel plant, and they were true to their word. They ensured that this did not happen.

The way they accomplished that was the fact that other members of management, we would stress we would have daily meetings with our employees. We had mandatory meetings in which we would tell them, "If the union comes in, you can no longer come to me. You have to talk to a union rep. I cannot help you any more." We were told—I personally was told; I cannot speak for other members of management except for the meetings that I was there, so I will speak for myself and leave the other management out of it. I was told that to threaten them with strikes. "The UFCW is known for strikes. What is going to happen? You do not have a paycheck. You will lose your job. What are you going to do? How are you going to feed your family?"

We also threatened them—and that is the only word you can use—we coerced, we manipulated employees to come in to the company line. The company employees would take and feed us information to tell our employees. "This is what you do." I had two employees that worked for me that during the last several weeks of the election did not do a lick of work for me, nothing. The company paid them to go into the closed-door meetings and spy, and find out who were pro-union employees, who were pro-company employees. These pro-union employees were then picked out, singled out, and found a reason to be terminated.

For example, I had a lady that worked for me in laundry. She was from New York. She was a very hard worker, or else I would never have put her in a position of crew leader.

Senator WELLSTONE. Is that Margot?

Ms. BUFFKIN. Margot. I made her a crew leader. She voiced her opinion. Laundry is a very populated place. Most of the employees, over 3,000, I would say 3,800 of the employees have to go through laundry at least 4 times a day, in and out. Margot voiced her opinions. I was called downstairs by a company attorney and asked if Margot was one of mine. By that I assumed he meant my employee. At which point I responded, "Yes, she is." He then told me that he had come out of a meeting in which Margot's name had come up repeatedly, and that Margot was pro-union. This company attorney looked me dead in the face and told me, "Fire the bitch. I'll beat anything she or they throw at me in court."

At this point my response was, "I cannot do that. She has never been disciplined. There is no disciplinary action in her files. She has never been written up." He said he did not care, "Fire the bitch."

She was called downstairs with another member of management, the plant manager. She was told that she was causing problems among the other employees, other employees did not get along with her. That was the line they gave her. So she goes back upstairs and she gets a petition. In less than an hour she has several hundred names on this petition, telling that she is a good employee, that nobody has problems with her. This was presented the next afternoon when she came back to work. I had offered her a job, trying my best to help this lady. I had offered her a job in a label cage. She told me she would think about it over the night. Well, she comes back the next day, and this plant manager, he tells her, he said, "I am sorry. The job is no longer available." She starts crying. She becomes hysterical. She said, "You know, you told me to think

about it. I went home and I thought about it." She excuses herself to go to the bathroom.

At this point the plant superintendent that was in the room with me got a jovial manner and started laughing. He thought this was hilarious. "We got another one. We got another one. Do not have to worry about her." The woman was crying hysterically. She has 3 kids. He sits there and looks me in the face and laughs, and tells me, "Well, I could have gotten a blow job out of her if I had wanted to, she wanted her job so bad." Pardon my expression, that is exactly what was said. At that point I left work, and he dealt with it, and I went home.

The union filed charges with the National Labor Relations Board about these terminations that I was involved in, and that is just one of their many. I do not have the time to go into it.

The attorney write affidavits which were filed. He would misconstrue what I said to fit what the company wanted. Yes, I had a family to feed. I support my family. I tell them it was wrong. When the plant manager, vice president and an attorney tells you this is what you do, I am so sorry, I have to live with myself, but I also need to support my family. I signed the affidavits knowing they were false.

During the meetings the attorney showed us how to undermine pro-union sentiment. We were to keep names of all the employees that were pro-union. We were told that if an employee was pro-union, that we were to ride them. Overtime was only given to pro-company employees with the exception of pro-union employees that did not want the overtime. At this point I was to make them work over. When they tell me no, they were fired for insubordination. The general manger, vice president and myself pushed the fight that Smithfield Packing Tar Heel Division would never get into a union. If a union come in, they would close the plant, and they would move, they would relocate. We pushed this and we were very good at it.

We told employees that if a union got in, it would be years before they would ever negotiate a contract if then. While the union was organizing, the two ladies I told you about earlier that worked for me, they were paid to spy on other employees. Their names were turned in and they were terminated.

Smithfield would take and set black workers against Hispanic workers because the black workers were pro-union, the majority; the Hispanics are easier to manipulate, easier to coerce, easier to talk into your way of thinking. "You want to leave? We will make you leave fast." They even hired an attorney from California in order to help them speak Spanish and the company line.

In 1998 right before, less than a month before the National Labor Relations Board trial, the attorneys asked me to testify. At this point I told them that I had lied for them for the last time, and I would not under any circumstances put my hand on the Bible and lie. At this point I was fired.

I do not justify. I am not sitting here to justify anything that I have done. Since then my house has been foreclosed on. I have had to file bankruptcy. I have not found another job. But I want to personally encourage the Members here to please go to Smithfield

Packing yourself, go unannounced, walk in. See for yourselves—do not take my word for it—what goes on.

My time is up. I was not through, but my time is up. [Applause.]

[The prepared statement of Ms. Buffkin follows:]

PREPARED STATEMENT OF SHERRI BUFFKIN

Mr. Chairman and Members of the Committee: I am Sherri Buffkin. I live in Bladenboro, North Carolina. I'm here to testify today because I want to be able to look my ten-year-old daughter in the eye with a clear conscience. I worked as a division manager in charge of purchasing for Smithfield Foods in Tar Heel, North Carolina. Too many days I'd come home from work crying, and my daughter would ask, "Mommy, who did you have to fire today." I'm here to tell this committee how I terminated employees who didn't deserve to be terminated. I'm here to tell you that Smithfield Foods ordered me to fire employees who supported the union and that the company told me it was either my job or theirs. I'm here because Smithfield Foods asked me to lie on an affidavit and made me choose between my job and telling the truth. I'm here today to tell you how Smithfield Foods sought out and punished employees because they were union supporters, and that the company remained true to its word that it would stop at nothing to keep the union out.

I began working at Smithfield Foods, which is the biggest hog slaughter and processing plant in the world, on September 12, 1992, as an hourly employee in the plant's box room. Within two years, I became a supervisor and in less than six months after that, I was promoted to division manager. I was in charge of all plant purchasing, except for maintenance items and buying the hogs for slaughter and processing. I made several million dollars in purchases on behalf of the plant every month. At the same time, I also oversaw employees in the plant's warehouse and receiving, laundry, sanitation, buildings and grounds, and purchasing departments.

The company recognized my hard work and efficiency with letters of commendation and awards. My last three years at Smithfield Foods, from 1995 to 1998 when I was terminated I received the highest raises of anyone in plant.

I had a very good working relationship with my employees. I always gave them the benefit of the doubt and tried to work with them whenever a problem arose in their lives. I encouraged people to further their education and helped them make arrangements for leaving a bit early or coming in a bit late when their children were sick. By the same token, it was not uncommon for my employees to come in for weekend shifts when others were off.

In 1997, when the union started handing out pamphlets and standing on the road outside the plant talking to workers, the company brought in attorneys to tell us what to do and how to react.

The first thing the company told us was that the attorneys were there to make sure that the union did not get in. We had mandatory meetings where we were told that the main priority was to keep workers from forming a union—to stop the United Food and Commercial Workers Union (UFCW) from having an election at the plant, no matter what. Every day we were required to report the level of union activity in our departments, and the lawyers told us what to say to workers to keep the union out. In these meetings, the attorneys told us they would do whatever was necessary to keep UFCW out. They did.

A lady—her name was Margot, who worked for me in laundry as the second shift crew leader—was pro-union. She wasn't afraid to voice her opinions to her co-workers. I was called downstairs and told that the company attorney wanted to speak with me. A plant manager was with him. The lawyer said that he had just come out of an anti-union meeting where her name came up and asked me if she was one of mine. I told him she was, and the attorney said, and I quote, "fire the bitch, I'll beat anything she or they throw at me in court."

I gave the lady the opportunity to take another job in the plant where she'd have less contact with other employees. She said she'd like to think about it. But when she came back the next day, the manager told her that another job in the plant was no longer an option. The excuse he gave her was that other employees found her difficult to work with. That night she began to circulate a petition throughout the plant and got about a hundred signatures saying she was someone who got along well with other employees. When she showed the petition to the plant manager the next day, he told her it was irrelevant and fired her. She was very upset and stared crying, practically begging for her job. The manager came out of the meeting with her, laughing. He told me, while she was leaving, that she was so desperate for her job that he could have gotten sex from her if he'd wanted. That made me sick.

Another employee, a lady know as granny, who worked in laundry, had made a statement in the local newspaper that the union was going to win. I was called to the superintendent's office. The paper was on his desk, and he was visibly upset by it. The employee was called downstairs and terminated. I was told that the laundry was a hotbed of union activity and that other people would also have to be fired. They were.

The union filed charges with the National Labor Relations Board about these terminations. The attorney wrote false affidavits for me to sign and gave those affidavits to the Labor Board. The attorney wrote things that came out of his own mouth, and I told him they weren't true. I felt I had no choice but to sign the affidavits, because I had a family to feed.

The attorneys showed us how to undermine pro-union sentiment and undermine pro-union employees. We were told to keep a record of the names of anti-union employees in our departments and the shifts they worked. We were given anti-union materials and papers and told to speak to each of our employees and ask if they supported the union.

If an employee was pro-union, we were to tell them how bad it would be if the union got in. We were told to push the idea that the union would mean a threat of strikes, that strikes would mean loss of their job, and that without a job they wouldn't be able to support their families. We were to remind employees that if they were out of work because of a strike they would lose their homes and their cars because they wouldn't be able to make their loan payments. We were also instructed to push the idea of violence, that the UFCW was known for violence.

I was instructed to tell employees that they couldn't come to me any more with their problems, because if a union came in then they'd have to talk to the union about any problems they might have. But I was told that I should also warn employees that if the union got in it would take years for employees to get a union contract, if they got one at all.

One of the attorneys told us to give overtime to anti-union employees who wanted it and to force overtime on any pro-union employees who didn't want more hours. If any pro-union employee refused the overtime, we were to fire them for insubordination. I fired Wayne, who worked in the warehouse, because he wouldn't take overtime.

While the union was trying to organize the plant, I had two employees in sanitation who, for the weeks just before the election, were relieved of their regular work. The company was paying them to go to all the union meetings and inform on what was taking place and who was pro-union. They were to talk with people in the cafeteria and bathrooms to find out if they were anti- or pro-union. I had to pull people off their shifts or have others come in early to cover for these two individuals.

Smithfield keeps Black and Latino employees virtually separated in the plant with the Black workers on the kill floor and the Latinos in the cut and conversion departments. Management hired a special outside consultant from California to run the anti-union campaign in Spanish for the Latinos who were seen as easy targets of manipulation because they could be threatened with immigration issues. The word was that black workers were going to be replaced with Latino workers because blacks were more favorable toward unions.

On the day of the union election, all salaried personnel were ordered to be in the election room when the votes were being counted. It looked like there was going to be a riot or something on that day. Deputy sheriffs were all over the place. As the votes were being counted, the crowd got really rowdy and started to chant, and I quote, "Niggers get out" and "union scum go home." The plant manager was giving the directions. I became frightened and jumped up on table to get out of the way. Danny Priest, the chief of security, who was also a sheriff, and the deputies ended up arresting one of the union representatives and a worker who everyone knew supported the union.

In 1998, right before the National Labor Relations Board trial started, the attorneys told me I would have to testify. I told them I wasn't going to lie. I was fired shortly after that.

I'm not justifying anything I've done. Since I lost my job, I had to declare bankruptcy, and avoided foreclosure on my house by just one day. I haven't been able to find another decent job. I couldn't even get a job as a shipping clerk, even though I'd supervised shipping clerks. I don't regret standing up for the truth because now I can look my daughter square in the eye.

Senator WELLSTONE. It turns out Ms. Buffkin's daughter is indeed here, and I know you must have heard that applause for your mom. I will tell you, everybody in this room is very proud of your

mother and what she has had to say, and Senator Harkin is, and I am, and Senator Kennedy thank you very, very much for it. I would say one other thing to you and Tom—I know you have to leave. You may want to say something before you leave, but I want to go forward. We have got other powerful testimony. I think that you have just showed tremendous courage in what you have done, and I think you are going to light—this testimony and what you have done, I think you will light a candle for a lot of other people, I really do, and I would like to thank you.

Your mother is special, no question about it. Us Jewish people would say "mensch."

Ms. BUFFKIN. May I say one more thing? For the anti-union people that are here, I just want to say if it was your mother, your father, your brother, your sister, your child that had to live every day going to work in those inhumane conditions, they would change your point of view. Thank you. [Applause.]

Senator WELLSTONE. That is true.

Senator HARKIN. I have to leave, Ms. Buffkin, but thank you very much. That is a real profile in courage.

Ms. BUFFKIN. Thank you, sir.

Senator HARKIN. God knows we need more of you out there.

Senator WELLSTONE. We need more Harkins out there too. [Laughter.]

Senator WELLSTONE. Nancy Schweikhard is from Ventura, CA and for the past 8 years she has been a registered nurse interested Neonatal Intensive Care Unit at St. John's Regional Medical Center in Oxnard, CA; a member of SEIU, which I think is one of the great, great unions in the country, and I want you to know, Ms. Schweikhard, we think here that your president, Andy Stern, is just absolutely a true justice labor leader, the best.

Ms. SCHWEIKHARD. We think so too, thank you.

Senator WELLSTONE. The best.

Ms. Schweikhard.

STATEMENT OF NANCY SCHWEIKHARD, R.N., ST. JOHN'S MEDICAL CENTER, VENTURA, CA

Ms. SCHWEIKHARD. By the way, there was a comment made pro-company, pro-union. I kind of see them as the same. I am pro-union because I am pro-company.

