Conclusion

The judicial, legislative, and executive climate in Washington is very favorable to collective bargaining as the preferred procedure for resolving disputes at the workplace. Those who have been willing to communicate and compromise have done well in the latest session of the Washington State Legislature. Whether 1993 will go down in history as a time of "opportunity lost" for state employees and farm workers in Washington remains to be seen.

[The End]

Reforming Labor Law To Remove Barriers to High Performance Work Organization

By Paula B. Voos, Adrienne Eaton, and Dale Belman

University of Wisconsin in Madison, Rutgers University, and University of Wisconsin in Milwaukee, respectively.

Labor law reform has returned to the political agenda with the recent appointment of the Commission on the Future of Worker Management Relations. As we prepare this paper, that Commission has not yet met. However, it appears that its deliberations and recommendations are likely to be only the beginning of a long political process involving widespread public debate about the appropriate structure of law for the contemporary workplace. Here we make a preliminary contribution to that discussion.¹

It is already clear that the goals of this reform effort will be more wide ranging than the one which occurred under the Carter administration. The Labor Law Reform Act of 1978 focused primarily on improving enforcement of the NLRA, on improving workers' opportunities to form and join unions within the fundamental structure of existing law. The goals of the current effort are broader.

The Commission is charged with examining three issues. (1) What (if any) new methods or institutions should be encouraged, or required, to enhance workplace productivity through labor-management cooperation and employee participation. (2) What (if any) changes should be made in the present legal framework and practices of collective bargaining to enhance cooperative behavior, improve productivity, and reduce conflict and delay? (3) What (if anything) should be done to increase the extent to which workplace problems are directly resolved by the parties themselves rather than through recourse to state and federal courts and government regulatory bodies?

¹ The views expressed here are personal and not necessarily those of the commission or any other organization.

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Clearly, current labor law reform is not only about guaranteeing workers' right to organize or about increasing workplace democracy, although these goals, too, are important. It is also about fostering a high wage, high productivity economy through what is increasingly being called high performance work organization.² This paper is focused on that aspect of reform.

High performance work organizations are ones that raise productivity and flexibility through the effective use of a highly trained, highly skilled, dedicated workforce involved in all levels of decision making.³ High performance work organizations require a mutual commitment between employers and employees. Employees in this type of firm are involved in their jobs, willing to undertake training, and committed to enhancing the productivity of the organization. They are given considerable leeway to make decisions. This allows them to respond rapidly and creatively to ever-changing consumer demands, to maintain high quality, and to increase efficiency. Often, formal programs that involve unions and/or employees in decision making are used in high performance organizations toward these ends.

In return, the high performance employer makes a reciprocal commitment to the work force by providing employment security insofar as possible, along with a good standard of living. These are prerequisites for employee commitment to the firm. We view union representation as highly compatible with high performance work systems for both reasons and note that "just cause" provisions in union contracts provide employees with considerable individual employment security.⁴

High performance work organization, where technologically and economically feasible, provides the basis for a high wage, yet internationally competitive, economy. And yet, while many companies have implemented some type of participative or cooperative programs, only a small number of U.S. workers are believed to be now working in high performance work environments—no more than 5 percent according to the Commission on the Skills of America's Workforce.⁵ Today there are many barriers to the establishment of high performance workplaces. A number of barriers can be found in existing labor law, although labor law is by no means the only or even necessarily the chief impediment. This paper will consider how labor law reform efforts might remove some of those barriers to high performance work organization, many of them rooted in the "Taylorism" that has long dominated management practices and assumptions in the United States.

Belief That Management Alone Should Make Certain Decisions

One barrier to high performance work organization is the presumption that management alone should make certain decisions. Beliefs about management's inherent authority and "right to manage" run deep in the business culture of the U.S.⁶ According to this view, management should decide what product or service is to be produced, how

⁴ The greater individual security in union firms may be one reason we now see more employee involvement, work teams, and gain sharing in the union sector than in the nonunion sector; see Adrienne Eaton and Paula B. Voos, "Unions and Contemporary Innovations in Work Organizations, Compensation, and Employee Participation," in Unions and Economic Competitiveness, L. Mishel and P. Voos (Armonk, NY: M.E. Sharpe, 1992). Unionization aids employee participation in a number of ways: by legitimizing programs in the eyes of an often skeptical work force, by insisting that programs are appropriately balanced between quality of worklife and productivity goals, and by providing employee input into the overall design and operation of the program.
⁵ America's Choice," cited at note 1.
work is to be organized towards that end, what machinery or equipment is to be employed, where production is to be located, whether or not a given facility is to be sold, and so forth. The right of employees or their representatives to participate in such fundamental decisions has in fact been a source of struggle between labor and management in the U.S. One chapter of this struggle ended with a management victory in the 1940s. This victory has been embodied in the legal distinction between mandatory and permissive subjects of bargaining and in many management rights clauses. While unions may demand to bargain over wages, hours, and working conditions, and over the impact of the fundamental strategic decisions on employees, they have no right to bargain over the decisions themselves.

