DOCUMENT RESUME

ED 317 706 CE 054 122

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TITLE Impediments to Innovative Employee Relations Arrangements. Background Paper No. 37.
SPONS AGENCY Department of Labor, Washington, DC. Commission on Workforce Quality and Labor Market Efficiency.
PUB DATE Sep 89
CONTRACT 99-9-4779-75-033-04
NOTE 54p.; In "Investing in People: A Strategy to Address America's Workforce Crisis" (CE 054 080).
PUB TYPE Information Analyses (070)

EDRS PRICE MF01/PC03 Plus Postage.
DESCRIPTORS Adults; *Collective Bargaining; *Conflict Resolution; *Cooperation; Court Litigation; *Economic Change; Employees; Employers; Grievance Procedures; Labor Problems; *Labor Relations; Problem Solving; Strikes; Unions
IDENTIFIERS National Labor Relations Act

ABSTRACT

An examination of how employers and employees may be encouraged to adapt to changing economic conditions through innovation and cooperation rather than conflict indicates that the system of dispute resolution in the United States contains substantial disincentives to resolving disputes through negotiation and substantial incentives to resolving disputes through the exercise of legal rights. Because it operates on the basis of institutionalized conflict and adversarialism, the legal system must be reconsidered as the ultimate arbiter of such disputes. The premises of labor policy must also be changed. Government must state that negotiation, cooperation, and the private resolution of labor and employment disputes are the preferred methods of resolution and of adjusting to economic change. Among other changes, the National Labor Relations Act should be modified so that all employer decisions with a direct impact on employment would be subject to negotiation with the union; in situations where a facility must be closed and/or production shifted in order to remain competitive, the bargaining unit should be defined as the work done or products produced rather than as employees at a given location; and employers should be permitted to hire only temporary replacements for employees engaged in an economic strike. (27 references) (CML)

37. IMPEDIMENTS TO INNOVATIVE EMPLOYEE RELATIONS ARRANGEMENTS

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This project was funded under Purchase Order No. 99-9-4779-75-033-04 from the U.S. Department of Labor, Commission on Workforce Quality and Labor Market Efficiency. Opinions stated in this document do not necessarily represent the official position or policy of the U.S. Department of Labor, Commission on Workforce Quality and Labor Market Efficiency.

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INTRODUCTION

The widespread structural economic changes experienced by the United States since the late 1970's have had a marked impact on employee relations in this country (Block and McLennan, 1985; Kochan, Katz, and McKersie, 1986; Gershenfeld, 1987; Block, 1988). In attempting to a adapt to a newly competitive economic environment characterized by world-wide competition and deregulation, firms turned to their employee relations systems as important vehicles for making the adjustments that would permit them to survive. In many cases this meant attempting to develop innovative and cooperative employee relations arrangements. In other cases, however, it meant engaging in large scale layoffs and other disputes with employees in an attempt to reduce labor costs. The conflict that resulted in these latter situations had severe impacts on employees and communities (Bluestone and Harrison, 1982).

Given the high social costs associated with economic adjustment through worker-management conflict, policy makers at the Federal (primarily the U.S. Department of Labor and Federal Mediation and Conciliation Service) and State levels began to inquire how employers

and employees may be encouraged to adapt to changing economic conditions through innovation and cooperation rather than conflict. One category of policy response has been to attempt to encourage managers and workers and their representatives to develop innovative ways of cooperating to reduce costs (Cleveland, 1987; Block, Kleiner, Roomkin, and Salsburg, 1987). A second category of public response has been to attempt to determine whether or not there are aspects of United States labor and employment policy that discourage innovation and cooperation, and, if so, explore whether there should be changes (U.S. Department of Labor, 1986).

The purpose of this paper is to extend this latter work. Our operating assumption in this analysis is that it is not appropriate for government to force the parties to an employment relationship to cooperate or innovate. It is appropriate however, for government policy to state that negotiation, innovation, and possibly, cooperation between labor and management is the preferred method of adjusting to economic change and resolving disputes. Accordingly, an appropriate role for government is to increase incentives for the parties to work together and decrease incentives for the parties to resolve conflicts through the exercise of legal rights.

This paper presents a set of policy recommendations in the unionized and nonunion sectors that would aid in moving government toward such a role. In the unionized sector, this paper recommends making changes in the National Labor Relations Act so that the incentive for employers to negotiate with unions would be increased, and the incentive to use legal conflict to obtain preferred outcomes decreased.

In the nonunion sector, this paper recommends that the government develop a policy of deferral to internal corporate complaint systems so that these systems would be somewhat insulated from legal challenge, thus encouraging employers to establish such systems.

A governmental labor policy that would discourage the use of conflict has at least two advantages. One has been already noted; the reduction in social costs associated with large scale layoffs and plant closings.[1] A second advantage would be through savings in the use of public judicial and administrative resources that are used when private labor and employment disputes are resolved through the exercise of legal rights. Decentralizing the dispute resolution process by encouraging these disputes to be settled by the affected parties using their own private mechanisms would aid in reducing the congestion in the legal system.

This paper will attempt to analyze the incentives of employers, workers, and unions to resolve differences through bilateral negotiations on the one hand - a necessary condition for innovation and cooperation, and through the exercise of legal rights, on the other - the antithesis of cooperation. Part II of the paper will develop a generalized framework for analyzing the decision to engage in bilateralism or legalism in an industrial relations system in which the law is the major vehicle for resolving conflicts. Part III will apply that framework to labor-management relations in the unionized sector and to employee relations in the nonunion sector. Part IV will present conclusions and policy recommendations.

FRAMEWORK

Modes of Dispute Resolution

For the purposes of this analysis, labor and employment conflict will be defined as occurring when an employer and an employee or many of its employees or a union find themselves in a dispute, disagreement, or a new divergence of interest because of changed conditions. When such a disagreement occurs, there are two broad categories of methods by which the dispute can be resolved. For the purposes of this analysis, they can be categorized as bilateral and unilateral. The bilateral method of resolution may be defined as occurring when the parties negotiate to resolve the matter. The key characteristic of bilateralism is that it involves the effort of both parties to reach an agreement. The employer, on one hand and the employee, or employees, or union, on the other, must be willing to agree and possibly modify their original positions. The preferred result is a new agreement that ends the dispute.[2]

Bilateralism is a necessary condition for innovation and cooperation, as it involves the parties dealing directly with each other. While bilateralism in and of itself does not guarantee that innovation and cooperation will occur, innovation and cooperation cannot result when bilateralism is absent. For the remainder of the paper, the terms "bilateralism," "negotiations," and "working together" will be used interchangeably.