Thank you for having me. It is an honor to be here and to say what I have to say.

Like you said, I have been an R.N. for the last 8 years in the Neonatal ICU at St. John's in Oxnard, CA. I would also like to mention that I also was fired from a nursing position in the early 1980s. We did not have an organizing effort. I was merely asking questions. After 3 years at a hospital where I was well liked and well respected, within a week I was charged with flagrant insubordination. I was fired. I was devastated. I take great pride in my position there. Went to the NLRB and they could not help me.

Consequently with this effort that we had, we also filed a fair labor practice. It took almost a year for a ruling to be made on it, so not 45 days.

I love being a nurse, and together with the truly great and wonderful staff, the nursing staff, the neonatologists at my hospital, we

take great professional and personal satisfaction in taking care of sick babies. It was in that spirit of caring and commitment to patients that in 1999 the nurses at St. John's and I decided to organize together with the Service Employees International Union. In order to raise the standard of nursing, nurses know what is going on in the hospitals and you all need to be very concerned. You all need to just support your nurses and their efforts to unionize.

We went on to negotiate a contract that has raised standards for nurses and patients at our hospital. The decision to form a union should be based on facts not fear. I have been through 3 separate elections at St. John's, one for the RNs and two for the service and technical employees who we felt needed it far worse than we did.

When nurses first formed our union at St. John's 2 years ago we faced a great deal of opposition from the hospital. We were introduced to union busting. We were subjected to one-on-one meetings with our supervisors, in which they pressured us to oppose the union. Imagine how powerful such a negative message is for nurses when it is coming from the person who sets your schedule, gives you your assignments, approves your time off, has the power to impose disciplinary action and whether or not you get a raise. We were pulled away from patient care in order to attend mandatory one-on-one meetings. The hospital spent patient care dollars on expensive consultants who specialize in carefully working around the law to pressure and intimidate employees. In 1999 St. John's Hospital spent $2.7 million in union busting to the Burke Group. We were fed lies and half truths. We had managers around the clock watching us. We were told that we would not accomplish anything without a union and that the union would keep us from talking directly with our own supervisors. Managers even led us to believe that having a union would endanger our patients because union rules would prevent our supervisors from intervening or assisting in emergency care situation. This is powerful stuff for nurses, very powerful stuff.

Management distributed literature that said that they would not negotiate with us, and that the union could not improve staffing or other conditions at the hospital. We were told that we would have to pay high dues and initiation fees, and that we could lose our wages and our benefits. We were even told that a union might force the hospital out of business. That is powerful. We want to help our hospital. We have great ideas. We want to work with our hospital. We do not want to close it. The atmosphere in the hospital was purposely kept very, very tense, and the implication was that the negative atmosphere would continue indefinitely after we formed our union, so what is the point?

I was called into my manager's office on 3 separate occasions. I was questioned one-on-one and again two-on-one, two supervisors against me. I was well prepared by my union. I knew what the law was. I was specifically asked not to talk with nurses or other employees outside my unit about the union, and I was questioned about my whereabouts throughout my shift. I work in a neonatal ICU. It is all self enclosed. The only reason that I should have to leave is to go to high-risk deliveries, when a mother or a baby are in trouble, or to the restroom. They were installing cameras for infant security purposes, but also—funny how a lot of cameras

showed up during our union drive. They are positioned right outside of my unit. They knew when I was leaving my unit. They told me, security told me they were watching me. I was advised to take the stairway instead of the elevators when I did organizing on my break time and not in patient care areas. Every time I went to use the restroom, I waved to the camera, and then I would make sure that I waved back so that they knew that it only took me 3 minutes, and that I was not outside entering other units, talking to other nurses.

We did file a ULP. My evaluation was downgraded. I was specifically told by my supervisor it was because of my union activity. It was on dignity, the core value of dignity. It was not true. It took the NLRB a year to find a ruling on it, and they did again make me whole. I got one of those blue and white things that you described.

Despite all this, nurses at St. John's hung together because our goal was to make our hospital a better place to give and receive good patient care. Our goal was to improve patient care and work with our hospital collaboratively in decisions that affect our patients. With perseverance we managed to form our union, and now we have a real voice in the hospital on key staffing and patient care issues. None of the horrible things management told us would happen have occurred. They did stall for 9 months before they would bargain on anything except just cause. But on the contrary, things have turned out very much very well.

My second experience with a union election at St. John's was helping our service and tech workers. This includes radiology, respiratory, dietary and housekeeping. The same thing, the atmosphere was very hostile, even more so. Our workers whose first language is not English were told if they signed a union card they would be deported. Whether or not they could do it is one matter, but these were people who were very, very afraid to get involved because they were not sure that they could or could not do this. There was an overwhelming sense of fear and hostility. Ultimately management's tactics worked and my co-workers lost their election.

Since then they have won, but a little over a year ago there was a dramatic change. On April 4, 2001 our hospital system, Catholic Healthcare West, signed an agreement with SEIU that among other important issues, sets reasonable ground rules for union elections. It said employees at CHW hospitals would be allowed to make up our own minds about forming a union in an atmosphere of mutual respect, and that communication with employees would be factual and free of personal attacks. It said that CHW and SEIU would work to find position solutions to problems and would not engage in derogatory comments concerning the basic mission of either organization. It prohibited hospital management from holding one-on-one meetings to intimidate employees, and banned mandatory anti-union meetings called by hospital management on work time.

Finally, it prohibited the hospital from hiring outside consultants, saving us millions of dollars.

I believe that instead of being the exception these rules should be standard operating procedure in all union elections to ensure that employees can freely choose whether to join a union. After the

agreement was signed between SEIU and CHW, union staff were able to enter our hospital and talk with workers without the threat of being escorted out or having the police called. We were able to hang literature in designated areas without having it torn down.

The new contract and organizing agreement have brought us new far more cooperative relationship with our hospital and the CHW system. Things are better at the hospital for our patients, for our workers. The patients benefit by the new staffing language in our contract which allows us to work with our managers in resolving patient care issues. I do not believe that workers should have to climb mountains to choose a union. We should not have to fear for our jobs and our families. We should not be systemically intimidated, threatened or frightened for exercising our democratic right to have our own organization at work.

Thank you for inviting me to speak today.

[The prepared statement of Ms. Schweikhard follows:]

PREPARED STATEMENT OF NANCY SCHWEIKHARD, R.N., ST. JOHN'S MEDICAL CENTER, OXNARD, CA

Chairman Kennedy, Members of the committee, thank you for inviting me to today's hearing. It's an honor for me to be here.

My name is Nancy Schweikhard and for the past 8 years I've been an RN in the Neonatal Intensive Care Unit at St. John's Regional Medical Center in Oxnard, CA.

I love being a nurse, and I take great professional and personal satisfaction helping sick and premature babies get well and have a chance for a full and normal life.

It was in that spirit of caring and commitment to patients that in 1999 my colleagues and I decided to organize with the Service Employees International Union, and went on to negotiate a contract that has raised standards for nurses and patient care for patients at St. John's.

The decision to form a union should be based on facts not fear. I've been through three separate elections at St. John's—one for the Registered Nurses and two for the service and technical employees.

When nurses first formed our union at St. John's about 2 years ago, we faced steep opposition from the hospital.

We were subjected to one-on-one meetings with our supervisors in which they pressured us to oppose the union. Imagine how powerful such a negative message is for nurses when it is coming from the person who sets your schedule and assignments, approves your time off, has the power to impose disciplinary action, and has a say in whether you get a raise.

We were pulled away from our patient care duties to attend mandatory anti-union meetings with hospital administrators.

The hospital spent precious patient-care dollars on expensive consultants who specialize in carefully working around the law to pressure and intimidate employees into not forming a union. In 1999, CHW spent 2.7 million to a union-busting firm.

We were fed lies and half-truths. We were told that we wouldn't accomplish anything with a union and that the union would keep us from talking directly with our own supervisors. Managers even led us to believe that having a union would endanger patients because "union rules" would prevent our supervisors from intervening or assisting in an emergency care situation.

Management distributed literature that said they would not negotiate with us and that the union couldn't improve staffing or other conditions at the hospital. We were told that we would have to pay high dues and initiation fees and that we could lose wages and benefits. We were even told that a union might force the hospital out of business.

The atmosphere in the hospital was purposely kept tense, and the implication was that the negative atmosphere would continue indefinitely after we formed our union.

I was called into my manager's office three separate times and questioned 1:1 and 2:1 by my nursing manager. I was specifically asked not to talk with nurses or other employees outside my unit about the union, and I was questioned about my whereabouts throughout the shift—even on break time. Each time I left my unit, I was aware the surveillance cameras were watching me. In addition, I was told that my performance evaluation had been downgraded because of my support for the union. In response, we filed a ULP and St. John's corrected the evaluation.

Despite all of this, nurses at St. John's hung together because our goal was to make our hospital a better place to give and receive good patient care.

With perserverance we managed to form our union, and now we have a real voice in the hospital on key staffing and patient care issues. None of the horrible things management told us would happen have occurred. On the contrary, things have turned out very much the way the union said they would.

My second experience with a union election at St. John's was helping the service and technical workers form their union. This included everyone from radiology and respiratory technicians to dietary and housekeeping employees.

During that election, the atmosphere in the hospital was very hostile—between supervisors and workers, but even between co-workers. Management would pull employees off the floors during patient care hours for one-on-one meetings about the union.

There was an overwhelming sense of fear and hostility in the hospital that even the patients could sense. Ultimately, management's tactics worked and my co-workers lost their election.

But a little over a year ago there was a dramatic change. On April 4, 2001, our hospital system, CHW, signed an agreement with SEIU that among other important issues sets reasonable ground rules for union elections.

It said employees at CHW hospitals would be allowed to make up our own minds about forming a union in an atmosphere of respect, and that communication with employees would be factual and free of personal attacks.

It said that CHW and SEIU would work to find positive solutions to problems, and would not engage in derogatory comments concerning the basic mission of either organization.

It prohibited hospital management from holding one-on-one meetings to intimidate employees, and banned mandatory anti-union meetings called by hospital management on work time.

Finally, it prohibited the hospital from hiring outside consultants.

I believe that instead of being the exception, these rules should be standard operating procedure in *all* union elections to ensure that employees can freely choose whether to join a union.

After the agreement was signed between SEIU and CHW, union staff were able to enter the hospital and meet with employees in public areas as long as patient care was not disruptive. Employees were able to post literature and other materials in specific locations in the hospital.

This time, whenever an employee had a question, they could get it answered quickly and make a decision based on the facts.

The new contract and organizing agreement have brought us a new, far more cooperative relationship with our hospital and the entire CHW system. It is improving our hospitals and making things better for patients, who benefit in a number of ways from the new relationship and our collective bargaining agreement.

Patients benefit because there is less conflict in the hospital and employees are happier. They benefit by the new staffing language, which in our contract allows us to work with our managers in resolving staffing issues.

I do not believe that workers should have to climb mountains to choose a union. We should not have to fear for our jobs or our families. We should not be systematically intimidated, threatened, or frightened for exercising our democratic right to have our own organization at work.

Thank you again for inviting me to speak at today's hearing.

Senator WELLSTONE. Thank you very much. Much appreciated.

I was saying to Marge Baker, who works with me, I want to go forward with the testimony, and I am trying not to limit people to 5 minutes because you have so much to say. There may be fewer questions because I think it is probably more important just to get your testimony out, and I would like to thank you very much for very powerful testimony. I thought, in case I do not get a chance to ask many questions, I thought, Ms. Schweikhard, your initial statement about you do not view it as union versus company but you think it should be both together, was extremely important and particularly in affecting the quality of care for people in the health care field. I think it is a wonderful connection that you make.

Mr. Vidales from Zacatecas, Mexico, immigrated in the early 1980s, eventually went to work as a cook in the Santa Fe Casino's coffee shop. Thank you for being here, Mr. Vidales.

Mr. VIDALES. Food server.

Senator WELLSTONE. Pardon?

Mr. VIDALES. I was a food server, waiter.

Senator WELLSTONE. Oh, sorry.

STATEMENT OF MARIO VIDALES, FORMER FOOD SERVER, SANTA FE HOTEL AND CASINO, LAS VEGAS, NV

Mr. VIDALES. My name is Mario Vidales. I used to work as a waiter at the Santa Fe Hotel in——

Senator WELLSTONE. The record will be corrected. I apologize for that.

Mr. VIDALES. OK. Many of us felt that we are not getting respect at work. When we start working the company promised us good benefits and wage increases after 6 months and a year later. So we did not get none of those promises delivered, so we decide to organize the union. So we contact the Culinary Union to help us out. Pretty soon, you know, we signed up more than 70 percent of the workers in the union cards, so we asked the company to recognize the union and start bargaining with us. But of course they refused. The casino owner was the State Senator's husband, and they refused to bargain with us. They said the best way is to have another re-election. So we knew we were the majority and we can win that, so we agree.

So a year later we have an election which we win also even though there was a lot of management around it, you know, the election was held at the company. So there were supervisors looking at us, you know, step-by-step, when you go and vote, which was very scary. A lot of people was nervous. So we still win. But everybody was so happy and excited. I was one of them jumping. I says, "Great." You know, "Wonderful. We have union representation so we are going to have the same benefits as the other people on the strip," but I was wrong, because the company appealed the decision. It took a long time. It took them like 7 years went by, and the company appealed in every court including the U.S. District Court, just to delay the process of the negotiation.