This legal doctrine corresponds to the division of labor in the Tayloristic corporation. Under Taylorism, management decided the "one best way" for work to be performed and made jobs as "idiot proof" as possible by removing decisions from workers. But in a world in which we are calling upon workers to exercise judgment and responsibility, the legal distinction between mandatory and permissive subjects of bargaining is increasingly anachronistic. In a high performance work organization, workers make suggestions that continuously improve production. Workers and their representatives must be accorded input into basic decisions. At present, companies can ask for this input, but until our law recognizes that workers and their representatives have the right to be involved in these decisions at their own request, we will have a serious barrier to the spread of high performance work organization. Accordingly, we would advocate eliminating the mandatory/permissive distinction.

Lack of Information

A second barrier to high performance work organization is the lack of access to financial information about the enterprise on the part of employees or their representatives. At present the law requires employers to provide only limited financial information to unions and only when triggered by a claim of employer inability to pay for a union bargaining demand. Employers don't have to provide information about forthcoming business plans or about non-bargaining unit employees, unless the union can establish relevancy to its role as a bargaining agent. Information is regarded under current law as a legitimate source of bargaining power and indeed is guarded jealously for that very reason.

Of course management today may share more information than the legal minimum, and many companies, union and nonunion, do so. However, the absence of widespread and automatic information sharing taints voluntary information sharing. Because managers don't readily share good news lest the union ask for a bigger piece of the pie, the bad financial information that is more likely to be communicated is suspect. And firms considering extensive information sharing face a serious externality when competitors do not provide similar information. This occurs because information that is shared with workers may leak out to competitors, suppliers, or to the public. This latter consideration suggests that it might be important to require that non-union companies as well as union corporations provide certain financial information to their employees.

In a high performance work organization, employees and their representatives are expected to participate in business decisions that enhance the firm's performance as well as their own security. Such decisions are impossible without adequate

information. A reformed labor law should mandate periodic disclosure (without a request) of plant-level cost and profitability data; of future business plans for investments, advertising, products, etc.; and, indeed, of any information needed by employees for meaningful participation in business decisions.  

Rigidity of Job Definitions

A third barrier to high performance work organization is an overly rigid definition of individual jobs which limits the flexibility and responsiveness of the organization. High performance work organization typically involves wide job definitions and a degree of self-supervision. For instance, a work group may be responsible for work assignments, covering for absentee team members, allocating vacations or overtime, and providing immediate quality control. In the union sector, union members may participate in strategic business decision making. Thus, the roles of management and non-management can become blurred.

Our current law provides a definition of supervisor that conflicts with what is needed by the high performance work organization. The law considers persons with a very low degree of managerial responsibility to be supervisors. They are not protected by labor law should they desire union representation. Under the Yeshiva decision, professors in private universities were deemed to be supervisors because they participate in some administrative decisions through their faculty senates and other bodies of faculty representation. This aspect of our current law is increasingly outmoded. Bargaining unit employees must be able to make “management” decisions and self-supervise without losing their rights to collective representation. Removing barriers to the organization of lower and perhaps mid-level supervisory employees would have a further desirable outcome discussed below.  

Opposition of Some Supervisors and Support Staff

It is now widely recognized that first-level supervisors and technical support staff (e.g., engineers) often undermine efforts to create high performance workplaces. Increased self-supervision, employee involvement, and responsibility have the potential to strip authority and/or jobs from these employee groups. For instance, opposition by lower level supervisors to recent work reorganization efforts at USX’s Gary Plant contributed to frictions between team leaders in the bargaining unit and supervisors and has created difficulty for the new flexible manning effort. Even the Saturn model, which provides very extensive union and worker participation in management, does not provide that participation to its unrepresented white collar workers.

Presumably if individuals are involved in making decisions (for instance, the decision to realign supervisory authority), they will be less likely to undermine those decisions and instead will implement them in constructive ways. First-level supervisors and support staff are presently a group of unrepresented and forgotten individuals lacking much input into managerial decisions affecting their own jobs,

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11 Supervisory and non-supervisory employees may not have a sufficient community of interest to always be in the same bargaining unit. This might be handled in a fashion that parallels provisions for professional employees in the NLRA.
13 Rubinstein et al., cited at note 9.
responsibilities, and authority.\textsuperscript{14} It is not surprising that they should attempt to undermine efforts to create high performance workplaces.