The second category of resolution methods may be defined as unilateralism. In unilateralism, the matter is resolved through one party exercising its legal rights and using the legal system to impose

its will on the other party. This will be done either directly, through having the matter resolved through an administrative agency and/or the courts, or indirectly, through one side conceding to the other. This concession is based on a recognition by the conceding party that the other party has the law on its side and that litigation would be futile if it occurred.[3] For the remainder of this paper, the terms "unilateralism," "legalism," and the "exercise of legal rights" will be used interchangeably.

The Determinants of the Method of Dispute Resolution

The previous section pointed out that disputes or disagreements between employers and their employees/unions or individual employees can be resolved by negotiation or legalism. Most important for the purposes of this paper is to develop a framework to understand the factors that go into determining which dispute resolution method is adopted.

What determines the choice of dispute resolution mechanism? Each party will calculate, to the extent possible, the expected benefits associated with bilateralism or legalism, net of the costs of using each method. If the expected net benefits from negotiations exceed the expected net benefits from legalism for the party, the party will be willing to settle the dispute through negotiation. Conversely, if the expected net benefits from use of the legal system exceed the expected net benefits from negotiations, the party will prefer to settle the dispute through use of the legal system.

It is important to realize that the employer and the employee/ employees/union each make a separate benefit calculus. Working together

is, by definition, a joint activity. For it to occur requires each party to determine separately, based on its own individual calculus, that the benefits from working with the other party exceed the benefits from legalism. Only if both parties determine separately that the net benefits from working together exceed the net benefits from legalism will the parties negotiate.

Conversely, if only one side prefers legalism, the dispute will be settled in the legal system regardless of the calculus of the other side. This is because bringing a dispute into the legal system requires only unilateral action. Moreover, the principle of access to the legal system to have rights vindicated means that a party pursuing a legal outcome will have its voice heard. Indeed, because the legal system operates with the force of law, once it is invoked, or its invocation is threatened, it dominates the dispute resolution process and takes precedence over any informal processes that one party or the other may prefer. To put it another way, if one party prefers the use of the legal system and invokes it, there is no way for the other party, on its own, to move the dispute out of the legal system and toward more informal, bilateral cooperative methods of dispute resolution.

IMPACT OF THE LEGAL SYSTEM ON THE RELATIVE BENEFITS OF NEGOTIATION AND LEGALISM

The previous section of the paper developed a highly generalized framework for analyzing the choice of using negotiation or legalism as a means of settling disputes. This part of the paper will place this framework in the context of important disputes in the employment

relationship. The first section will discuss the choice in employment relationships that are unionized. The second section will examine the choice in nonunion employment relationships.

The Choice of Dispute Resolution Procedures in the Unionized Sector

Of the two sectors, union and nonunion, the former has the more developed set of legal rules. This is because unionization is covered by one law - the National Labor Relations Act, as amended (NLRA). In addition, this law is administered by a single agency - the National Labor Relations Board (NLRB). This section of the paper will demonstrate how important legal doctrines affect the calculus of choice of dispute settlement procedures that can arise in common situations in a collective bargaining relationship.

Prior to addressing these issues, it is important to provide the reader with the basic conceptual underpinnings that guide this section of the paper. In our view, the willingness of unions and employers to recognize each other's institutional legitimacy is a necessary condition for innovation and cooperation in labor-management relations to occur. For the union, this requires a recognition that the employer's long-term viability is essential for the continued receipt and improvement of wages and working conditions. For the employer, it requires acceptance of the union's role as the collective bargaining representative of its employees and a commitment to avoid conduct which would interfere with or undermine the union's status as a representative of the workers. As

will be seen, the policy recommendations in this portion of the paper depend on the acceptance of this principle.

The Mandatory-Permissive Distinction and Employer Decisions that Affect Employment

The NLRA has been interpreted to require bargaining only over terms and conditions of employment, issues that have been defined as mandatory under the NLRA. Issues other than terms or conditions of employment have been defined as permissive, with no obligation to bargain. Changes in the nature and operation of the business that are not related solely or primarily to labor cost considerations (matters that can be addressed through the collective bargaining process) are considered permissive. Thus, there is no requirement that the employer negotiate with a union over the decision to make these changes, even if employment would be affected by the decision.[4]

It is rare that labor costs are the sole reason why a facility might be viewed by an employer as noncompetitive. A judgement such as this is generally based on such factors as wages and labor costs, the skills and training of the workforce, the age and layout of the building, the stock of capital equipment, the employer's assessment of the product market, changes in the production process, etc. In such situations, the employer has no obligation to bargain with the union over the decision to close, although it must bargain with the union over the effects of the decision already made.

In situations like this, which might be thought of as just the type that could benefit from negotiations leading to possible innovation

and cooperation, the law encourages employer unilateral action wherein the employer exercises its legal rights to simply close the facility and move elsewhere. This way it can obtain everything it believes it needs without negotiating with the union, thereby eliminating any possibility for cooperation and innovation. Thus, in situations involving a potential plant closing, there are substantial benefits perceived by the employer associated with legalism. Even if the union were willing to negotiate and work with the employer to develop cooperative and innovative arrangements, such cooperation and innovation is not likely to occur.

In view of the foregoing, it is clear that the mandatory-permissive distinction provides a disincentive for the parties to resolve disputes through negotiation and an incentive to resolve disputes on the basis of legal rights. If the employer is successful in closing the facility without negotiating with the union, the (social) costs are borne by the employees, the community, and the taxpayers rather than the employer, who benefits from the closing.[5]

It is possible, however, that there will be a legal challenge by the union, as the importance of labor costs in the decision is likely to be a matter of disagreement. Thus, there is a substantial likelihood of resort to the legal system with the associated use of public resources to resolve the dispute. Once the employer asserts that it will close the plant on the basis of nonlabor, business considerations, the union has little reason to eschew an unfair labor practice charge under Section 8(a)(5) of the NLRA, as the employees will likely lose their jobs in any event. At the very least, public (NLRB) resources will be

used by a regional office investigation of the charge. If the charge is found to have merit, even more legal resources will be used through a hearing before an administrative law judge (ALJ), an ALJ recommendation, a Board decision, a possible Court of Appeals decision, and a possible Supreme Court response to a request for review. In other words, there is the possibility of a large investment of public resources in resolving this essentially private dispute, no matter what the outcome.