Finally the Labor Board forced them to sit down and negotiate with us. So they start to negotiate with us, but we have, through like 20 sessions of negotiations and nothing was happening, so you can tell the company was not serious about it. It was just like killing time. So any way it was 7 years of harassment and threats and intimidations. Years later the company sold the property to another corporation that is called Station Casinos. Immediately when they took over, they said they were not keeping the employees. They have to reapply again, so there was only a few employees from the Santa Fe left, so they end up without having the union, and all the employees lost their jobs. One of the occasions when I was working there the company was so upset because we were so organized.

Since I was first server, I was going earlier to work so I can see the workers before my shift, and I used to stay over so I can talk to all three shifts. Company was so furious because we were so organized there and they could not do nothing about it. So what they

did is they split us up. They changed everybody's shift so nobody will see each other again and destroy the organization.

I was conducting meetings at that time, trying to figure out how we are going to get our shifts back so we still can be organized, and one night when I was leaving from work, I came out. You know, I was going to get in my car, and as I was leaving there was two cars right outside. They were full of people. I was a little suspicious when I saw them, but you know, I thought no big deal. There was no reason for me to be afraid. So I kept on walking, going to my car. Then these two cars—that I was a little suspicious of—they pulled ahead of me and they came out of the cars with tire irons and baseball bats. So then I took on two of them, you know, I push them and throw them on the floor, but the others, they are going after me with the baseball bats and they start beating me and left me for dead. They thought I was dead because I was not screaming. I was on the floor bleeding, and so they said, "We killed him. He is gone." They were surprised. I am here. I am still fighting and I am not going to give up for our rights.

[The prepared statement of Mr. Vidales follows:]

PREPARED STATEMENT OF MARIO VIDALES, FORMER FOOD SERVER, SANTA FE HOTEL AND CASINO LAS VEGAS, NV

My name is Mario Vidales and I used to work as a waiter at the Santa Fe Hotel and Casino in Las Vegas. At the hotel, many of us felt like we were not getting any respect as employees or as human beings: we worked for minimum wages and had no paid health or pension benefits. In May 1992, we talked to the Culinary Union because we knew that union workers received fair pay and benefits. We were tired of the lies of the hotel owners, the Lowden family, who kept promising improvements but never came through.

More than seventy percent of us signed for the union and we asked the Lowden family to recognize our union and negotiate. They refused, saying that the only fair way to determine what people wanted was through an election supervised by the NLRB. We knew we could win, so we agreed.

In October 1993, more thaw a year after we had signed for the union, we finally had the election. We had to vote at work and people were nervous because our bosses kept an eye on us the whole time, but we won anyway. At the time I thought: "Great! We did it! Now we have some rights."

But I was wrong. One week after the election, the company protested and filed an appeal. Eighteen months later, the NLRB finally dismissed Santa Fe's case. But the company appealed again on June 5, 1995. Again, the NLRB turned them down and certified the union.

Still, the company refused to accept our decision to unionize and refused to bargain. The NLRB ordered Santa Fe to sit down and negotiate on November 30, 1995. But, the company filed one more appeal, this time with the U.S. Court of Appeals for the District of Columbia.

Ten more months passed. In October 1996, the Federal Court affirmed the bargaining order. Three years *after* winning the election the company finally stopped playing legal games and moved on to bargaining. But between March 1997 and April 2000, after more than 20 negotiating sessions, it was clear the company was not serious about reaching an agreement.

During all this legal process, a lot more was going on. From way back in the beginning, the summer of 1992, Santa Fe managers carried out a harassment and intimidation campaign against people who were for the union. I used to get out of work at 10 p.m. and would stay until midnight to talk to the people who were coming in for the next shift. Then, management began splitting and switching people's shifts to make it more difficult to talk to them, so we decided to set up a meeting late one night so everyone could be there. When I got off from work that night, I saw two cars full of people parked by the exit. It seemed suspicious to me but I saw no reason to be afraid. As I walked through the parking lot, the two cars suddenly drove up and 10 men came out wielding baseball bats. I took on two of them and tried running back to the hotel, but the others came up from behind and hit me in my legs. I fell to the ground. I could hear the security guard yelling for help on

his radio, but he did not come to my help. I was beaten and left for dead. They split my head open and inflicted serious injuries on my entire body and the swelling lasted for weeks. I couldn't work for 2 months.

Of course, we filed scores of unfair labor practice charges, hoping to deter the company from this brutality. Just like the endless election appeals, we found the prosecution of ULPs to be endless. It wasn't until September 1998 that the National Labor Relations Board approved a settlement of the ULPs. In all, there were forty-two separate incidents included in the NLRB's complaint: illegal terminations, illegal suspensions, illegal threats to fire, illegal refusals to promote, illegal surveillance, illegal changes in benefits, and on and on and on.

In June 2000, the Santa Fe sold its property to Station Casinos. The new company quickly announced that they would not be retaining us. We could re-apply but would not be given any kind of preference in hiring and the applications would be accepted only after the hiring process was opened to the general public. In the end, only a few former Santa Fe workers were hired to work there. So hundreds of Santa Fe workers lost our jobs and our union.

The Santa Fe's last day of operation (and the workers final day of employment) was October 1, 2000—exactly 7 years after we had voted for Union representation. At the same time we were going through all of this, thousands of Las Vegas casino workers peacefully were unionizing through the card check and neutrality process at places like the Mirage, MGM, Paris and Mandalay Bay. There were no costly legal shenanigans, no firings, no beatings; just a process that respects people's right to choose.

It is very sad that we tried to exercise our rights at work and met with threats and harassment. We followed the legal process but the law is a joke. Many times the NLRB said we were right and then one remedy would be to make the company put up a piece of paper that said: "We will never do it again."

If I cross a red light and get a ticket, it costs me a lot of money so I know that, if I break the law, I have to pay. Here the company simply apologizes and keeps playing games. When the NLRB finally began issuing settlement checks for all the unfair labor practices to former Santa Fe workers in the summer of 2001, *8 years* after the election, many people were long gone and unable to be contacted. In the end, there was no justice. The employer essentially laughed at the Federal Government and the Federal Government was powerless to enforce our rights. Our rights as workers counted for nothing.

Senator WELLSTONE. I tell you, I have to say I have been in the Senate for almost 12 years. I do not think I have ever heard more powerful testimony. I certainly believe you when you say you will continue to fight.

I also think people, if everybody in the United States of America was able to see this, I think they would have a hard time believing that in the year 2002 this actually happens to people. I think it would shock a lot of people in our country, because I think this goes so much against the grain of what the vast majority of the people consider to be fairness in the way you should treat people. Thank you so much.

Mr. MacDaniels founded ONCORE in March 1997. It is a concrete contractor with over 340 employees and a $35 million in annual revenues. We thank you for being here, Mr. MacDaniels. Thank you.

Mr. MACDANIELS. Thank you, Senator. Good morning, or I should say at this point, good afternoon.

Senator WELLSTONE. Good afternoon.

STATEMENT OF ROBERT MACDANIELS, PRESIDENT, ONCORE CONSTRUCTION, BLADENSBURG, MD

Mr. MACDANIELS. Mr. Chairman, Ranking Member Craig, Senator Wellstone and other Members of the committee, for the record, my name is Bob MacDaniels. I am the president and co-founder of ONCORE Construction from Bladensburg, MD, a company we started some 5 years ago, as you said, after hocking everything

that we owned, including our homes, to create our American dream. Today we have over 340 employees and do approximately 35 million a year in concrete construction in the metropolitan area as you mentioned.

We enjoy a reputation for providing a safe work place and quality workmanship. We offer competitive salaries, benefits and employee training. We are very proud of our excellent minority hiring record and compensation. In fact, we have been honored by a national organization by receiving the Accredited Quality Contractor Recognition, a national award that only 470 companies have received since 1993. This recognition demonstrates our commitment to employee safety, employee benefits, employee training and community service. We are pleased to have received this award in only 5 years.

However, Senator, in a very short period of time, our American dream has become the American nightmare, and it is not just ONCORE. We are facing some challenges that many companies in your State are facing. For the past 6 months the Laborers International Union has perpetrated some of the most outrageous acts against my employees, my customers and our reputation, all in the name of a labor dispute with ONCORE. The only dispute is that neither my employees nor I want to be in the union. Some 4 months ago, two representatives from the Laborers International Union came to my office. During our conversation, they admitted, through "salting efforts" that they have learned that my employees do not want to be in the union, but that did not matter to the union. Senator, they gave me an ultimatum. Either I was to sign a collective bargaining agreement, regardless of my employees' wishes, or they would work to put me out of business.

Since that meeting the union's efforts to deny ONCORE work really stepped up. Led by a group of paid agents from New York and New England, the union has engaged in mass trespassing of our job sites. They abused and assaulted my employees. They prevented deliveries to my job sites and overall disruption to my jobs. Last week some of my construction equipment caught fire and exploded under mysterious circumstances.

The union has created and passed out countless handbills that are false and defamatory of my company. In one union falsely quoted an employee saying something negative about salaries. Senator, you should know that that employee later denied, in a sworn statement, that he ever said anything negative about ONCORE. They also have quoted individuals on handbills who claim to have worked for ONCORE, but do not show up on my employee records, apparently dissatisfied that our employees and most of our customers remain loyal despite the union's vicious attacks on our company. They have risen to a new level of lawlessness through a campaign of systematically threatening my neutral customers. Their unions have repeatedly threatened economic terrorism against my general contractors, developers and property owners in the Metropolitan Washington area if they even considered giving business to my company. Union agents even went to the homes of some of my customers and threatened their projects with economic harm if I was not removed from the job.

Finally, enough is enough. We filed charges against the union with the National Labor Relations Board in April of this year. We supported those charges with videotapes of the union's illegal invasion of our job sites, and from employees' affidavits and customers who came forward to present evidence against the union's unlawful and misconduct. On May 24th of this year, the NLRB issued a 15-count indictment against the unions for unlawful secondary boycott activity. The complaint will be heard on July 15th of this year. Just last week at the request of the NLRB a Federal Judge has issued a temporary restraining order and set a hearing for further injunctive relief against the Laborers Union. I am providing the Committee with a copy of the Judge's opinion and order, which confirms everything that I have testified today. Naturally, I am grateful that the NLRB and the Courts have taken steps to stop the Laborers' Union from continuing its illegal activities. But I am told that the NLRB action is unlikely to cover the money that we have spent on added security, legal fees, disruption to my job, not to mention the injury to our reputation from union lies and threats to our customers and the general public.

It continues to amaze me that through all that has taken place in our company, not once has any of my employees ever come to me and said, "We want to be in the union."

Senator starting my own business has made me appreciate what great a country we live in. America is truly the land of opportunity. But writing laws that allow certain groups to basically extort unwanted agreements, that seems un–American to me.

Finally, I think in a democratic society, we should hold both businesses and unions accountable and to the same standards, and I am here today to ask you to do just that. I thank you for allowing me to testify before you this afternoon, and I would welcome the opportunity to answer any of your questions.

[The prepared statement of Mr. MacDaniels follows:]

PREPARED STATEMENT OF BOB MACDANIELS, ONCORE CONSTRUCTION, BLADENSBURG, MD

Good morning Chairman Kennedy, Ranking Member Gregg, and Members of the committee. My name is Bob MacDaniels and I am the President and Co-Founder of ONCORE Construction, Bladensburg, Maryland. ONCORE was founded 5 years ago after hocking everything we owned, including our homes, to start our American Dream. Today we have over 300 employees and do approximately $35 million per year in concrete construction work in the Washington Metro area.

We enjoy a reputation for providing a safe workplace and quality workmanship. We offer competitive salaries, benefits and employee training. We are very proud of our excellent record of minority hiring and compensation. In fact, we have been honored by a national organization by receiving the Accredited Quality Contractor recognition, an award that only 470 companies have received, since 1993. This recognition demonstrates our commitment to employee safety, employee benefits, training and community involvement. We are pleased to have received this recognition in only 5 years.

However, in a very short period of time, our American Dream has turned into an American Nightmare. And it's not just ONCORE. We are facing the same challenges that many companies in your States are. For the past 6 months, the Laborers' International Union has perpetrated some of the most outrageous acts against my employees and customers in the name of a so-called "Labor Dispute" with ONCORE. The only dispute is that my employees clearly have demonstrated they do not want to be a part of a Union.

Some 4 months ago, two representatives from the Laborers' Union came to my office. During our conversation, they admitted through their "Salting Efforts" they have learned that my employees don't want to be in the Union. But that did not

matter. They gave me a choice—either sign a Collective Bargaining Agreement, regardless of my employees wishes, or the Union would do everything it could to put me out of business.

Since that meeting, the Union's efforts to deny work to ONCORE really stepped up. Led by a group of paid agents sent here from New York and New England, the Union engaged in mass trespass on my jobsites, abused and assaulted my employees, disrupted jobsite work and prevented deliveries. Last week, some of our jobsite equipment was set on fire and exploded. The Union has created and passed out countless handbills about ONCORE that are false and defamatory. In one case the Union falsely quoted a former employee saying something negative about salaries. The employee later denied, in a sworn statement, that he made any negative comments about ONCORE at all. They have also quoted individuals in handbills who claim to have worked for ONCORE, but do not show up on our employee records.

Apparently dissatisfied that our employees and most of our customers remained loyal to us despite all of the Union's vicious attacks, the Union escalated their campaign to a new level of illegality by systematically threatening our neutral customers. The Union repeatedly threatened economic terrorism against neutral general contractors, developers and owners throughout the Washington Metropolitan area if they even considered using ONCORE for their concrete construction work. Union agents even went to the homes of some of our customers to threaten their projects with economic harm if we are not replaced on their projects.