A changed definition of supervisors in the NLRA would reduce this barrier, but it is unlikely that managers and support staff would rapidly unionize and achieve representation in this fashion. Hence, it may be worthwhile to provide all employee groups with a representation forum in all companies, union or nonunion. How such an American "works council" or "employee council" would or should operate is an open issue at present. Such a forum could provide a multilateral vehicle of voice in corporate decisions for all types of employees, regardless of their interest in traditional union representation.\textsuperscript{15}

**Uncertainty about Section 8(a)(2) of the NLRA**

In light of the *Electromation* decision, there is some uncertainty regarding the particular types of participation or representation efforts that might run afoul of Section 8(a)(2)'s prohibition of employer domination of labor unions. Some employer groups have called for legal reform that would remove all barriers to current participation or involvement efforts in the nonunion sector. Several academics have also raised the issue of what, if any, legal barriers to employee representation in nonunion companies are appropriate, and indeed whether or not labor law should be revised to promote vehicles of representation other than collective bargaining.\textsuperscript{16}

The logic of these proposals varies. Proponents typically argue that not only is enhanced workplace democracy a desirable end in itself, but also that employee representation would improve economic outcomes by promoting high performance work organization. They argue (1) that contemporary employees often desire some input into workplace decisions while not necessarily desiring traditional union representation; (2) that "employee councils" would improve the flow of information within firms; (3) that councils could be given responsibility for monitoring corporate compliance with health and safety or protective labor laws, hence improving the enforcement of those laws; (4) that councils could play an important role in administering training programs which would meet the needs of both workers and firms; and (5) that councils could facilitate labor-management consultation. At the same time, an effective barrier to employer-dominated labor unions must be maintained, both because dominated unions are undemocratic and because they cannot provide the independent voice needed to accomplish the tasks listed above.

Several things are critical in this regard. Clearly employee representatives must be chosen by the work force, not the employer. Moreover, employee representatives cannot be independent unless their speech is protected; nonunion employers cannot be allowed to discharge them at will or discriminate against representatives with regard to compensation or job assignment. Similarly, the councils themselves must have some independent status; employers cannot be allowed to dissolve them unilaterally. Councils which have independent legal status, which are charged with enforcing health and safety standards or other public policy objectives, and which have a legal right to consult with the employer over certain

\textsuperscript{14} Indeed, the insecurity of lower and middle level supervisors reduces their effectiveness in those firms where participative and cooperative efforts include them.

\textsuperscript{15} This is in contrast with the bilateral forum of collective bargaining. For other roles such councils could play, see below.

issues are not likely to devolve into employer-dominated company unions.

**Employee Insecurity**

Some employment insecurity, that associated with declining demand for products or services, may be inevitable in a market economy. However, employment-at-will makes many employees personally insecure. It limits their willingness to criticize existing practices or supervisors. Hence it reduces the potential of participation or involvement processes. Lawler, Mohrman, and Ledford\(^\text{18}\) point out that 47 percent of the top 1000 corporations provide no employment security whatsoever to any of their employees.\(^\text{19}\) Only 27 percent provide some security to more than 40 percent of their employees, and surely many of these corporations do so because they have negotiated collective bargaining agreements providing just cause dismissal policies. Employment-at-will is still the norm in American nonunion companies, and it limits current employee involvement efforts.

We might consider explicitly protecting speech in participatory or cooperative ventures, making such speech an illegal reason for discharge or employment discrimination.\(^\text{20}\) The main drawback of this approach is that it would spawn more employment litigation. Alternately, in a context of employee representation councils, it would be possible to provide general modification of employment at will in nonunion work environments. A legislated “just cause” dismissal standard could be backed by mandated grievance arbitration nationwide. In nonunion situations, employee representation bodies would be available to process grievances at lower steps and represent employees before outside neutral arbitrators.\(^\text{21}\) Such a system would have the advantage of reducing the current volume of wrongful discharge litigation because it could potentially remove most disputes over the reason for discharge from the courts.