Policy Recommendations

It is clear that the existence of the mandatory-permissive distinction results in a substantial incentive for the employer to exercise its legal rights and unilaterally close a plant for economic reasons. Conversely, there is a disincentive for the employer to engage in negotiations with the union over matters of plant closing for economic reasons. A similar calculus attends other employer decisions that affect employment, such as a partial closing or subcontracting for reasons other than labor costs. The results are the imposition of social costs on the community and the use of public resources to resolve what is essentially a private matter between an employer and the union.

Accordingly, we recommend that the mandatory-permissive distinction under Sections 8(a)(5) and 8(d) of the NLRA be eliminated, and that bargaining be required over all issues that affect employment. The only exceptions would be those issues that are illegal and those that go to the internal governance of each organization (i.e., selection of corporate management and Board of Directors, election of union officers, etc.). This would severely reduce the opportunity for the

dispute to be resolved on the basis of the legal rights of the employer and maximize the probability that the matter would be resolved through negotiation and the private collective bargaining mechanism, thus reducing the expected social costs of the dispute. As there would be little legal uncertainty associated with the bargaining obligation when an employer decision affects employment, there would also be fewer legal challenges under Section 8(a)(5) associated with plant closings or employment reductions. The major issue in such decisions, the importance of labor costs in the decision, would no longer be relevant.[6]

Eliminating the mandatory-permissive distinction along the lines proposed here would privatize the settlement of the dispute, increasing the probability of a negotiated settlement, decreasing the expected social costs associated the decision, and decreasing the expected amount of public resources going to resolve the dispute. It is acknowledged that elimination of the mandatory-permissive distinction for employer decisions directly affecting employment will result in a decrease in the legal rights of employers vis-a-vis unions. But the disadvantage to employers is not as great as might be believed on a cursory analysis. A recommendation that the scope of bargaining be expanded does not mean that the obligations under Section 8(d) are increased. The obligation to bargain carries with it no obligation to agree with the proposals of the other side.

Even considering the reduction in employer prerogatives, it is argued that the social benefits to such a legal change in terms of the reduction in labor conflict, the increased probability of a privately negotiated settlements, and a reduction in the use of legal resources

and legal congestion offset any additional private costs to employers. More fundamentally, however, it is also argued that if policy-makers wish to encourage labor-management negotiation and the possibility of innovation and cooperation, bargaining must be required over issues affecting the job status of workers.

Unionization at the "New Facility"

The previous discussion examined only the factors associated with the decision to work with the union at or to leave the original site. It did not examine what might happen at the site to which production might be moved. If production at the new site entailed few costs savings as compared to production at the old site, the incentive to cooperate at the old site would be enhanced. Conversely, the greater the potential savings at the new site, the greater the benefits associated with legalism.

If the employer is able to unilaterally determine its labor cost structure at the new site, this will encourage the employer to shift production because the certainty of the cost reduction is increased. This is more likely to occur if the facility to which production is shifted is nonunion and will remain nonunion over time. Thus, the greater the probability of preventing union organization at the new site, the greater the relative benefits from legalism vis-a-vis negotiation at the old site.

As the law of union organizing has evolved over the last forty years, there has been a consistent deference to employer interests vis-a-vis union interests that has made it increasingly difficult for unions

to organize. The employer has virtually unlimited workday access to its employees, and may distribute whatever information it deems appropriate. The union has almost no right of access to the premises, which means that it is limited to meetings and home visits, both of which are voluntary. Although employees may discuss unionization, the information to which they are permitted access may be circumscribed by the employer's good faith business assertions of a need for confidentiality (Block and Wolkinson, 1986; Block, Wolkinson, and Kuhn, 1988).

Through these advantages, employers are able to resist union organizational drives. This phenomenon, combined with the employer's legal right to unilaterally close facilities, provides the firm contemplating closure and/or a transfer of operations with the incentive to act without negotiating with the union. While the union may desire to cooperate and bargain with the employer over appropriate changes in terms and conditions of employment at the old site, the benefits to the employer of negotiation and possible cooperation at the old site as compared to unilateral conduct premised on the assertion of legal rights seem to be quite small. In view of the foregoing, it is clear that the high probability of avoiding unionization at a new facility decreases the probability that the employer will negotiate with the union at the old facility, augmenting the negative impact on negotiations of the mandatory-permissive distinction.

Policy Recommendations

The previous discussion indicates that the evolution of the law on the scope of bargaining and the law of union organizing have given

employers both the legal rights and the economic incentive to avoid negotiating with the union at a facility that may close. Even if the mandatory-permissive distinction were eliminated, as proposed above, and negotiations occurred over the plant closing, the ability of the employer to avoid unionization at the new facility would reduce the incentive of the employer to come to an agreement with the union at the old facility. Thus, while elimination of the mandatory-permissive distinction would provide the union the opportunity to negotiate with the employer over the closing, because the employer has no obligation to agree with the union, the probability is still quite high that the facility would be closed even after negotiations. This is because the chances are still high that the employer will perceive that it has greater flexibility and lower costs of production at the new (presumably nonunion) facility even if the union agrees to make concessions. Thus, the expected social costs associated with the plant closing, while less than in the presence of the mandatory-permissive distinction, are still quite high.

In order to further reduce the social costs of the plant closing and increase the probability that the costs of the closing are privatized, it is recommended that the definition of the bargaining unit be altered in cases involving a partial or complete facility closing in which production will be shifted to a newly established facility. In such situations, the bargaining unit should encompass the work done by a unit of employees or the products produced by a unit of employees and not be limited to workers employed at a geographic location.[7] Consistent with this, we therefore recommend that a principle analogous

to that of bargaining unit accretion is applied, and that there be an initial presumption that the union at the "old facility" is the bargaining representative for the employees at the "new facility."[8]

This policy would have several advantages from the point of view of encouraging dispute resolution by chose affected and minimizing the social costs of the employer's business decisions. First, it would provide further encouragement for the employer to negotiate with the union at the old facility in order to resolve the competitiveness problem. To the extent that the employer's unwillingness to come to an agreement and its interest in moving is driven in part by its desire to avoid the unionized workforce, a change in the definition of the bargaining unit as proposed would reduce the possibility for its decision to actually effectuate this desire. If this results in more intensive negotiations at the old site that result in the maintenance of production there, the social costs of the closing are reduced.

Even if the negotiations are unsuccessful in maintaining production at the old plant, the union's enhanced bargaining rights would increase the probability that the employees at the old plant would have opportunities to fill the positions at the new plant. Such an outcome would reduce the social costs of the closing by reducing the number of displaced workers that must be accommodated by the community. It would also mean that more of the costs of the transfer of production (i.e., moving expenses, costs associated with the inconvenience) than otherwise would be borne by the company, employees, and union that are most affected.