Finally, enough is enough. We filed charges against the Union with the National Labor Relations Board in April of this year. We supported our charges with videotapes of the Union's illegal invasion of our jobsites and with affidavits from our employees and customers who came forward to provide evidence of the Union's unlawful threats and other misconduct. On May 24, 2002 the NRLB issued a 15-count indictment against the Union for engaging in unlawful secondary boycott activity. The complaint will be heard on July 15, 2002. And just last week, at the NLRB's request, a Federal Judge issued a TRO and set a hearing for further injunctive relief against the Laborers Union. I am providing the Committee with a copy of the Judge's Opinion and Order, which confirms everything I have just testified to about this Union's campaign of lawlessness.

Naturally, I am grateful that the NLRB and the Court have taken steps to stop the Laborers Union from continuing its illegal activities. But I am told that the NLRB action is unlikely to recover for us the money we have spent on increased security, lawyers and jobsite delays, not to mention' the injury to our reputation from all the Union's lies and threats to our customers and the general public. And it continues to amaze me that all of this has taken place without any of my employees saying to me that they want anything to do with this Union.

Starting my own business has really made me appreciate how great a county we live in. America is truly the land of opportunity, but existing laws that allow certain groups to basically "extort" unwanted agreements seem very un-American! In a democratic society, businesses and unions alike should be held to the same standard. It is my hope that Congress will enact laws that prevent such abuses while at the same time protecting the rights of workers.

Thank you for allowing me to testify before you today. I would like to take this opportunity to answer any questions you may have.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN THE MATTER OF	:	
WAYNE R. GOLD, REGIONAL DIRECTOR OF THE FIFTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,	:	
Petitioner	:	**Civil Action No. 02-1121 (JDB)**
v.		
LABORERS' INTERNATIONAL UNION OF NORTH AMERICA AND ITS AFFILIATE MID-ATLANTIC REGIONAL ORGANIZING COALITION,	:	
Respondent.	:	

MEMORANDUM OPINION

Before this Court is a petition filed on June 7, 2002, seeking a temporary restraining order filed by petitioner Wayne Gold, the Regional Director of the Fifth Region of the National Labor Relations Board (hereinafter "the Board"), against the Laborers' International Union of North America and its affiliate Mid-Atlantic Regional Organizing Coalition (hereinafter "Respondent" or "Union"). The Board seeks injunctive relief pursuant to § 10(l) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(l), to prohibit Respondent from violating Sections 8(b)(1)(A) and 8(b)(4)(i)(ii), subparagraph (B), of the Act, 29 U.S.C. § 158(b)(1)(A) & (b)(4)(i)(ii), subparagraph (B), and preclude Respondent from conducting alleged secondary

boycott activity against companies that contract with Oncore Construction, LLC ("Oncore"), a non-union concrete subcontractor based in Bladensburg, Maryland. Respondent hopes to organize Oncore as a union company from top to bottom. Petitioner's Ex. 3 (Masters Aff.) p 3. The Board seeks injunctive relief pending the final disposition of charges brought by Oncore against Respondent now pending before the Board, with a hearing scheduled before the Board on July 15, 2002.

Since January 2002, Respondent has been in a labor dispute with Oncore. This dispute, however, has spilled over to involve contracting firms and businesses with whom Oncore works. The Board contends that it has reasonable cause to believe that Respondent has trespassed, improperly demonstrated, assaulted persons, blocked ingress and egress, physically disrupted work, and threatened neutral employers contracting with Oncore who have no dispute with the Union, all in violation of secondary boycott prohibitions under Section 8(b)(4)(i)(ii) subparagraph (B), of the Act. See Petitioner's Memorandum of Points and Authorities at p. 2.

For example, according to the Board's submission, on January 18, 2002, Paul Goodrich and Anthony Frederick, who are both associated with Respondent, threatened officers of Lincoln Property Company and Manhattan Concrete that if they awarded Oncore a subcontract to work on their construction projects, it would cost Lincoln Property more money for the other trades." Petitioner's Ex. 3 (Masters Aff.) p. 3.[1]

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[1] Likewise, on January 22, 2002, Union representatives Bill Goodrich and Stephen Lanning allegedly threatened an official of Lincoln Property, warning that if Lincoln did not chose a subcontractor other than Oncore, Respondent would shut down Lincoln projects in New Jersey and Boston. Petitioner's Ex. 3 (Masters Aff.) p. 4. This threat was repeated on February 20, 2002, when Lanning called an official at Lincoln and warned him that the Union would target other Lincoln properties in other cities if Lincoln hired Oncore as a contractor. Id. at 5.

Notably, the Board cites a string of incidents in mid-April 2002 at a number of construction sites where Oncore was a subcontractor. During one incident on April 9 on property owned by Lincoln where Oncore was a subcontractor, 50 to 60 hostile and angry union members allegedly came onto the construction site and trespassed without permission and refused to leave. Petitioner's Ex. 5 (Godwin Aff.) p. 1. Oncore's foreman attempted to retreat up a ladder to the second floor of the building under construction, but was told he "wasn't going anywhere" and was restrained by individuals holding his arms, shoulders, and back, while another individual wrapped tape around his throat and attempted to choke him. Id. Until police arrived, the union members disrupted work for approximately 20 minutes, and as they left, they chanted "we will be back." Id. at 5. Over the next few days, similar incidents of trespass and threats by the Union occurred at construction sites owned by companies where Oncore was a subcontractor.[2]

The Board initiated an investigation of these incidents pursuant to Oncore's charge of unfair labor practices. Respondent then provided a number of assurances to the Board that there would be no further violations of the Act. Finally, on May 23, after a number of oral assurances were allegedly violated, counsel for Respondent sent further assurances to the Board in writing, agreeing that Respondent would "not threaten, coerce or restrain any person" or "neutral person" where the object was "to force or require the person . . . to cease doing business with Oncore." Petition at 17.[3] At that same time, Donatelli & Klein, Inc., a construction company based in

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[2] Similar events of mass trespassing allegedly occurred on April 10 and April 11 at the construction site of the Mandarin Hotel, where Oncore was a subcontractor for Armada Hoffer Construction, and included blocking ingress and egress to the construction site, assault, intimidation, yelling, and threats. Petitioner's Ex. 6 (Stiles Aff.) at 5-7.

[3] For purposes of this proceeding, Respondent has conceded that the facts of the various

events and incidents alleged by the Board in the Petition and supporting affidavits and exhibits occurred as asserted, contending that even as alleged those facts do not constitute violations or unfair labor practices warranting emergency injunctive relief, and reserving the right to challenge the facts before the Board or in subsequent proceedings before this Court.

Bethesda, Maryland, was considering whether to award a subcontract to Oncore for a project at the Ellington Apartments in Washington, D. C., which the Union opposed. On May 31, Larry Clark, the vice-president of Donatelli & Klein, received a telephone call from Paul Goodrich, a Union representative, who complained that Donatelli & Klein had awarded the contract to Oncore and warned that "we will delay your job and mess up your schedule . . . it's your money to lose." Petitioner's Ex. 10 (Clark Aff.) p. 3-4. On June 4, Union representatives allegedly came to Donatelli & Klein's offices and protested across the street on a public sidewalk. Clark was waved over to talk to the representatives, and Goodrich allegedly told Clark that he would "regret using Oncore." Id. at 5-6. On June 3, another Union representative went to the home of Louis Donatelli, the chairman of Donatelli & Klein, in Potomac, Maryland. The man identified himself as "Reverend James Green" of the "United Baptist Church," and walked up Donatelli's driveway at around 8:00 p.m. to complain to Donatelli that Oncore did not hire blacks. When Donatelli challenged Green to support his complaint, Green told Donatelli that he "will be sorry for using Oncore." Petitioner's Ex. 11 (Donatelli Aff.) p. 2-3. Respondent has conceded that the man was an agent of the union, but neither a reverend nor named James Green.

Under Section 8(b)(4)(ii)(B) of the Act, it is an unfair labor practice "to threaten, coerce, or restrain any person engaged in commerce . . . where . . . an object thereof is . . . forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person." In considering a petition for interim injunctive relief under section 10(l) of the Act, a district court must limit its inquiry to (1) whether the Board has reasonable cause to believe that the defendant has committed the unlawful labor practices alleged, and (2) whether

injunctive relief is, in the language of the statute, "just and proper." The "just and proper" inquiry involves the traditional test for emergency injunctive relief, including an assessment of the threat of irreparable harm to others and the public interest. Kinney v. Int'l Union of Operating Engineers, 994 F.2d 1271, 1275 (7th Cir. 1993); Kinney v. Pioneer Press, 881 F.2d 485, 489-90 (7th Cir. 1989); D'Amico v. United States Service Ind., Inc., 867 F.Supp. 1075 (D.D.C. 1994); D'Amico v. Townsend Culinary, Inc., 22 F.Supp.2d 480, 484 (D.Md. 1998).

Here, the Court finds that the Board has shown that it has "reasonable cause" to believe that Respondent is committing unfair labor practices. Based on the affidavits submitted, it appears that Respondent may be threatening other companies that have hired Oncore as a subcontractor with the object of forcing or coercing them to cease doing business with Oncore.[4] Clearly, companies such as Lincoln Property and Donatelli & Klein are not primary employers who have a dispute with Respondent. Rather, they are neutral employers that are apparently being threatened by the Union that there could be consequences, perhaps severe, if they continue to use Oncore. This is typical secondary boycott activity. On the basis of the affidavits provided

[4] The Board submitted Board precedent to support its contention that the acts alleged amount to unfair labor practices, and the Court believes that given this precedent, the Board does have reasonable cause to believe these acts are unfair labor practices. See, e.g., Teamsters Local 456, 307 NLRB 612 (1992) (union threats to neutral employer that it will "shut the [neutral employer] down"); Sheet Metal Workers Local 27, 292 NLRB 1046 (1989) (Board found general "unqualif[ied]" threats to secondary employer, in light of number of previous threats, to violate the act); Charles Rutherford, Local 18, Int'l Union of Operating Engineers, 205 NLRB 487, 492-493 (1973) (Board found threats by Union to neutral that "the job would be brought to a halt" violative of the Act); United Bhd. of Carpenters & Joiners of America, Local Union 2067, 166 NLRB 532, 534 (1967) (union agents telling a neutral employer that it would have "problems" if it did not cease doing business with a nonunion employer and that the union "would have to do something about it" amounted to unfair labor practice); see also Service Employees International Union, 329 NLRB 638 (1999) (Board found visits to private homes of neutral employer not a primary site).

by the Board, this does seem, without more, to give the Board reasonable cause to believe that Respondent is engaging in activity that is a direct threat to these secondary companies not to use Oncore, in apparent violation of Section 8(b)(4)(ii)(B) of the Act.

Of course, the most serious alleged conduct was in April and Respondent urges that it has lived up to its promise of May 23 not to violate the Act. But the earlier conduct cannot be ignored given the Board's obligation to examine the totality of the circumstances, see Int'l Union of Operating Engineers v. NLRB, 47 F.3d 210, 222 (7th Cir. 1995), and in any event some troublesome activity has occurred more recently. With respect to the post–May 23 events, it is the express threatening language that is of concern to the Court, not the letters that Respondent has written or even the fact of the contacts made. Nor is Respondent's expressive activity near Donatelli's home or place of business problematic, absent the direct threats that were made. The Act speaks of coercion, threats, and restraints, and direct threats such as "you'll be sorry" or "you'll regret it" – albeit vague – when considered in light of the very recent conduct of assaults, trespasses, threats, work disruptions, and physical and verbal intimidation concededly engaged in by Respondent, become very ominous portents involving conduct seemingly prohibited by the Act. In short, even simply worded warnings may seem like more ominous threats given the Union's past conduct regarding Oncore with these same companies. Thus, the Board may fairly anticipate that Respondent will continue to repeat such acts unless enjoined.

Although the Court is not yet convinced that these post-May 23 acts actually violate Section 8(b)(4), that is not the test under the Section 10(l) of the Act. Rather, the test is whether the Board has reasonable cause to believe that the Respondent has committed the alleged unlawful labor practice, and whether injunctive relief is "just and proper." Here, the harm at

issue is the threats – both specific and vague – to these secondary employers that their business in Washington and elsewhere will suffer by their use of Oncore. Indeed, the Union warned Lincoln Property that they would impact Lincoln's construction projects in New Jersey and Boston if they used Oncore. Given the actions of Respondent over the past several months, there is reason to fear the Union's warnings. Congress has concluded in section 8(b)(4) of the Act that this type of "secondary boycott" activity is improper and thus harmful to the affected companies, to national labor policy and to the public interest. On the basis of such threatened harm, the entry of a narrowly-tailored order temporarily restraining conduct prohibited by section 8(b)(4)(ii), subparagraph (B), is warranted.

Accordingly, the Board's a petition for a temporary restraining order is granted in part. A narrowed order has been issued on this date.

Dated this ____ day of June, 2002.

John D. Bates
United States District Judge

Copies to:

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In the Matter of	:	
	:	
WAYNE R. GOLD, REGIONAL DIRECTOR OF THE FIFTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD	:	
	:	
Petitioner,	:	
	:	
v.	:	Civil Action No. 02-1121 (JDB)
	:	
LABORERS INTERNATIONAL UNION OF NORTH AMERICA AND ITS AFFILIATE MID-ATLANTIC REGIONAL ORGANIZING COALITION	:	
	:	
Respondent.	:	
	:	

TEMPORARY RESTRAINING ORDER

The petition of Wayne R. Gold, Regional Director of the Fifth Region of the National Labor Relations Board ("Petitioner"), having been filed pursuant to Section 10(l) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(l), praying for a temporary restraining order against Respondent Laborers International Union of North America and its affiliate Mid-Atlantic Regional Organizing Coalition ("Respondent"), the Court concludes that Petitioner has

reasonable cause to believe that Respondent has engaged in acts in violation of Section 8 (b) (4) (i) (ii), subparagraph (B), of said Act, 29 U.S.C. § 158 (b)(4)(i)(ii)(B), and that such acts are likely to be repeated unless enjoined. It appears further to the Court from the petition, affidavits, exhibits and the entire record in the case that:

1. Charges have been filed with the National Labor Relations Board charging the Respondent with violations of Section 8 (b) (4) (i) (ii), subparagraph (B), of the Act; and

2. Petitioner has reasonable cause to believe that Respondent has engaged in acts in violation of Section 8 (b) (4) (i) (ii), subparagraph (B), of the Act, as amended, affecting commerce within the meaning of Sections 2 (6) and (7) of the Act; and

3. The acts of Respondent will result in irreparable harm to other persons, to the policies of the National Labor Relations Act, and to the public interest, if Respondent is permitted to continue those acts pending a further hearing on the petition filed herein.