**Union Insecurity**

We have long known that if unions are not institutionally secure, they will not be cooperative.\(^\text{22}\) Many unions are insecure today because of dwindling membership and reduced bargaining power. Unions often view their decline as resulting from a number of problems in the organizing process, including lengthy delays before representation elections, lack of fair access to employees during organizing campaigns, and high numbers of management unfair labor practices. Managers often contend that declining union fortunes are more the result of a fundamental lack of appeal of unions to many nonunion employees than the result of deficiencies in current organizing law.\(^\text{23}\) Be that as it may, it is apparent that the current system for the establishment of new collective bargaining relationships is both highly legalistic and provides anti-union employers with many weapons for frustrating the desires of employees who do desire representation.

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17 See Eaton and Voos cited at note 3 for a full discussion of this issue.


19 This is based on survey data received from 313 of the corporations in 1990.

20 The current protection of the right to engage in “concerted activities” for the purpose of “mutual aid or protection” in Section 7 of the NRLA could be applied to these activities.

21 There has been rapid growth of nonunion grievance systems in recent years, but these often suffer from lack of credibility, inhibited use, and other problems. We regard grievance systems as being more effective not only when they end in binding arbitration using an outside neutral, but also when the individual employee has an effective advocate, drawn from the workplace and knowledgeable about it. In a union situation, this role is played by the local union. In a nonunion situation, employee councils could provide similar assistance.


23 We note that the employers who make this argument nonetheless resist legal changes that would make it easier for employees to organize where they so desire. Their behavior is inconsistent with their argument.
We need to sharply reduce the legalism of the current representation process, curtail unfair labor practices, and reduce delays so as to increase the ability of workers to choose union representation if they so desire. We might avoid many of the abuses currently associated with representation elections by returning in part to a nonelection system of certification. Certification could proceed once a labor organization had received authorization signatures from more than 50 percent of the bargaining unit. If Congress believes such a system would be open to abuses (for instance, if some individuals sign authorization cards while truly not desiring union representation) it might require that authorization signatures must be accompanied by a dues payment and/or by requirement of a larger threshold of signatures (e.g., two weeks dues and signatures of 55 percent).

Alternatively, expedited representation elections with legal challenges to be decided after the election would be helpful. The shorter the period of the campaign, the fewer the unfair labor practices or other abuses that are likely to occur. If elections were held within 14 days there would be fewer problems than if the standard were set at 30 days. If a longer campaign is permitted, unions should have increased access to employees in public areas where this would not be disrupted. Unions should be able to reach employees as they exit from buildings, in the public part of shopping centers, and in parking lots. These changes should be coupled with increased penalties for violations of labor law. Weiler has suggested that "front pay" and other tort damages similar to those used in employment discrimination litigation would more effectively deter discriminatory discharges of union supporters than would triple damages, simply because it would more sharply raise the cost/benefit ratio of illegal employer behavior.26 We also should encourage the NLRB to implement expedited processing of serious unfair labor practice charges. However, it is important to note that in a context of certification on authorization cards or very rapid elections, we would expect many fewer labor law violations, and hence the issues of access, penalties for ULPs, and expedited processing become less significant.

High Levels of Union-Management Conflict

Hostile labor relations are almost inevitable where unions perceive their existence to be endangered. In particular, the use of permanent replacements during strikes threatens the very existence of labor organizations and violates the reciprocal obligation of employer to employee necessary to a high performance work system. The recent events at Caterpillar illustrate the costs of this particular management tactic. Caterpillar employees, threatened with permanent replacement by management, went back to work without a contract after a bitter strike. As a result of this attack on each employee's personal security as well as on the union's institutional continuation at the company, Caterpillar's highly successful employee involvement program is no longer in operation.27 Productivity at Caterpillar has fallen below pre-strike levels.

Nor is this an isolated instance. Since 1980 we have seen many destructive uses of permanent strike replacements including those at Phelps Dodge, International Paper, and Eastern Airlines. Neither unions nor employees are likely to commit

24 Weiler, cited at note 15.
25 Ibid.
26 Currently, we assume that the employee who is illegally discharged for union activity will return to the workplace and hence is only entitled to be "made whole" for earnings lost in the period of discharge, minus any amount earned from other employment. For various reasons, most employees are not able to successfully return to work in the discriminatory situation. Front pay would compensate them for reduced earnings over their future lifetime of employment occurring as a result of a discriminatory discharge.

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themselves to improving corporate performance where they have been threatened with permanent replacement. This possibility needs to be eliminated in order to encourage cooperation in the union sector and reduce the adversarialism of contemporary labor relations. Temporary strike replacements give employers sufficient bargaining leverage to say “no” to unreasonable economic demands.