A concept of the bargaining unit such as is outlined here in combination with the proposed modification of the mandatory-permissive distinction would not prevent the employer from closing a facility or shifting production. Under this proposal, however, the decision would be driven primarily by nonlabor factors such as plant layout, geographic proximity to markets, capital equipment, etc. Under this proposal, the current employees would be given the option of working in the new facility.[9]

It is also important to point out that a bargaining unit proposal such as this does not mean that the union will necessarily represent the employees at the new facility over the long run. Union representation at the new facility would depend on such factors as the number of incumbent employees transferring to the new facility, the number of new hires at the new facility, and whether the old facility is part of a multi-plant bargaining unit. If the employer has a good faith doubt that the complement of employees at the new facility wishes to be represented by the union at the old facility, it has the right to have this doubt tested through regular NLRB procedures.

Finally, it should be noted that the type of dispute discussed in the last two subsections is at the cutting edge of adjustment to competitiveness. This scenario, repeated over and over again in plants around the country, is a common method by which corporations have adjusted to structural economic change and new competition in product markets. This is not to say that in every case in which wages and benefits are perceived as high and the capital stock is uncompetitive, the employer will close the plant and shift production to a nonunion

incentive to reach an agreement with the union is reduced. If the employer is able or appears able to produce with permanent replacements, the union has no choice but to accept the employer's final pre-impasse proposal whether or not the replacements are actually hired, or whether or not the union actually went out on strike, since if the employer is successful in hiring permanent replacements it is unlikely that the employees will ever be reinstated. The existence of the legal right of the employer to permanently replace strikers and the possibility that it would be exercised caused the union to settle on the employer's terms. Whatever the outcome, replacement or union acquiescence, the possibility of negotiation between the employer and the union leading to labor management cooperation and innovation is decreased.

In this example, which we believe is not atypical, the legal doctrine involving bargaining weapons discourages cooperation by providing the employer with a disincentive to cooperate and an incentive to engage in legal conflict. Thus, the potential for innovation and cooperation in the relationship is reduced.

Policy Recommendations

Although the social costs of permanently replacing strikers are not nearly so great as the social costs associated with the closing of a facility,[12] as noted, the right to permanently replace strikers may lead to more labor conflict than would otherwise occur, as the employer has a means of moving toward nonunion status. This result is inconsistent with the rationale for permitting the employer to hire permanent replacements, with is the maintenance of production during a strike.

facility. Clearly, however, the system encourages legalism rather than cooperation; therefore, it is not surprising that this scenario is common.[10]

Right of Permanent Replacement of Striking Employees

The previous discussion involves crucial but nonrecurring situations in the life of a collective bargaining relationship. Equally important is the situation associated with regular collective bargaining negotiations, especially at impasse. At impasse, the parties are permitted to use their legal bargaining weapons. The employer may implement its final preimpasse proposal. The union may engage in an economic strike and the employer may lock out. If the union engages in an economic strike, the employer may hire permanent replacements for the striking employees. If an employer chooses to permanently replace striking employees, striking employees must be given the option of returning to their positions at any time until they are replaced. Although strikers who are permanently replaced remain on a preferential hiring list indefinitely, there is no guarantee that they will ever be reinstated. The probability of reinstatement depends solely on the expansion of the employer's workforce.[11]

The legal right to hire permanent replacements provides the employer with the option of considering continuing production with employees who are willing to work for the employer's last preimpasse proposal and who might not wish to be represented by a union. To the extent that the employer believes it can be successful in hiring permanent replacements through exercise of its legal rights, its

Accordingly, we propose that the NLRA be amended to permit employers to hire only temporary replacements during an economic strike. This would permit the employer to attempt to exercise its right to maintain production during the strike while at the same time reducing, if not eliminating, the probability that the employer can use the strike to avoid coming to an agreement with the union. After the strike ends, the employer would be required to reinstate the strikers with the option of placing the temporary replacements on a preferential hiring list. Thus, the status of the union would be secure, and there would be an increased incentive on the part of the employer to engage in bilateralism with the union.

It may be argued that the proposal to permit the employer to hire only temporary replacements would make it more difficult to maintain production during the strike as compared to the situation when it may hire permanent replacements, thereby increasing the costs imposed on employers. Regarding the additional costs on employers, we are unaware of any evidence to support the notion that an employer must offer permanent tenure in order to guarantee for itself a sufficient number of workers to maintain production during a strike. Furthermore, where labor unions are strong and the supply of labor low, it is unlikely that employers will be able to hire either permanent or temporary workers. Conversely, where the supply of labor is plentiful, there is no necessary reason why an offer of job permanency is necessary to attract labor.

It should be also noted that employers continue to have a set of tools that would permit them to operate, or at least to service

customers, during a strike. In addition to hiring temporary replacements, management may assign nonbargaining unit personnel to do the work and may assign work to another facility or subsidiary. It may also stockpile inventory prior to the strike in order to maintain customer service.

Although these weapons weaken the union's collective bargaining power by permitting the employer to maintain production and/or customer service during a strike, none of these weapons threatens the union's status as a collective bargaining representative, nor the jobs of the strikers. When these weapons are used, once the strike is over, the situation returns to the status quo in that the strikers return to work and the union continues to represent the employees.

Overall, in our judgement, the right of employers to permanently replace strikers is one of the major legal obstacles to labor-management innovation and cooperation. It is inconsistent with the mutual respect for institutional legitimacy that is necessary for cooperation to occur. It has the potential for destroying the union, the actor with whom public policy is supposedly attempting to encourage the employer to innovate. Thus, it is believed that any costs to employers resulting from a less potent arsenal of bargaining weapons is more than offset by the potential benefits associated with an increased probability of labor-management innovation and cooperation.

The Impact of the Law of Employer Domination and Assistance to Unions - Section 8(a)(2)

The impact of Section 8(a)(2) of the NLRA on labor-management innovation and cooperation has been the subject of much debate over the last several years. This appears to be the result of at least two factors. First, the precise wording of Section 8(a)(2) - that "(i)t shall be an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it" - would seem to suggest that, at the very least, Congress did not anticipate cooperative arrangements between unions and management and did not desire a close alignment between the two parties. It is well established, however, that the purpose of Section 8(a)(2) was to outlaw company unions - labor organizations established or supported by the company for the purpose of averting employee representation by an independent labor organization. Similarly, it was also meant to keep employers out of the determination as to which union should represent employees when more than one union was involved in the representation dispute.