NOW, THEREFORE, IT IS HEREBY ORDERED that Respondent Laborers International Union of North America and its affiliate Mid-Atlantic Regional Organizing Coalition, its officers, representatives, agents, servants, employees, attorneys, and all members and persons acting in concert or participating with it or them, be, and they hereby are, enjoined and restrained until June 25, 2002, at 5 p.m., and not longer without the further order of this Court, from:

(a) threatening, coercing or restraining neutral parties, including but not limited to Lincoln Property Company, Manhattan Construction Company, Armada Hoffer Construction, Inc., Bovis Lend Lease, and Donatelli & Klein, Inc., engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require any person to cease using,

selling, handling, transporting or otherwise dealing in the products of or to cease doing business with Oncore Construction, LLC; and

(b) engaging in any threats (or other coercive or restraining activity), such as threats to officers and representatives of neutral parties that Respondent will shut down, disrupt or target their work or schedules or that neutral parties will regret utilizing Oncore Construction; engaging in trespass, blocking street traffic, mass demonstrations, or distribution of threatening handbills at neutrals' work sites, offices and private residences; or engaging in assault and battery, threats of bodily harm, property damage or defacement, physical entrance into areas where work is in progress at neutral sites to disrupt such work, or blocking ingress and egress to such neutral sites -- where an object thereof is to force or require any person to cease using, selling, handling, transporting or otherwise dealing in the products of or to cease doing business with Oncore Construction, LLC.

IT IS FURTHER ORDERED that Respondent shall within three (3) days provide to the Regional Director of Region 5 of the National Labor Relations Board at 103 South Gay Street, 8th Floor, Baltimore, MD 21202, the names of all constituent organizations, agents and representatives of the Mid-Atlantic Regional Organizing Coalition, and every organization or person known to be acting in concert with them, together with their addresses, where service of the Court's Order can be effectuated.

IT IS FURTHER ORDERED that Respondent shall appear for a hearing before Judge John D. Bates of this Court at the E. Barrett Prettyman Federal Courthouse in the District of Columbia, on the 25th day of June, 2002, at 2 p.m., and then and there show cause, if any there be, why, pending the final disposition of the matters now pending before the National Labor

Relations Board, Respondent should not be preliminarily enjoined and restrained as set forth herein.

IT IS FURTHER ORDERED that Petitioner file its request for a preliminary injunction, and serve a copy upon Respondent, on or before the 13th day of June, 2002.

IT IS FURTHER ORDERED that Respondent file an answer to the allegations of the petition, and its opposition to the request for a preliminary injunction, and serve a copy upon Petitioner, on or before the 18th day of June, 2002.

IT IS FURTHER ORDERED that Petitioner file its reply to Respondent's opposition, and serve a copy upon Respondent, on or before 5 p.m. on the 21st day of June, 2002.

IT IS FURTHER ORDERED that service of a copy of this Order be forthwith made by a United States Marshal or by an attorney, field examiner or agent of the Board, upon the Respondent and upon Maurice Baskin, attorney for the Charging Party (Oncore Construction, Inc.) in the administrative proceedings pending before the Board, in any manner permitted under the Federal Rules of Civil Procedure or the National Labor Relations Board Rules and Regulations, and that proof of such service be filed herein.

Dated at Washington, D.C. this 12th day of June, 2002.

/s/
John D. Bates
United States District Judge

NOTICE: This opinion is subject to formal revision before publication in the Board volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Santa Fe Operating Limited Partnership d/b/a Santa Fe Hotel & Casino *and* Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226, and Bartenders Union, Local 165, affiliated with Hotel Employees and Restaurant Employees International Union, AFL–CIO; International Union of Operating Engineers, Local 501, AFL–CIO; Professional, Clerical & Miscellaneous Employees, Local 995, affiliated with International Brotherhood of Teamsters, AFL–CIO. Case 28–CA–13321

November 30, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

Pursuant to a charge filed on September 14, 1995, the General Counsel of the National Labor Relations Board issued a complaint on September 19, 1995, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Cases 28–RC–5146, 28–RC–5147, and 28–RC–5148. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On October 30, 1995, the General Counsel filed a Motion for Summary Judgment. On November 2, 1995, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On November 14, 1995, the Respondent filed a response, opposing summary judgment.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer and response the Respondent admits its refusal to bargain but attacks the validity of the certification on the basis of the Board's unit determination in the representation proceeding and the Board's failure to consider, as untimely raised, certain conduct alleged by the Respondent to be objectionable.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is now, and has been at all material times, a Nevada corporation maintaining an office and place of business in Las Vegas, Nevada, where it is engaged in the hotel and gaming industry. During the 12-month period ending September 14, 1995, the Respondent, in the course and conduct of its business operations, purchased and received in interstate commerce at its facility products, goods, and materials valued in excess of $50,000 directly from points outside the State of Nevada, and derived gross revenues in excess of $500,000. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held September 30 and October 1, 1993, the Union was certified as the collective-bargaining representative of the employees on August 28, 1995,[1] in the following appropriate unit:

> All full-time and regular part-time employees employed by the Employer at its Las Vegas, Nevada facility, in the following classifications and departments, including: all front desk, PBX, valet parking, courtesy bus driver, warehouse, receiving, slot mechanic, food and beverage, housekeeping, bowling alley, ice rink, gift shop, nursery, and slot department employees, excluding engineering, maintenance employees, casino table game employees, keno, bingo, race and sports book employees, office clerical employees, confidential employees, guards, and all other employees, and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

[1] 318 NLRB No. 57 (Aug. 28, 1995).

B. *Refusal to Bargain*

About September 6, 1995, the Union requested the Respondent to bargain, and since September 7, 1995, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after September 7, 1995, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Santa Fe Operating Limited Partnership d/b/a Santa Fe Hotel & Casino, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226, and Bartenders Union, Local 165, affiliated with Hotel Employees and Restaurant Employees International Union, AFL–CIO; International Union of Operating Engineers, Local 501, AFL–CIO; Professional, Clerical & Miscellaneous Employees, Local 995, affiliated with International Brotherhood of Teamsters, AFL–CIO as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time employees employed by the Employer at its Las Vegas, Nevada facility, in the following classifications and departments, including: all front desk, PBX, valet parking, courtesy bus driver, warehouse, receiving, slot mechanic, food and beverage, housekeeping, bowling alley, ice rink, gift shop, nursery, and slot department employees, excluding engineering, maintenance employees, casino table game employees, keno, bingo, race and sports book employees, office clerical employees, confidential employees, guards, and all other employees, and supervisors as defined in the Act.

(b) Post at its facility in Las Vegas, Nevada, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 28 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. November 30, 1995

William B. Gould IV,	Chairman
Margaret A. Browning,	Member
Charles I. Cohen,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226, and Bartenders Union, Local 165, affiliated with Hotel Employees and Restaurant Employees International Union, AFL–CIO; International Union of Operating Engineers, Local 501, AFL–CIO; Professional, Clerical & Miscellaneous Employees, Local 995, affiliated with International Brotherhood of Teamsters, AFL–CIO as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time employees employed by us at our Las Vegas, Nevada facility, in the following classifications and departments, including: all front desk, PBX, valet parking, courtesy bus driver, warehouse, receiving, slot mechanic, food and beverage, housekeeping, bowling alley, ice rink, gift shop, nursery, and slot department employees, excluding engineering, maintenance employees, casino table game employees, keno, bingo, race and sports book employees, office clerical employees, confidential employees, guards, and all other employees, and supervisors as defined in the Act.

SANTA FE OPERATING LIMITED PARTNERSHIP D/B/A SANTA FE HOTEL & CASINO

June 26, 2002

The Honorable Edward M. Kennedy
Chairman
Senate Committee on Health, Education and Labor
United States Senate
Washington, DC

Dear Senator Kennedy:

Thank you for permitting me to testify at the June 20, 2002 hearing on labor issues before the Committee on Health, Education and Labor. I am submitting this letter in order to supplement for the record my response to a question asked of me by Senator Wellstone.

As President of ONCORE Construction, LLC and as Chair-Elect of Associated Builders and Contractors of Metropolitan Washington, Inc., I wish to make clear for the record that I fully support the right of employees to join or support any labor organization or to refrain from such activity, without fear of coercion or retaliation by employers or labor unions. ONCORE and ABC share the view that work should be performed on the basis of merit, and that employees should not be discriminated against in any way based upon their union affiliation, or lack thereof.

As I further testified at the hearing, the employees of ONCORE Construction have expressed no desire to be represented by the Laborers Union, but that has not stopped the Union from unlawfully threatening and coercing our company, our employees and our customers. I would like to personally ask you, Senator Kennedy, to join with the NLRB and the federal courts in demanding that the Laborers Union stop its unlawful and slanderous campaign against ONCORE and our predominately minority workforce.

Thank you for making this letter part of the record of the June 20th hearing.

Sincerely,
ONCORE Construction, LLC

Robert J. MacDaniels
President

cc: Senator Judd Gregg

ONCORE Construction, L.L.C.
4703 Webster Street, Bladensburg, MD 20710
(301) 927-7700 • (301) 927-7931 **FAX**

Senator WELLSTONE. I thank you for your very important testimony. I think that holding all to the same standards is—I do not think you will get any quarrel and I do not think anybody will write any legislation. I will be the one that will probably be taking the lead on this legislation, and certainly there will be no legislation that would tell employees that they have to join a union. The question is people should have the fair elections and people should be able to decide, and people should be able to make the decision and have the right of association and to decide themselves. Probably we hopefully would not disagree on that.

Mr. MACDANIELS. We do not, except at the point when it is decided that either you are or are not going to be in the union, or either your employees want to be or do not want to be, it should be over.

Senator WELLSTONE. Well, let me make an observation and go to some questions, and this is not to take away from your testimony, but it is interesting to have you follow Mr. Vidales because all together, and as you said you are thankful for this, your company, you were able to get some action in 6 months as I think about it, and Mr. Vidales and his co-workers worked on this for 7 years and got nothing. So in some ways you should have a considerable amount of sympathy for Mr. Vidales as well. It worked for you, and I am glad for you, without knowing all the merits, but for Mr. Vidales, the worker, it did not work at all for him.

Let me ask Ms. Buffkin, one thing—and I am going to do this, I am going to apologize to everyone; we will just do 5 minutes of questions; I want to try and get to everybody. An observation first that I think is real interesting. I do not think people generally speak and focus on how hard that sometimes it can be managers—and this is in the case not of a good company, but what you were dealing with, it can actually be the managers or the supervisors who are put under the pressure and can be victimized and put in a horrible position. Where it is your family, supporting your family, or doing something you do not think is right, and boy, I do not know that anybody has spoken to that more clearly than you have.

Now, in February 2002 several of the workers at Smithfield won their civil rights lawsuit against company. Do you think this means that the workers at Smithfield will have attained justice? Does this mean now that we can count on fair elections? My second question for you is, what makes you think the workers at Smithfield really want a union?

Ms. BUFFKIN. Let me start with the first question. That was one employee who won, and he has been gone since 1998. In 2002 he was rewarded for the injustice that happened to him. What about the 5,000 people, the employees that are left there, that do not know where to turn, that do not know who to call, that do not know their rights. This is one individual. You have 5,000 left. No, sir, it has no changed.

No, there are no fair labor practices going on as if this moment. My husband still works there. He goes through it every day. I have friends and family members that work through it, that work there that go through it every day. In the past month and a half, 276 cards have been signed out of 310 maintenance employees that want a union in. No, sir, this is not even close.

Senator WELLSTONE. Your comments speak for themselves.

Ms. Schweikhard, why do you think the hospital initially had such resistance to your organizing efforts?

Ms. SCHWEIKHARD. Hospitals have a vested interest in maintaining the nursing shortage. This is a conflict of interest. RNs comprise, if I am not mistaken, 25 percent of their payroll. We are their largest single working force in the hospital. When they keep conditions on the floor as bad as they are, when they assign 10 patients to one nurse, when they make it so that you cannot get your breaks and your meal breaks and you have to work it out to go to the restroom, when you do not get the right supplies that you know that you need, they are saving money. So we are losing nurses on a daily basis because they are leaving the workforce and they are not coming back. The hospitals can say, "Oh, dear, cannot do anything about it. You know, there is no nurses. Where do you want us to get them from, the woodwork?" If the hospitals would improve the situation, the nurses would come back.

Through a union we are able to accomplish this. I think it is our obligation as health care providers that all hospitals and nurses should unionize and try to turn this around. This is the only vehicle that we have that we can actually legally be recognized and repair the harm that has been done to the nursing profession.

Senator WELLSTONE. A quick observation on the acute shortage. I remember in Minnesota at St. Scholastica College up in Duluth, that a nurse testified—we were talking about the shortage—and she said, "If the choice is between my livelihood and my life, I am going the choose my life." Her point was I have now worked 23 straight days and I have got small children and I cannot keep doing this. So, obviously the more civilized the working conditions, the better the working conditions, the more likely we are to not only attract but also retain nurses. So it goes together, and again, in terms of quality of care for all of us.