First contract negotiations also present problems. They can be plagued with very adversarial labor relations, following as they do on the heels of an organizing campaign. Often employers continue their opposition to labor organization in this stage of the unionization process, making it clear that employees will not get a “contract” without a strike. Indeed, at present a large portion of persons who vote for representation never achieve a collective bargaining agreement, either because they are unwilling or unable to carry out a successful economic strike.

One proposal would be to provide for interest arbitration of first contracts in the event of impasse. Interest arbitration, in several variants, is widely utilized in the public sector in many states; we especially like final offer arbitration because of the incentives it offers for settlement by the parties. Interest arbitration could be imported into the private sector for first contract impasses. First contract interest arbitration doesn’t solve all problems: the second agreement still must be negotiated in the future. It also has some drawbacks for those who value the resolution of problems by the parties themselves or who regard arbitrated contracts as less innovative. For these reasons and also because it is likely to be widely unacceptable to the parties, we do not advocate a system of interest arbitration for all contracts in the private sector. Nonetheless, first contract interest arbitration would move us further away from an adversarial, strike-based system of establishing collective bargaining relationships and would thereby increase employee free choice.

**Conclusion**

In order to facilitate a high wage, high productivity economy, we need to consider modifying our basic labor law in ways that would remove existing barriers to high performance work organization. Important first steps would be the elimination of the mandatory/permissive distinction, increasing information sharing requirements, including some supervisors as employees under the NLRA, and clarifying the meaning of the current prohibition of employer domination of labor organization. Furthermore, we might encourage alternatives to union representation by fostering the growth of “employee councils” in all workplaces with appropriate rights for representatives. This might be paired with a “just cause” discharge policy for all employees, backed by grievance arbitration.

To be successful, labor law reform must make it possible for workers to organize (should they so desire), must make unions more secure, and must reduce the adversarialism of current labor relations. Here we would suggest returning in part to a nonelection system of certification based on authorization cards. We also should increase union access to employees, change the cost/benefit ratio of ULPs to discourage law-breaking, reduce election delays, provide for arbitration for first-contract impasses, and permit temporary, but not permanent, strike replacements.

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28 Although the Wagner Act was intended to do away with a strike-based system of organizing, to some extent the overt conflict has simply been disguised as it has shifted from the recognition process to the initial collective bargaining process.

This is a wide agenda, but it is only a partial list of needed changes. A comprehensive package of reforms is needed if we are to modernize our increasingly anachronistic labor law in a way that facilitates a high wage, high productivity economy.

[The End]

How Come One Team Still Has To Play With Its Shoelaces Tied Together?  
By Sheldon Friedman and Richard Prosten

AFL-CIO Department of Economic Research and Director of Bargaining and Research, Industrial Union Department, AFL-CIO, respectively

It is not mere hyperbole to assert that freedom of association for American workers is in greater peril today than at any time in the last seventy years, since trade unions were freed from the concept that their activities were illegal restraints of trade. Freedom of association is a basic human right. ILO Conventions #87 and #98, ratified by 102 countries and 117 countries respectively, guarantee freedom of association and the right to organize and bargain collectively. According to ILO Convention #87: “Workers... shall have the right to establish and... to join organizations of their own choosing... The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention... Each Member of the ILO for which this Convention is in force undertakes to take all necessary and appropriate measure to ensure that workers... may exercise freely the right to organize.”

Strong support for workers' rights of self-organization is also deeply rooted in the Judeo-Christian religious tradition. According to the 1986 pastoral letter on Catholic Social Teaching and the U.S. Economy: “The Church fully supports the right of workers to form unions or other associations to secure their rights to fair wages and working conditions. This is a specific application of the more general right to associate... No one may deny the right to organize without attacking human dignity... We firmly oppose... efforts, such as those regretfully now seen in this country, to... prevent workers from organizing... U.S. labor law reform is needed to meet these problems as well as to provide more timely and effective remedies for unfair labor practices.”

Despite widespread employer opposition, the importance of respecting workers' rights of self-organization has also become widely recognized, if not so widely acted upon, in the American political system since the New Deal. As Franklin D. Roosevelt put it: “If I were a worker in a factory, the first thing I would do would be to join a union... Trade unionism has helped to give everyone who toils the position of dignity which is his due... I believe now as I have all my life in the

30 There are many other possible elements of reform other than the ones discussed here, for instance, the issue of how to foster the growth of occupational or craft organization where appropriate. See Dorothy Sue Cobble, “Organizing the Post-industrial Work Force: Lessons from the History of Waitress Unionism.” Industrial and Labor Relations, 44 (April 1991), pp. 419-436.

1 This title harks back to an earlier paper by one of the authors, Richard Prosten, Research Director, Industrial

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