The issue, then, appears to be basically one of intent and employer motivation. Is the employer's cooperation for the purpose of undermining the independence of the labor organization? The U.S. Department of Labor analysis of the cases under Section 8(a)(2) strongly suggests that the Board and the courts have been successful in determining the answer to these questions in most cases, generally finding a violation where there was unlawful intent and finding no violation in the absence of intent (U.S. Department of Labor, 1986).

Thus, Section 8(a)(2) appears to be neutral on the matter of labor-management cooperation.

It is also clear, however, that the provision leaves room for legal debate and litigation, suggesting that if a union and employer wish to initiate labor-management cooperation, they run the risk of a legal challenge. To the extent that this results in greater costs to the parties and more uncertainty associated with labor-management cooperation than would otherwise exist, it reduces the expected benefits associated with such activity. Thus, the possibility of an 8(a)(2) charge could discourage labor-management cooperation.[13]

Policy Recommendations

Based on the foregoing, it appears that the potential legal uncertainty associated with labor-management cooperative arrangements may be a major impediment to labor-management innovation associated with Section 8(a)(2) of the NLRA. Accordingly, it is proposed that Section 8(a)(2) be amended to include an explicit statement that cooperative arrangements between unions/employees and employers shall not be considered as violations of the NLRA. This will reduce, if not eliminate the legal uncertainty of cooperative labor-management arrangements under Section 8(a)(2) of the NLRA.

The Grievance Procedure and Labor-Management Innovation.

A standard component of nearly all collective bargaining agreements is the adoption of grievance and arbitration procedures. In 1977, 98 percent of all U.S. contracts had grievance procedures, with 96

percent of these provisions culminating in final and binding arbitration by a mutually selected neutral arbitrator (U.S. Department of Labor, 1977). There is no indication that the spread of concession agreements in the early and mid-1980's resulted in an elimination of these procedures. As the grievance procedure, by its very nature, is a system of communication between employers, employees and union representatives it has the potential for being a vehicle that encourages workplace cooperation and innovation.

The availability of the grievance procedure and arbitration as a means of resolving disputes has been recognized by the NLRB in its policy of deferring unfair labor practice charges to the grievance adjudication process. This policy was first promulgated in Spielberg Manufacturing Co.,[14] where the NLRB ruled that it would defer to an existing arbitration award where the subject matter was the same as the unfair labor practice being charged, provided three conditions were met: 1) that the arbitration proceedings were fair and regular; 2) that all parties had agreed to be bound by the arbitration award; and 3) that the arbitration decision was not repugnant to the purposes and policies of the Act.

Sixteen years later, in Collyer Insulated Wire,[15] the NLRB significantly expanded its policy of deferral by requiring unions and employers to utilize their existing grievance arbitration procedure to resolve unfair labor practices that also raise questions of contract interpretation. The NLRB's plurality decision rested on the following assumptions: 1) that the courts have recognized a national policy of encouraging dispute resolutions through the grievance arbitration

machinery; 2) that such a policy is endorsed by Section 203(d) of the Taft-Hartley Act which fosters the resolution of disputes through the "method agreed upon by the parties;" and 3) that disputes which, at their core, raised issues of contract interpretation, are better resolved by arbitrators who have developed special skills in resolving such matters.

It is clear that the Spielberg (post-arbitral deference) and Collyer (pre-arbitral deference) doctrines provide a mechanism by which the parties can resolve disputes on their own, thus creating an incentive to labor management cooperation. If one wanted to generalize, one could note that the Spielberg and Collyer doctrines involve the principle of deferral from the legal system to a private dispute settlement mechanism, under certain conditions. The major condition underlying the principle of deferral is that the private mechanism not unduly compromise the legal rights that the administrative agency (the NLRB) is charged with enforcing.

In terms of the model discussed above, the Spielberg and Collyer policies change the legalism-cooperation cost-benefit analysis of the parties by limiting, if not eliminating, the option of resolving the dispute through legal means. In essence, the NLRB is encouraging the parties to eschew the legal system in favor of the dispute resolution system that they created. It is one of those rare situations in the law governing the employment relationship - union or nonunion - in which the legal system is encouraging parties to resolve disputes in an nonlegalistic, nonadversarial manner.

The deferral principle in Collyer and Spielberg is likely to have its greatest impact in encouraging cooperation if the NLRB and the Courts, the arms of the adversarial system, truly give it deference. The narrower the scope of review, and the less likely either party is to generate a better decision from the Court and/or Board than from the grievance (and arbitration) procedure the more important the bilateral process of the grievance procedure in resolving the dispute.[16]

A narrow scope of review is most likely to be successful if there is a strong probability that the private system of dispute resolution generates results that are compatible, on an overall basis, with the results that would be generated by the administrative process. The empirical evidence that exists suggests that this has generally, but not totally, been the case under Collyer. The evidence suggests that regional offices of the NLRB only infrequently reject arbitration awards as incompatible with the Spielberg criteria, suggesting that the charging party's rights have been adequately safeguarded in arbitration. In the Detroit Regional Office over an 18-month period, 17 deferral cases culminated in arbitration awards. Of these 17, seven resulted in appeals to the Regional office. The Regional office issued a complaint in only two cases (Wolkinson, 1985). Similarly, a study of the Boston and Philadelphia Regional offices indicated a rejection of arbitration awards in only 9.5 of 103 cases that arose between January 1983 and June 1985 (Greenfield, 1988).

Spielberg reviews are limited to appeals of arbitration awards. A more comprehensive approach to evaluate the impact of Collyer on the parties' statutory rights compared the remedies unions achieved through

grievance settlement or arbitration awards in deferred unfair labor practice cases considered meritorious by the Detroit Regional Office, with the remedies that same regional office would most likely have implemented in the absence of deferral. The data indicated that deferral most often produced statutory compatible decisions in 8(a)(3) (discrimination in employment) cases that were either settled within the grievance machinery or that were resolved on the bases of an arbitration award. Statutorily compatible settlements in 8(a)(3) cases were attributed to employer efforts to immunize themselves from further NLRB interventions, by the employer's concern that labor/management harmony might be threatened by the friction and antagonisms typically generated by continuous litigation, and the expansive reach of the just cause provision in the collective bargaining agreements (Wolkinson, 1985).

At the same time, the study suggested that the deferral of Section 8(a)(5) (refusal to bargain charges) may frequently result in decisions not compatible with statutory objectives, particularly in cases settled short of arbitration. Thus, no relief was obtained in a majority of refusal to bargain cases settled short of arbitration, although in these same cases, the regional office had found that violations had occurred. This outcome may reflect a strong reluctance of employers to reverse decisions when, in so doing, they would incur significant economic costs that typically arise when management reverses unilateral decisions concerning subcontracting, removal of machinery, termination of shifts, and elimination of benefits. Also in some of these cases arbitrators applied contract rules of construction that conflicted with statutory

policy. Still, however, in half of the refusal to bargain cases studied deferral outcomes did produce results compatible with Board policy.