Mr. Vidales, I think a real quick question I have for you is, I mean this is just unbelievable, 6 years trying to organize and negotiate a contract. After 6 years you did not have a contract. The employer sells out and then most of you lose your job. Three of those six years you were in first contract negotiations. The NLRB and the courts kept ruling in your favor, but you still were not able to get the employer to negotiate a contract. You were assaulted, brutally assaulted. I mean it is fair to say the system did not work for you.

What do we need to do that you think could make a difference?

Mr. VIDALES. Well, first of all, I believe that the law needs the take a real close look at it, because in my cases we did not see no justice at all, either at the local or State law or the NLRB. One of the assaultants was one of the supervisor's son, who I recognized. After the first Labor Board trial, him and his whole family, their mother, their father, two sons, two daughters and a daughter-in-law, the whole family was testifying in favor of the company. So that is how I recognized one of assaultants. We filed Labor Board charges, of course, but nothing was done. We filed charges with the local police and they claimed that they could not find him, that he was a fugitive, and until the next year when I myself—I went to the park and I spotted the guy with other 6 fellows. So I called the

police and they arrested him and they put him in jail. But it was me who did it.

So I think the law has to be more efficient and the labor law, and instead of delaying and giving the opportunity to make this long, long, long trials, it should be closer. Just like his case, this case is going to be here in 6 months, but ours, 7 years later we still have not got anything. So I think just stop the delay.

Senator WELLSTONE. Obviously, if there had been a point in the process where you now have won the election and you are trying to negotiate, and then they would not sign a contract, if there had been a point where they would have to go to mediation and arbitration, that would help in terms of just stalling forever on the contract too, because that became a big issue for you all, correct?

Mr. VIDALES. Correct.

Senator WELLSTONE. I think what I want to—I do not really, because I think I understand Mr. MacDaniels, and I want to try to ask a very fair question. You are here and you have spoken with great feeling. I want to say one thing that is rhetorical and I do not think it is aimed at you at all, at least in terms of the measure I take of you. When you said after the election is over, it should be over. I wanted to point out that for Mr. Vidales's, it is not over, and for the Smithfield workers, it is not over. So it is also the companies that do not necessarily stop, especially if we are talking about the intimidation.

But here is what I want to get on the record, because you have made the case, and you have said—and I think it is important—that we ought to hold everybody accountable to the same standards. There should not be—without knowing the merits of the specific case you discuss, there should not be intimidation on any side.

Let me try to—it is not a trick question. It is I want to see where you come down on the record. In your testimony you have expressed great concern of violations of labor law by the workers or members of the unions. I mean that is what you have talked about.

Mr. MACDANIELS. Yes, sir.

Senator WELLSTONE. At the same time today we have heard some pretty powerful stories of management unlawful action to prevent workers from forming the unions. We have heard about—and you have heard all of that because you have been here. So the question is: do you believe that employees have the right to form unions in the work places free from any illegal interference and pressure from management? Do you believe that they do have that right? It is not meant to be a trick question.

Mr. MACDANIELS. It sounds like it. Let me say this. I believe that—the stories that I have heard today are heartwarming and despicable, to use President Sweeney's words. But I just cannot believe that in today's economy businesses can run like that and survive, at least not my style and certainly not many of my competitors in my industry. I believe that employers should have the right to hire, pay and promote, based on merit. I believe that employers should be allowed to run their businesses in a free enterprise. I do not believe that there should be an artificial set of rules that stifle competition, stifle productivity.

Should we have had unions 30 years ago? Perhaps. Today I think that the demands of staying competitive in this economy we have

mandate that an employer treat their employees well like we do. I mean our success in our company is because of our employees, and we recognized that from the day we went into business.

Senator WELLSTONE. Mr. MacDaniels, listen, I am not going to take advantage of my position up here and badger you. It is my nature to like people, but I just want to point out that—I mean you are expected to be the next chair-elect of the Metro DC–ABC, correct?

Mr. MACDANIELS. I am very proud of——

Senator WELLSTONE. Well, you should be. I have no right to tell you not to be proud. I was just hoping, given this position, you would go on record saying employees have the right to form union in the work place, free from illegal interference and pressure from management. You do not want to go on record saying yes.

Mr. MACDANIELS. Being president——

Senator WELLSTONE. I mean it is like—do you want us to go back 70 years? I mean, come——

[Applause.]

You know what, I am saying to you friend to friend, I think you should say yes because that is consistent with who you are, I believe.

Mr. MACDANIELS. Senator, let me say this, I now know what it feels like to walk into a lion's den with a hamburger overcoat on.

Senator WELLSTONE. No, you do not, because I am being really nice. [Laughter.]

Mr. MACDANIELS. I appreciate that. Senator, I stand on my answer.

Senator WELLSTONE. Okay, that is fine. That is fine.

Well, I want to thank all of you, all of you for being here today. This hearing is concluded.

[Whereupon, at 12:30 p.m., the committee was adjourned.]

A P P E N D I X

PREPARED STATEMENT OF FELIZARDO ENRIQUEZ, RESIDENTIAL ROOFER, METRIC ROOFING, ARIZONA

Buenos dias. Mi nombre es Felizardo Enriquez y tengo tres anos trabajando por Metric Roofing. Estoy casado y tengo una hija, Cristal, que tiene un ano.

Durante el verano, cuando el calor sube hasta 109 grados y mas, trabajamos poniendo techos por developers como Pulte Homes y otros. Trabajamos todo el dia duro, sin agua muchas veces porque la compania no nos da agua. No tengo plan medico. ?Que pasara si mi hija esta enferma? Creo que si yo voy a ganar miliones de dolares para la compania Metric, que yo tengo derecho a tener la misma proteccion de un plan medico que yo se que el dueno de la compania tiene.

Hemos tenido muchos problemas con el robo de esquadras. Metric nos paga por el tamano del techo y muchas veces el techo es mas grande de to que ellos dicen. Eso es un robo de dinero que necesitamos para ayudar nuestras familias. Y si reclamamos, nos castigan, reduciendo nuestro trabajo.

De todo eso, abusos diariamente. Tengo orgullo para decir que soy parte de un grupo de trabajadores en nuestra compania que estamos organizando para formar nuestra union para mejorar la vida de nosotros y de nuestras familias. Pero Metric esta luchando muy fuerte contra nosotros.

Algunos trabajadores fueron despididos por ser parte del grupo que esta tratando de ganar una voz en nuestro trabajo. Algunos de los trabajadores que han vocalizado contra las injusticias de la compania fueron castigados. Metric ha amenazado algunos trabajadores con demandas por no mas hablar de las condiciones a la prensa .

!No se cuando vamos a ganar, pero no vamos a parar hasta que ganemos la justicia!

ENGLISH TRANSLATION

Good day. My name is Felizardo Enriquez and I have been working at Metric Roofing for three years. I am married and have a one-year-old daughter named Cristal.

During the summer when the heat reaches 109 degrees and more, we work constructing roofs for developers such as Pulte Homes and others. We work hard all day long, without water a lot of the times because the company does not provide any water to us. I don't have a medical plan. What would happen if my daughter became ill? I feel that if I am going to make millions of dollars for this company, that I have a right to the same protection of a medical plan that I know the owner has.

We have had many problems with them underpaying us. Metric pays us for the size of the roof and many times the roof is bigger than what they say it is. They are taking money away from our families. If we complain they punish us by reducing our work.

With all that, daily abuses. I am proud to say that I am part of a group of workers in our company that are trying to organize to form a union to improve our lives and the lives of our families. But Metric is fighting very hard against us.

Some workers have been dismissed for supporting the union that is trying to give them a voice at work. Some of the workers who have spoken up against the abuses in the company have been punished. Metric has threatened to sue some of the workers for talking about the conditions to the media.

I don't know when we will win, but we are not going to stop until we get justice!

PREPARED STATEMENT OF EDITH (TEDDY) LAIL, PROGRAM ANALYST, FEDERAL AVIATION ADMINISTRATION, WASHINGTON, DC

Hi, my name is Teddy Lail. I have worked for 13 years as a Program Analyst at the Federal Aviation Administration's Office of the Chief Counsel. Our experience shows that even under the best of conditions—when you've chosen a union, won collective bargaining rights, negotiated and ratified a contract, and the employer is the Federal Government—workers can still be treated unfairly.

In 1999 and 2000, in four separate elections, FAA Headquarters employees voted for AFSCME as our union representative. The FAA had tried to get Congress to prohibit us from organizing back in 1996, but we managed to win that battle.

But our struggle was far from over. On February 5, 2001, we finally reached agreement on a first contract and the Chief Negotiators for FAA and AFSCME signed off their approval. Union members overwhelmingly ratified the contract 2 weeks later. We expected the FAA to start to implement the contract immediately but the FAA refused to implement the contract. And they still refuse to implement

the contract a year and half later. The agency claims that the Office of Management and Budget had ordered them to renege on the contract even though OMB does not have that authority.

AFSCME continued to fight the FAA on our behalf. The union filed an unfair labor practice charge, and, at a December 5 Federal Labor Relations Authority hearing last year, internal management documents and testimony clearly showed that OMB had not, in fact, ordered the FAA not to implement the contract.

Congress passed legislation last year directing FAA Administrator Jane Garvey to immediately implement the ratified contract. They didn't implement. Instead, FAA has thumbed its nose at Congress.

We have lobbied, litigated, picketed and done everything we could to get what we bargained for but a year and a half later, the FAA still won't implement the contract in clear violation of labor law and the direction from Congress.

Meanwhile, employee morale has plummeted, just as the FAA is coming under intense pressure to help insure the safety and security of our air travel system. Many employees are upset about the agency's refusal to sign the agreement and attempts to destroy the union.

As a Federal agency, the FAA should set a good example for companies but, sadly, in our case they have set the wrong example.

To make it worse, our company tries to cover up injuries—I know a worker who lost three forgers and the company reported it as finger lacerations. A friend and co-worker spent 3 weeks in the Seattle hospital burn center and my company said he had a bad case of sunburn. I know of injuries never reported at all.

Seven years ago, we thought if we joined together, we could improve pay and working conditions and have a voice that makes Nabors a better company.

We want Nabors to thrive; we just want a fair shake too.

But instead of respecting our choice, the company held one-on-one meetings to try and freeze us with fear. They sent anti-union propaganda to our homes. They forced us to watch anti-union movies.

They tried to humiliate union supporters. And they fired some of us, and then blacklisted them from getting other jobs, bankrupting families.

A majority of Nabors workers have voted to join together in a union to make things better. But 7 years after we started, the company refuses to take us seriously and negotiate a contract that would ensure things are better. In fact, they say point blank they'll do anything but negotiate seriously with us.

A lot of people may have heard that Nabors just this month decided to create a paper headquarters in Bermuda to avoid paying American taxes.

So now my company doesn't just break laws that are supposed to protect workers—or distort the law to get away with unsafe conditions—they're evading taxes too. Yet the CEO of Nabors will make $128 million in the next 2 years, and Nabors itself is a $2 billion a year company.

This is not right. America can do better. I have friends who have been killed—who didn't come home to their families. I won't let Nabors take me away from my children.

I came from the oil fields of Alaska to ask Congress—and President Bush too—to enforce laws that are supposed to protect our freedom to work together to make life better for our families—and to make new laws if the old ones don't work.

PREPARED STATEMENT OF MICHAEL MASON, FORKLIFT DRIVER, NABORS' ALASKA DRILLING, ALASKA

I'm Mike Mason and for 23 years I've worked in the Alaska oilfields.

It's not the most common way to raise a family in America, but it's crucial work—we wouldn't have oil products without the thousands of workers who do this type of work.

Since 1988 I've worked for Nabors Industries, the biggest drilling company in the world.

The northern slope of Alaska is a place where coffee freezes before it hits the ground; where exposed skin will freeze in 30 seconds flat. Fifty to sixty degrees below zero is common.

We work in remote areas, often 12 hours away from civilization—a half a day away from hospitals, doctors or something so simple as a grocery store.

But that's not why I've traveled from Alaska to Washington, D.C. Under the best of conditions it's harsh work in the oilfields and I knew that before working there.

I'm here because 7 years ago, me and my co-workers at Nabors decided to make things better by joining together with the Laborers' Union.

There hadn't been a pay-raise in two decades; in fact pay has been cut.

Living conditions in the camps are horrible. You awake with your hair and scalp frozen to your wall and when the spring melt comes, there's mold everywhere.

Our insurance simply doesn't work—Nabors is self-insured. I myself came down with pneumonia on the northern slope last December—and Nabors still hasn't paid the medical bills.

The kind of work we do—high on rigs, or with heavy equipment on the ground, or on ships at sea—is dangerous.

I've seen co-workers crushed. Many people I know have had severe frostbite. My friends have cleaned up the blood after co-workers have been killed. I've seen workers covered with chemical burns.

And all this occurs 12 hours away from help, away from the public eye.

PREPARED STATEMENT OF TERENCE M. O'SULLIVAN, GENERAL PRESIDENT, LABOERS' INTERNATIONAL UNION OF NORTH AMERICA

As General President of the Laborers' International Union of North America, I wish to thank the Committee for this opportunity to comment on the many difficulties facing tens of thousands of American workers today who routinely experience inordinate delays, employer interference, intimidation, threats of job loss, harassment and coercion to prevent their exercising their free choice to join unions and to bargain collectively.

Our Union has over 800,000 members from many occupations covered by the National Labor Relations Act such as construction, health care, industrial and many others. On June 20th the Committee heard from a broad cross section of workers and the difficulties they face in gaining a union and a voice at work. Like them and so many others our members at Nabors drilling in Alaska have been thwarted in their attempt to gain the fruits of collective bargaining.

Those members began organizing for our Union to represent them back in 1995, when the Company began a prolonged anti-union campaign. Nonetheless, these employees voted for Union representation in 2000 but even today have still been unable to win a fair first contract from the Company.

These employees work in dangerous conditions on rigs in the Alaskan oil fields. Their concerns include fair wages, competitive benefits, and safety on the job. The Company's response has been to drag out negotiations as long as possible while moving its corporate headquarters to Bermuda to avoid U.S. taxes while paying their Chief Executive a multi-million dollar salary. Unfortunately, what has happened to these workers is all too typical of what goes on every day in workplaces throughout America where workers' legal right to organize and to bargain collectively is routinely frustrated by unfair employer tactics and ineffective legal remedies.

Unfortunately, after the early federal legislation that first recognized the right of employees to organize and to bargain collectively in the Wagner Act that was passed in 1935, there has been little new legislation to make sure that these fundamental rights of workers are being honored and enforced in this country. The American workplace and the problems our employees face have changed dramatically in the past 67 years. Many companies have grown bigger and more powerful than we could ever have imagined and very often operate across national borders. Workplace technology has advanced far more quickly than at any other time in history and has posed a constant challenge to American workers, who have responded by becoming the most productive and efficient in the world. And yet, our labor laws have left these same workers with few effective remedies when, as often happens, their employers bring in high-paid outside consultants to run sophisticated anti-union campaigns when these same employees try to organize for collective bargaining. By the time the Labor Relations Board acts, several years go by where the Union supporters have been fired or forced out of their jobs. Even when the Board finally acts, it is often impossible for the Union to regain the support it lost as a result of the intervening unfair labor practices.

Even if the Union does somehow win the election notwithstanding employer interference, under the current rules the Company can stall and drag out negotiations for years with no assurance that the workers will ever get a fair contract. And, since the Company can permanently replace strikers, who may never get their jobs back, the so-called right to strike has become almost meaningless.

Good, loyal productive American workers like our members at Nabors Drilling in Alaska deserve better. I urge this Committee to propose meaningful reforms in our labor laws in order to make the right to organize and the right to bargain collectively a reality.

PREPARED STATEMENT OF ANDREA TAYLOR, FLIGHT ATTENDANT, DELTA AIR LINES, NEW YORK, NY

Good Morning. My name is Andrea Taylor and I am a flight attendant for Delta Air Lines.

Last August the Delta flight attendants filed a petition with the National Mediation Board requesting an election to join the Association of Flight Attendants.

Our 20,000 flight attendants are the last non-union flight attendant workforce at a major U.S. airline, and our election was the largest ever in the airline industry, and the single largest private-sector organizing effort since the 1960's. In response, Delta Air Lines ran one of the most expensive and illegal anti-union campaigns in history.

I am here today as a representative of the hundreds of Delta flight attendants who filed reports of Delta's illegal interference in our union election and on behalf of the hundreds of others who were too frightened to come forward and stand up for their rights.

Our struggle to get union representation proves that it does not take a barbaric act of violence or mass firings to create a climate of fear and intimidation that paralyzes workers and prevents them from exercising their right to have a voice in their workplace.

Delta Management has conducted massive captive audience meetings, pressured and intimidated union activists, and engaged in polling and surveillance. Management has formed and assisted in-house committees designed by their anti-union consultants to serve as a voice for the company's anti-union campaign.

In October, the National Mediation Board found that flight attendants' sworn statements presented a *prima facie* case of illegal conduct by Delta. But rather than take action to charge Delta with illegal conduct and provide the flight attendants with an atmosphere free from intimidation when voting, the NMB held off further investigation of the charges until after the election.

Little did we know, the worst was yet to come.

Flight attendants were devastated after the terrorist attacks on September 11. Our confidence in our safety and in our industry was shaken to the core. Delta played on our uncertainty and fear and exploited the tragedy by linking Delta's survival to the defeat of the union.

The company sent letters and videos from senior management to the homes of flight attendants implicitly threatening flight attendants with job loss if they unionized; supervisors harassed AFA supporters asking, "How can you support a union at a time like this?" They told us that union support was anti-Delta and falsely promoted Delta's lay-off plans as better than those at unionized carriers.

Management even went so far as to tell the more than 3,000 flight attendants laid off after September 11 that they were not eligible to vote in the election, to keep them from returning their ballots. In fact, all laid off flight attendants were eligible to vote and an unreturned ballot counts as a "no" vote.

Employers like Delta that intimidate, scare, harass, and threaten workers who have the legal right to organize must be stopped. Employers that are found guilty of labor law violations must be penalized. A slap on the wrist after the fact, does not serve as an effective deterrent to this abhorrent behavior.

There is an assault on workers rights in this country and we'd like to thank Senator Kennedy for holding these important hearings to investigate the hurdles workers must clear to gain the dignity, respect and security that comes with having a voice at work.

Thank you.

FLIGHT ATTENDANTS FIGHT AGAINST DELTA AIR LINES' ILLEGAL INTERFERENCE IN ORGANIZING ELECTION

Delta Air Lines flight attendants officially began their historic union election campaign on August 29, 2001 when they filed a petition with the National Mediation Board requesting that a vote be held to join the Association of Flight Attendants, AFL–CIO.

This election was the largest ever in the airline industry, and the single largest private-sector organizing effort since the 1960's. The 20,000 Delta flight attendants are the last non-union flight attendant workforce at a major U.S. airline.

Delta management has run one of the most expensive and illegal anti-union campaigns in history, designed to discourage flight attendants from supporting the union. This campaign has proven that it does not take an overt act such as violence or multiple firings to create a climate of fear and intimidation that prevents workers from unionizing.

Management has conducted massive captive audience meetings, pressured and intimidated union activists, and engaged in polling and surveillance. Management has formed and assisted in-house committees designed by their anti-union consultants to address bargaining subjects through company-dominated committees, and to serve as a voice for the company's anti-union campaign.

In September 2001, the Association of Flight Attendants, AFL–CIO, filed sworn declarations with the National Mediation Board, on behalf of hundreds of Delta flight attendants, charging management with severe violations of the Railway Labor Act, the law that governs the airline industry.

A partial list of the illegal tactics Delta is charged with includes:

• One-on-one interrogation of union supporters behind closed doors in company offices;

• Confrontations with flight attendants exercising their right to conduct union activity in non-work areas;

• Phone calls from supervisors to the flight attendants' homes challenging their pro-union sympathies;

• Questioning flight attendants about the union during annual performance reviews;

• Publicly labeling pro-union flight attendants as 'anti-Delta' in front of their fellow flight attendants;

• Harassment of flight attendants that had the effect of discouraging them from exercising their right to organize in non-work areas, and which clearly intimidated other flight attendants from seeking out information about the union in those areas;

• Questioning flight attendants under oath about the union in unrelated civil litigation;

• Disciplining flight attendants for matters arising from their union activity;

• Distributing a series of inflammatory videos and an overwhelming stream of antiunion literature to the flight attendants' homes and to their flight attendant mail boxes;

• In-person surveillance by management staff or consultants of union organizing activity, both in non-work areas on company property and at outside events;

• Use of the police to harass and intimidate union activists in the conduct of legally permissible union organizing activity;

• Conducting paid, system-wide, mandatory captive audience meetings.

In October 2001, the NMB found that the flight attendant claims presented a *prima facie* case of illegal conduct by Delta. But rather than take action to charge Delta with illegal conduct and provide the flight attendants with an atmosphere free from intimidation when voting, the NMB held off further investigation of the charges until after the election.

Even after the NMB found significant evidence of an illegal anti-union campaign, Delta Air Lines management continued to interfere with the flight attendants' right to organize by exploiting the September 11 tragedy to create a climate of fear and intimidation.

On Sept. 12, Delta began conducting weekly conference calls that were censored so that pro-union flight attendants were not permitted to ask questions. Other departments at Delta do not have these conference calls, only flight attendants.

Delta communications with flight attendants during the election period inextricably linked Delta's survival to defeating the union effort. These communications included:

• Letters and videos from senior management to the homes of flight attendants implicitly threatening flight attendants with job loss if they unionized;

• Supervisors illegally questioning AFA supporters asking, "How can you support a union at a time like this?"

• Management constantly referring to the job losses in the industry in the wake of 9–11 and falsely promoting Delta's lay-off plans as better than those at unionized carriers;

• One-on-one meetings where supervisors would take aside flight attendants they identified as AFA supporters and grill them on their support for the union, in many cases saying that support was anti-Delta.

Management even went so far as to tell the more than 3,000 flight attendants laid off after September 11 that they were not eligible to vote in the election, to keep them from returning their ballots. In fact, all laid off flight attendants were eligible to vote.

The NMB is conducting its investigation into Delta management's illegal interference and AFA is asking for a new election with a balloting procedure that limits the effects of further illegal conduct by Delta management.

PREPARED STATEMENT OF THE GULF MARINERS

The right to choose to be represented by a union is *not* a right in the Gulf of Mexico offshore oil and gas industry primarily based in South Louisiana. Mariners who work on the boats that service and support the rigs and other petroleum and natural gas-related operations in the Gulf are trying to organize a union. Thousands of seafarers working on U.S.-flag boats and ships already enjoy the benefits of union representation. Those unionized shipping companies enjoy the benefits of a collaborative industry/labor partnership that advances the interests of U.S.-flag shipping. But in the Gulf, the boat companies and every other power structure in the community have declared war on the right of mariners to choose a union.

Here is the bare outline of the Gulf mariners' story. To exercise their rights of freedom of association and freedom of speech, mariners must take on almost insurmountable opposition. For instance, Captains Eric J. Vizier and Mark A. Cheramie worked for Guidry Brothers, a boat company based in Lafourche Parish, in South Louisiana. Three days after Christmas in 2000, Captain Cheramie was fired for supporting the union, the Offshore Mariners United (OMU), a federation of four maritime unions—the Seafarers International Union (SIU), the International Organization of Masters, Mates & Pilots (MM&P), the Marine Engineers' Beneficial Association (MEBA) and the American Maritime Officers (AMO). Two days after New Years' 2001, Captain Vizier was fired for his efforts to secure OMU representation for Guidry mariners.

The following are some of the obstacles that Captains Vizier and Cheramie and the Guidry mariners, along with the OMU organizers, have had to confront. These impediments to organizing are not solely related to Guidry. No matter the boat company's size, its management has harshly punished union supporters. For instance, at Trico Marine Services, a large vessel operating company conducting business in the North Sea, Brazil and West Africa, management with its anti-union law firm, Jones Walker of New Orleans, managers have fired pro-union captains, forced pro-union mates and able-bodied seamen to quit through assigning them unsafe work, kept mariners locked behind gates when their vessels dock near the corporate office, subject mariners to captive audience meetings on almost a weekly basis for more than 18 months, among other punitive tactics. Ironically, Trico operates its North Sea, Brazilian and West African boats with union crews while swiftly punishing any hint of support for a union among its Gulf mariners. Joining Captains Vizier and Cheramie is a Trico mariner who by coming forward publicly on Thursday at the press conference and hearing risks being fired and blackballed by the company.

Thus, the record shows that mariners at every boat company operating in the offshore oil and gas industry in the Gulf of Mexico face the same vicious anti-union collaborative industry-wide campaign. For purposes of this presentation to the U.S. Senate, Guidry only serves as an example.

ANTI-UNION CAMPAIGN OF THE COMPANY

Firing pro-union mariners, isolating other pro-union mariners with anti-union mariners (usually ones who are related to owners).

Threatening to shut down the company if majority of employees choose union representation.

Threatening loss of benefits, loss of work and loss of jobs if employees choose union representation.

Engaging in surveillance of union activity among mariners.

Interrogating mariners about their support for the union.

Calling the police to break up peaceful conversations between mariners and union organizers on non-work time at the docks.

Tailing union supporters and driving menacingly behind the union supporters.

Breaking a bottle in a restaurant frequented by union representatives and holding up the jagged edge claiming that it will be used to cut the throats of union organizers.

Posting "no solicitation" signs but only enforcing this in regard to union activity.

Distributing venomous anti-union material filled with misrepresentations and lies.

Identifying union supporters to other boat companies and blackballing them from future employment opportunities.

Refusing to hire qualified pro-union mariners because they are pro-union.

Locking down boats and having them leave docks when union organizers are present.

Telling mariners they work for the company 24-hours a day (mariners are paid a day rate) and that they are not allowed to talk to union organizers on company time.

Making new deckhand recruits sit through an anti-union indoctrination of more than six hours during their training to obtain their Standards of Training, Certification and Watchkeeping (STCW 95) certification required by the U.S. Coast Guard. And more.

ANTI-UNION COLLABORATIVE EFFORTS OF ALL BOAT OWNERS THROUGH THE CCFC

Forming a front group known as the Concerned Citizens for the Community (CCFC) that conducts a vigorous anti-union campaign for all boat owners.

So-called CCFC representatives visit pro-union mariner with brother working at another company and offer pro-union mariner the choice: Be pro-union and brother will be fired, become anti-union and brother can continue to work and job will be found for him as well.

Post bright yellow anti-union CCFC signs within 20–30 yards of each other all the way down Route 1 and Route 308, the highway that all mariners use (and their company transport vans) to go to Port Fourchon, the largest port of offshore supply vessels in the U.S.

Post bright yellow anti-union CCFC signs in every business used by mariners and their families—from insurance companies to massage therapists.

Post bright yellow anti-union CCFC signs at the gates of the big customers—oil and drilling companies.

Put up security shacks and security fences to keep union organizers away from mariners at their worksites—the vessels.

Have security guards refuse to allow union organizers access to mariners.

Have security guards wear yellow CCFC anti-union buttons.