The foregoing discussion indicates that a policy of deferral to an internal dispute resolution system, with appropriate judicial and administrative oversight, can result in outcomes that are compatible with a statutory scheme.[17] This matter will be addressed further in policy recommendations in the concluding section of the paper.

The Arbitration Procedure: A Caveat

Although the grievance procedure may provide an alternative to the formal legal system as means of resolving disputes and thereby encourage cooperation innovation, informal resolution of labor disputes within the grievance procedure is not automatic. The grievance procedure, especially its arbitration component, can be extremely legalistic, and contain many of the trappings of a court of law. Indeed, it has been shown that when one of the parties to arbitration uses an attorney and the other party does not, the party that uses an attorney is more likely to have a superior outcome, from its point of view, other things equal (Block and Stieber, 1987).

Employers, either because of superior resources, inclination, or both, use attorneys in arbitration to a greater extent than unions. If it is assumed that attorneys, generally, are more likely to be legalistic or adversarial than nonattorneys, then it appears that employers benefit from making the grievance and arbitration procedure as legalistic as possible. If employers, who use attorneys, believe more often than unions that they can obtain a preferred outcome in the

grievance procedure by going to arbitration with attorney representation, then there will be a disincentive in the system to resolve cases in the more cooperative mode of the prearbitral steps of the grievance procedure. If this occurs, the Collyer and Spielberg doctrines may only be partially successful in encouraging cooperation and innovation. They may keep cases from going before the formal legal system embodied by the NLRB; but cases may instead turn up in the informal, but still legalistic system of arbitration.[18]

The Choice of Dispute Resolution Procedures in the Nonunion Sector

Over the last two decades there has been reported a significant increase in the use by non-union firms of alternative dispute procedures to resolve employee complaints and grievances. One study reported that a majority of large firms have established some type of grievance mechanism for their unorganized workers (Freedman, 1979).

What accounts for the increase in the number of firms utilizing a non-union grievance procedure? Conference Board reports have suggested that management's primary objective has been to maintain the non-union status of their workforce (Freedman, 1985). While not discounting this phenomenon as a motivating factor, it is no less true that other central concerns underlie this development. The period of the 1970's and 1980's have witnessed the rapid decline in many jurisdictions of the employment-at-will doctrine. This decline is further reflected in the explosion of wrongful discharge suits in both state and federal courts.[19] To ward off such litigation, many firms have adopted

alternative systems to resolve worker complaints in this area. Some firms, however, may also establish systems of alternative resolution as a part of a human resource approach to supervision which will increase the productivity of employees.[20]

Unlike the unionized sector, which has well established formal grievance procedures, nonunion procedures exhibit wide variation in formality. They include unstructured open-door policies, ombudsmen, systems of conciliation, peer review, and formal grievance mechanisms with and without arbitration as the final step. For the purposes of this study, the more formal system are of most interest, as they provide the most logical structure for an alternative to the use of legal remedies.

Legal Barriers to the Establishment of Nonunion Grievance Mechanisms

Section 2(5) of the National Labor Relations Act defines the term "labor organization" as:

> Any organization of any kind or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

In early cases, the NLRB held that the term "dealing" included various types of employee committees which discuss grievances and working conditions, although their deliberations fell short of actual bargaining. The Supreme Court in Cabot Carbon[21] confirmed the Board's policy by ruling that employee committees established to discuss grievances and working conditions constituted a labor organization and

was therefore, subject to the legal restraints of Section 8(a)(2) prohibiting company-dominated unions. The Cabot Carbon precedent raised the question of whether or not grievance committees in non-union firms, composed of management and employees for the exclusive purpose of adjudicating grievances are labor organizations. If such a committee is, and the Board finds that it was controlled by management, the NLRB would then order the firm to disestablish it. As a result, the grievance committee would be directed to cease functioning.

Based on subsequent NLRB cases, it appears that joint grievance committees established in non-union settings are outside the scope of the statute. Thus, in the 1970s, the NLRB established an exception to the definition of "labor organization" found in Section 2(5). In several cases, the NLRB suggested that where management delegated to a group of workers' representatives authority previously or traditionally considered to be a management prerogative, such groups are not "labor organizations." For example, in Sparks Nuggett,[22] the NLRB found that an employees' council which was composed of two representatives of management and one designated employee that handled worker grievances, was not a labor organization. According to the Board, its function was strictly the adjudicatory - one of resolving employee grievances. It did not deal or interact with management on any other issue. On the basis of this decision and others, it would appear then that joint employer-employee grievance committees are not likely to fall within the scope of Section 2(5) if limited to hearing and resolving individual grievances.

Placed in the context of our earlier model, although non-union dispute resolution systems are promulgated by the employer, they facilitate employee-management discussion and negotiation over employment issues and grievances. They create a vehicle for resolving employment disputes within the firm and without resort to the legal system. As in grievance negotiations in unionized firms, these discussions may lead to agreements satisfactory to each party. Where such outcomes occur, the process of employee-management cooperation is certainly encouraged. At the same time, these informal dispute settlement mechanisms lack whatever protections the NLRA provides to the grievance and arbitration procedures under collective agreements via the Spielberg and Collyer doctrines.

Concerning non-union complaint mechanisms, two central issues remain open. (1) Must these procedures be used?; and (2) if they are used, what is the likelihood of a successful challenge in court to a decision made by one of these procedures? Regarding the first question, if there is no requirement that the procedure be used, then the procedure loses much of its force and legitimacy as a dispute resolution mechanism. Indeed, uncertainty involving this issue means that employees may be strategic in deciding when to use it, bringing complaints to the system when they believe their complaint will be upheld, but avoiding the system when they believe the system will find the complaint without merit. While an employer may require an employee to exhaust these procedures, it is unclear whether such an exhaustion requirement would be successful in court. Presumably, if the procedure were part of a contractual relationship between the employer and the

employee, an exhaustion requirement might be upheld. To date, there is at least one court that has required exhaustion of internal non-union grievance procedures that have been set forth in an employee handbook.[23] On the other hand, claims rooted either in public policy or in statues will not likely be held subject to an exhaustion principle.[24] In what might be a model for other states, Montana's wrongful discharge statute requires that individuals exhaust "written internal procedures" before filing a wrongful discharge suit (Westin, 1988).