Use CCFC anti-union columns run in local newspapers as clips purporting to be "news" and giving these to mariners to read.

Regular meetings of boat owners through the CCFC, the Chamber of Commerce and their federation, the Offshore Marine Service Association (OMSA) to share information on union supporters, union activity and anti-union tactics.

Spy for each other—communicating when union organizers are on the docks or reporting to each other when a mariner is seen talking with pro-union sympathizers, organizers or "strangers."

Organizing harassing phone calls and visits to union supporters wives and mothers at their places of work and at their homes, including sexually lude and inappropriate remarks.

Blackballing union supporters.

ANTI-UNION COLLABORATIVE EFFORTS OF ALL BOAT COMPANIES THROUGH OMSA

In 1999, the maritime unions helped Gulf mariners form the Gulf Coast Mariners Association (GCMA), an organization to bring together mariners to give the men and women who go to sea in the Gulf for a living with a voice in the many legislative and political forums that impact their lives. In 2000, the maritime unions formed the OMU, a union structure for offshore mariners. Around these events, the federation of boat companies that also includes the oil companies and drilling companies and others in the industry as associate members, went on the warpath against unions coming into the Gulf. This federation (or union of boat companies), known as Offshore Marine Service Association (OMSA) has—in the most vitriolic and rabid way—organized and mobilized the offshore energy industry to suppress mariners' union aspirations at every turn. OMSA has been:

Raising funds from the companies for an industry-wide anti-union effort.

Holding seminars for all boat companies on how to keep unions out.

Whipping up a level of anti-union hysteria.

Insuring that every player in the offshore oil and gas industry understands that unions must be kept out.

Networking boat companies, their customers—the oil and drilling corporations, the other businesses that provide offshore services, in an anti-union campaign.

Promoting certain law firms (anti-union law firms) to assist with anti-union activities.

Allowing boat companies to use OMSA material to counter union initiatives.

Bringing together the personnel directors of boat companies to teach them how to avoid unions.

Telling boat companies to unilaterally make captains "supervisors" so they do not have the (few) protections of the NLRA.

Ensuring that mariners who identify themselves as pro-union are punished (their businesses boycotted by boat owners, losing their jobs if representing a pro-union organization in a public forum, etc.)

ANTI-UNION EFFORTS OF THE POLICE

Arresting union organizers for leafleting at the docks (charges have been dropped).

Arresting union organizers for holding "Gore/Leiberman" signs on Election Day November 2000 (charges have been dropped).

Arresting union organizers (mariners themselves with upper level U.S. Coast Guard licenses) for operating a small boat in a no-wake zone (charges have been dropped).

Arresting union organizer for leafleting at the port, claiming he needed a parade permit for this (charges have been dropped).

Illegally seizing a video tape union organizers took of police harassment at the ports.

Tailing union organizers at the docks and in small dock communities.

Pulling union organizers out of a restaurant to tell them that they are not allowed at docks.

Ensuring that mariners on the boats see that where there is a union organizer there will be a law enforcement official.

Detaining a group of trade unionists who came from the countries of Australia, the UK and Norway, forcing them to get out of their vans and produce their identification and taking down detailed information from their IDs.

When Captain Vizier reported that his house had been broken into and dead fish left on his doorstep, doing a cursory (laughing while doing it) investigation and never following up.

INEFFECTIVENESS OF THE NATIONAL LABOR RELATIONS BOARD (NLRB)

Failing in the Guidry case, after investigating the charges of the union and mariners and finding facts which resulted in the issuing of a complaint that required a bargaining order remedy, to seek such a bargaining order remedy in either settlement discussions or before a court as is the NLRB's right.

Attempting to force the fired captains to take a cash settlement without first discussing this with the union attorney handling the case.

Attempting to force the fired captains to take a cash settlement without first discussing this with the union attorney handling the case—a second time and a third time!

Taking one year and three months to finally issue a settlement document approved by the regional director and the NLRB.

Failing to conform any of the remedies outlined in the settlement document to the maritime industry.

To exercise their freedom of association and freedom of speech rights, the mariners working in the oil and gas industry offshore in the Gulf of Mexico must go up against the entire power structure of their industry and put their livelihoods on the line. They must put the privacy of their family life on the line. They must open up their wives, husbands, mothers, fathers, children to harassment and other tactics of intimidation. They face blackballing and threats to their physical safety. They know as they drive around South Louisiana that every boat owner is against them. They know that the powerful customers that drive the Gulf oilfields—the oil companies and the drilling companies—are against them. They know the police are against them. All of these powerful forces are lined up against the mariners' right, under U.S. law and recognized in the fundamental principles of the International Labor Organization, to choose for themselves whether they want to belong to a union.

That mariners' "crime" is that they believe they can make their lives, the lives of their families, the lives of their fellow mariners and their companies and the industry better if the men and women on the boats have a voice in the process with a union.

This is what we bring to the attention of the U.S. Senate.

MAY 23, 2002

Re: Nabors Alaska Drilling—A Brief History of Organizing Events

In 1994, Jim Taylor retired as President of Nabors Alaska Drilling and Jim Denny took over as President of Nabors in Alaska. During the winter of 1994–1995, Jim Denny arrived on the North Slope and started to conduct meetings with the Rig Hands. The first topic of discussion at each meeting was, "You people in Alaska don't deserve any more money than Roughnecks in West Texas." After those statements, we all looked at each other and could not believe what we were hearing. Up

until that point in time, it had been almost 8 years since we had any raise in pay. In 1986 we took pay cuts of over $3.00 an hour to help Nabors during the oil crunch, and our insurance had dropped to almost nothing. We now had no co-pay, travel-time, holiday pay, etc., were gone. Now this guy, that nobody had ever met, wanted to out us again!! We could not believe our ears; he was comparing the North Slope of Alaska with Texas. Most of us in the Alaska Oil Industry have been here since we first started working and have made this our career. We would like to keep it that way. Eventhough it is some of the harshest weather on the planet, working with each other year after year has been like having an extended family for most of us. After a few meetings with the management about our new President, we were told, that is the way it is, take it or leave it.

In another meeting at Milne Point, Jeff Couture informed Mr. Denny that we had not had a raise in 10 years. Mr. Denny's response was that there would be no raises; it would interfere with his bonuses! That really started the guys talking! We had a couple of meetings and found that the only way we could keep what we had was to approach the Unions. We contacted the Laborers' Unions Local 341 and Local 942. The education started when Tim Sharp, the Organizer for Local 942, began our long journey to a contract.

From the start of the Nabors Organizing Campaign, management was spying on employees; we were denied access at airport meeting rooms, or any common meeting areas on the North Slope. All personnel were kept isolated from Union people. Our first attempt to unionize failed due to lack of contact with employees, threats by management, management spying, and intimidation. The Union was able to file many Unfair Labor Practices with the National Labor Relation Board. After over 2 years, and having appealed all the way to the 9th District Court of Appeals (case #325 N.L.R.B. #104 & #105), the N.L.R.B. sided with the Union on every Unfair Labor Practice that was filed against Nabors Alaska Drilling. Access to Nabors camps was made available, and employees that were fired were re-instated with back pay. We were then granted a second election in October 2000, which we won.

After a month or so, negotiations started with Nabors Drilling and the Laborers Union. As of this date, Nabors refuses to agree on a contract beyond what is already in place for its Employees. They will still meet for negotiations, but we will not move from their last offer with us, which is unacceptable to their Employees.

Thank you for your consideration.

MICHAEL PEARSON.

SMITHFIELD FOODS' SYSTEMATIC, ILLEGAL CAMPAIGN TO SUPPRESS WORKERS

Smithfield Foods, based in Smithfield, Virginia, is the world's largest hog producer and pork processor. It's plant in Bladen County, North Carolina is the largest pork processing plant in the world. Nearly 5,000 men and women work at the plant, located in Tar Heel, North Carolina. By the company's own estimates, turnover is 100% annually; this means that every year, 5,000 people are hired at the plant and 5,000 leave. An estimated 60 percent of the workforce is Latino, and most of the rest are African American. The plant was featured as part of the award-winning New York Times series "How Race is Lived in America," where the reporter documented divisions of labor according to race.

Twice, workers at the Smithfield plant have stood up for a voice on the job. Both times, Smithfield Foods broke the law to silence their voices. The first campaign in 1994 resulted in numerous charges filed against Smithfield for illegal surveillance, intimidation, threats, coercion and harassment of workers. In 1997, workers again tried to join the United Food and Commercial Workers (UFCW) Local 204, and the company's campaign violated federal labor and civil rights laws.

During the union drive, the company held forced meetings to intimidate and threaten workers for supporting the union. Smithfield held separate meetings for black and Latino workers to pit worker against worker based on race. Managers like Sherri Bufkin, were instructed to seek out and fire union supporters.

On the day of the election, deputy sheriffs, dressed in battle gear, lined the long driveway leading to the Bladen County plant. The sheriff's menacing presence created a violent mood for the workers who were merely trying to exercise their right to vote for a voice on the job. As workers passed the lines of police in riot gear, they saw company management standing with the head of the Bladen County Sheriff's department near the entrance to the plant. Deputies—in riot gear and heavily armed—stationed themselves at the entrance to the plant on days that civil rights leader Reverend Jesse Jackson and other religious leaders handed out literature with workers.

Following the vote count on the final day of balloting, company personnel stormed the counting area and, in the resulting confrontation, the two union supporters were subject to physical violence and arrest. Rayshawn Ward, a Smithfield meatpacking worker whose only crime was that he supported the union was handcuffed, maced and jailed. John Rene Rodriguez, a union organizer, tried to help Mr. Ward as the Company's Chief of Security was assaulting him. For that, he found himself in handcuffs, jailed and facing criminal charges. Both men were cleared of any wrongdoing.

Through the use of force, Smithfield's message was clear to workers: if you vote for a union, the law and law enforcement will not be on your side. Under federal law, workers have an absolute right to support and vote for a union in a secret ballot election without fear, intimidation or coercion.

Two independent courts of law have ruled against Smithfield for it's illegal anti-worker campaign. In December, 2000, an Administrative Law Judge of the National Labor Relations Board issued a monumental 400-plus page ruling against Smithfield for massive violations of federal law. The NLRB judge found that Smithfield conspired with law enforcement to instigate the violence at the vote count.

The NLRB Judge's decision contains some of the strongest language in recent labor history against a company's flagrant disregard for the law. The Judge found that Smithfield attorneys suborned perjury during the NLRB trial. The Judge also ruled that company witnesses "lied under oath" throughout the decision and that Smithfield managers conspired with the local Sheriff Department to physically intimidate and assault union supporters.

The NLRB Judge found Smithfield guilty of illegally firing seven workers during the 1994 campaign and four more in 1997.

The Judge overturned the results from the 1997 union election at Smithfield and ordered the company to provide free access to the workers in the plant in the cafeteria, parking lot, and break rooms. The UFCW will also have the right to be present at any time Smithfield addresses its employees about unions and respond to any statements made by the company. The eleven illegally fired workers have been granted reinstatement or back wages as compensation for their unfair discharge.

In April 2002, a jury in federal district court in Raleigh, North Carolina found Smithfield Packing in violation of the federal civil rights law originally known as the Ku Klux Klan Act of 1871. The jury verdict directed Smithfield and the company's former security chief, Danny Priest, to pay $755,000 in compensation and punitive damages as the result of the beating and arrests of two union supporters at the 1997 union election.

UNITED FARM WORKERS of AMERICA, AFL-CIO
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June 24, 2002

Senator Edward M. Kennedy
Committee on Health, Education, Labor and Pensions
639 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Workers' Right to Organize Labor Unions

Dear Senator Kennedy,

We appreciate the opportunity to submit this comment regarding the Committee's hearing on the right to organize.

Obstacles to labor union organizing in agriculture are extensive. Outside California, in general farmworkers lack the effective right to join and organize a labor union and demand collective bargaining with their employers because they are excluded from the National Labor Relations Act and lack an adequate state law or, when state law protections exist, lack adequate enforcement. A description of agricultural labor relations laws appears in Maralyn Edid, Farm Labor Organizing: Prospects and Trends, Cornell Univ. ILR Press 1994.

The California Agricultural Labor Relations Act, enacted in 1975 and co-written by Rep. Howard Berman, offers farmworkers some protections against retaliation by the employers for organizing labor unions and some mechanisms to encourage collective bargaining leading to agreements between the employer and the union. However, in past years, the ALRA's protections have been undermined by misconduct by some employers. Furthermore, during the administrations of Governors Deukmejian and Wilson, during 1993 to 1999, the budget of the Agricultural Labor Relations Board, the enforcement agency, was severely cut and the agency simply refused to enforce the law. One of the most glaring defects in the law, however, is the ability of many companies to engage in bad-faith bargaining designed to prevent a contract from ever being reached. This tactic is so wide-spread and detrimental to farmworkers and the purpose of the law, that we are seeking legislation in California that would require binding arbitration to determine the terms of a collective bargaining agreement when the parties can not reach agreement.

Further, agricultural employers have increasingly relied on undocumented immigrants, or in some cases so-called "guest workers" under the H-2A temporary foreign agricultural program, to harvest fruits and vegetables. In most cases, undocumented workers and guest workers are reluctant to join labor unions and seek collective bargaining because

they rightly feel vulnerable to retaliation by the employer in the form of being fired or not being called back the following season.

The proper response of government agencies is to remove these obstacles, including by developing a legalization program to provide true immigration status to the many undocumented workers who perform agricultural work.

Again, we thank you for bringing to the attention of the Committee the obstacles that workers are experiencing to the fundamental right to join and organize labor unions and engage in collective bargaining.

Sincerely,

ARTURO RODRIGUEZ
PRESIDENT