The second question involves the matter of whether courts will view the results of such a nonunion internal complaint procedure to be sufficiently credible as to preclude making an independent judgement on the employee's complaint. This issue is analogous to the deferral issue in arbitration that has been associated with the Spielberg and Collyer cases.[25] Underlying that issue is the fundamental question of whether a privately negotiated dispute resolution procedure can be a substitute for the decision of a governmental administrative agency and the courts in protecting the statutory and contractual rights of employees. In that sense, the deferral issue regarding grievance and arbitration procedures is analogous to the preclusion issue associated with nonunion employee complaint procedures. As discussed, research on the application of the Collyer doctrine has shown that these private procedures can generate results that are consistent with the outcomes of the legal system. In view of this research on deferral to arbitration, a relevant question to ask is whether or not deferral to these nonunion complaint procedures can result in similarly consistency between internal outcomes and legal outcomes?

To be sure, there are differences in the rati nale underlying deferral to grievance and arbitration procedures and some kind of deferral to nonunion complaint procedures. The grievance and arbitration procedures in unionized setting are negotiated between an employer and the collective bargaining representative of its employees, a relationship that is created and usually certified by the NLRB pursuant to its authority under the NLRA. Thus, it is logical that the grievance procedure can be viewed as a reasonable substitute for NLRB or judicial decisionmaking, especially given the congressional recognition of the importance of dispute resolution procedures established by the parties.[26] As a result of this, the scope of review of the NLRB under Spielberg and Collyer is narrow. It is limited to assuring that the grievance procedures were fair, regular, and timely and that the decision was not repugnant to the NLRA.

Policy Recommendations

In view of the advantages in terms of the conservation of judicial resources, the possibility for firm innovation, and the overall success of the Collyer and Spielberg doctrines in generating outcomes compatible with the NLRA, it is recommended that the principle of deferral to internal nonunion complaint procedures be established. Because there is no statutory basis for the establishment of these procedures, a greater degree of judicial oversight than that used for grievance and arbitration procedures under Collyer and Spielberg is appropriate. A useful standard of review might be based on that suggested by commentators who have reviewed the few judicial decisions available on

this issue. They have concluded that a decision reached in an internal complaint procedure may be given preclusive weight where the following conditions have been satisfied: 1) the decision maker was impartial and the individual was afforded due process; 2) the decision reached was based on a full record; 3) and the employee implicitly or expressly agreed to be bound by the results of the dispute settlement mechanism (McGill, 1988; Westin, 1988). A fourth criterion should also be considered; that the decision be consistent with public policy in the state in which the complaint arose.

We recommend that states and possibly the federal government enact legislation that would implement a policy of deferral of cases not otherwise governed by federal statutes (i.e., Title VII of the Civil Rights Act, Occupational Safety Health Act, etc.) to an internal corporate complaint procedure when one exists that has the characteristics outlined above. The deferral procedure could be as follows: when a suit is filed, the employer could request that the matter be remanded back to the internal procedure because the procedure, on its face, meets the standards of impartiality and employee consent. If the judge finds that the procedure does meet these standards, deferral would occur. A review of the decision would be based on an analysis of whether the employee was afforded due process, whether the decision was based on a full record, considered as a whole, and whether the decision was consistent with public policy or common law in the state. If one or more of these three criteria were not met, the case would be heard through the normal judicial procedures.

Enacting a policy such as this has several advantages. First, it encourages employers to adopt fair, impartial, internal complaint mechanisms, thus increasing the probability of private resolution of the matter through negotiation. Second, there is also the possibility that judicial resources can be conserved. Finally, even if the court decides against affirming the decision of the internal complaint procedure, the record of the procedure used may aid the court in deciding the case.[27]

Based on the foregoing, we believe there are sound reasons for adopting a policy that defers employment disputes in nonunion firms to internal complaint procedures where those exist. With appropriate judicial oversight, we believe that it can have the same success in the nonunion sector that it has had in the unionized sector.

CONCLUSIONS AND POLICY RECOMMENDATIONS

It is clear that the system of dispute resolution associated with the employment relations system in the United States contains substantial disincentives to resolve disputes through negotiation, and substantial incentives to resolve disputes through the exercise of the legal rights. As negotiation is a necessary condition for cooperation and innovation in employee relations, a system that places a premium on legalism in the employment relationship is inconsistent with a policy of encouraging innovation.

Several legal doctrines discourage innovation. In the unionized sector, the mandatory-permissive distinction permits some employers to exclude from negotiations decisions on capital investment and corporate strategy that can have adverse effects on employee job security. The

law of union organizing creates a disincentive for some employers to negotiate with employees at a unionized plant if they are in a position to shift production to a nonunion plant. The right of employers to permanently replace striking employees may encourage some employers to engage in conflict with employees rather than working with employees, knowing that they may be able replace the unionized employees with employees who may work at inferior terms and conditions of employment and may not desire union representation.

There are also legal uncertainties associated with these programs that may impose costs on the parties who participate in them. The existence of the prohibition of employer assistance to labor organizations brings an element of legal uncertainty to cooperative arrangements, thus discouraging parties from initiating them and possible encouraging litigation.

In the nonunion sector, although many firms have adopted internal dispute resolution procedures, the legal status of the outcomes of these procedures is still an open question. The success of a suit challenging these procedures depends on the nature of the procedures and the jurisdiction in which the suit is brought. To the extent that an employee can use the legal system to overturn the results of these arrangements, employers will have less of an incentive to establish them.

Policy Recommendations

There are several policy implications that result from the analysis in this paper. But they are all grounded on one fundamental

premise - there must be a serious reconsideration of the legal system as the ultimate arbiter of disputes within the employment and labor relations system in the United States. The legal system operates on the basis of institutionalized conflict and adversarialism. Conflict and adversarialism are the very antithesis of innovation and cooperation. To the extent that the principles of the legal system dominate dispute resolution at the workplace, there is unlikely to be any major shift in employment relations away from an adversarial mode and to the more bilateral modes that will encourage negotiation, cooperation and labor-management innovation.

Consistent with this we believe that there must be a change in the premises of labor policy. Government must state, as part of the findings of any legislation, that negotiation, cooperation, and the private resolution of labor and employment disputes are the preferred methods of resolving such disputes and adjusting to economic change. Government policy should discourage the resolution of labor and employment disputes through the exercise of legal rights and the use of the legal system. Use of the legal system rather than negotiation usually means that scarce public resources are used to resolve these essentially private matters. Moreover, exercise of legal rights generally results in communities and taxpayers bearing the costs of the adjustment.

Acceptance of this premise implies a new way of thinking about labor-management relations. Rather than considering whether labor or management gains or loses power from any policy change, it is important to think in terms of whether or not the changes will encourage labor and

management in both the union and nonunion sector to resolve disputes on their own, thus encouraging negotiation and enhancing the probability for labor-management cooperation. Such a change in thinking is a necessary condition for any policy changes that will remove impediments to and encourage labor-management cooperation and innovation.

It must also be recognized that such a change will not be in the interest of employers who wish to retain their options vis-a-vis unions in the adversarial model. But such a view is fundamentally inconsistent with developing legislation and policy under the premise of encouraging cooperation and the private settlement of labor and employment disputes as the preferred method of dispute resolution. While it is clear that one cannot legislate cooperation between the labor and management or management willingness to provide employee due process on its own, one can put into place a legal system that encourages the parties to resolve their own disputes, makes it less advantageous for one party to resolve disputes through the legal system, and decreases the legal uncertainty associated with cooperative and innovative arrangements.

Specific Policy Recommendations

Specific policy recommendations have been outlined throughout the paper in the appropriate context. The recommendations will be repeated here with a very brief rationale. The reader should refer to the main body of the text for a more detailed explanation of the bases for these recommendations.

1. Modify the current mandatory-permissive distinction under the National Labor Relations Act so that all employer decisions with a direct impact on employment are subject to negotiation with the union. While admittedly reducing the scope of unilateral employer action, such a change will encourage employers and unions to resolve disputes around important issues such as plant closing through negotiation, thereby reducing the social costs of such decisions and the use of public legal resources to resolve these disputes.

2. In situations in which, after bargaining, it is clear that a facility must be closed and/or production shifted in order to remain competitive, define the bargaining unit as the work done or products produced rather than as employees at a geographic location. This would not only help ensure that the employer and the union made every attempt to maintain production at the old plant, it would also reduce the probability that the employer would shift production solely to avoid the union at the old facility. The employer would still reap all the nonlabor benefits of a new facility. A policy such as this would encourage innovative agreements such as that entered into by GM and the UAW for the Saturn plant in Tennessee. In that situation, current GM employees represented by the UAW were able to bid first on the Saturn jobs. Thus, the parties established an innovative way to develop a new production system and protect employee interests.

3. Permit employers to hire only temporary replacements for employees engaged in an economic strike. This will permit the employers to

continue production during a strike while maintaining the attachment between the union and the employer. It would also reduce the likelihood that a strike could be used to effectively terminate all the employees of the union and destroy the union.

4. Include an explicit statement in legislation that cooperative arrangements between unions/employees and employers shall not be considered as violations of the NLRA. This will reduce, if not eliminate the legal uncertainty under Section 8(a)(2) of the NLRA.

5. Establish the principle of deferral to internal complaint procedures in nonunion firms where such remedies exist. Possible standards might include the following; (a) the decision maker was impartial; (b) the employee was afforded due process; (c) the decision was based on a full record which included all points of view; (d) the employee had agreed to accept the results of the procedure; and (e) the decision was consistent with public policy in the state in which the complaint was brought. Such a principle would encourage nonunion employers to establish such procedures.

We believe that implementation of these policy recommendations would be a large step toward reducing the level of adversarialism in employment relations in the United States. To the extent this occurs, the probability for innovation in employee relations is greatly increased.

NOTES

1. The social costs associated with plant closings have already been acknowledged by policy makers by the enactment in 1988 of The Worker Adjustment and Retraining Notification Act which requires large firms to provide employees with sixty days notice for most plant closings.

2. For the purposes of this analysis, economic strike activity or a lockout in which work stops is considered bilateral activity. Although it is conflict in the traditional sense, it is a dispute resolution process in which both parties participate without the involvement of a third party that has not been called in by both sides. In essence, this kind of dispute is part and parcel of the traditional structure of industrial relations created by the National Labor Relations Act. See NLRB v. Insurance Agents International Union, 361 U.S. 477 (1960).

3. This discussion assumes that each party uses the legal system for its outcomes rather than for any benefits associated with using the procedure, per se.

4. See, for example, First National Maintenance Corporation v. NLRB, 42 U.S. 666 (1981) and Otis Elevator Company, 269 N.L.R.B. 891 (1964). See also, more generally, Donna Sockell, "The Scope of Mandatory-Permissive Bargaining: A Critique and a Proposal," Industrial and Labor Relations Review, Vol. 40, No. 1 (October 1986), pp. 19-34.

5. Bargaining over the effects of the plant closing, which is likely to address such issues as severance pay, transfer rights, retraining, etc., is not likely to cause a substantial reduction in the social costs of the closing, as the jobs are still gone. Moreover, in effects bargaining, as in any other bargaining, the employer has no obligation to agree to a union proposal, and union bargaining power is likely to be nonexistent at the time of a plant closing.

6. The increase in litigation and legal uncertainty associated with a subjective standard that is open to dispute was one of the major reasons that the Board used in determining that it would not regulate campaign tactics. See Midland National Life Insurance Company, 263 N.L.R.B. 127 (1982), and Shopping Kart Food Market 228 N.L.R.B. 1311 (1977).

7. For a comparable discussion involving production and nonproduction employees at Cummins Engine, see Peter Cappelli and Peter D. Sherer, "Spanning the Union/Nonunion Boundary," Industrial Relations, Vol. 28, No. 2 (Spring, 1989), pp. 206-26.

8. For a discussion of the principle of unit accretion under the NLRA, see for example, The Developing Labor Law, Second Edition, Volume I, Charles J. Morris, Editor-in-Chief (Washington, D.C. Bureau of National Affairs, 1983), pp. 369-71, 376-79 and The Developing Labor Law, Second Edition, Third Supplement, Stuart Linnick, Stephen D. Gordon, and Harold J. Datz, Editors-in-Chief (Washington, D.C. Bureau of National Affairs, 1988), p. 183.

9. This would permit the development of the type of innovative agreement negotiated by GM and the UAW for its Saturn plant in Tennessee. In that situation, GM decided to open a new facility and, along with the UAW, developed a system by which current UAW-represented employees could apply for jobs at the new plant.

10. The auto industry is an important example of an industry in which this did not occur. But the auto industry appears to be a situation in which access to suppliers plus an enormous investment in plant capacity required modernization of existing plant and locating many new facilities near those plants. Most industries are not under such constraints (Block and McLennan, 1985; Katz, 1985).

11. See NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938); American Shipbuilding Co. v. NLRB, 380 U.S. 300 (1965); NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967). If an employer chooses to permanently replace striking employees, those employees must be given the option of returning to work. Any employees who are permanently replaced remain on a preferential hiring list indefinitely. Permanently replaced employees may vote in a representation election.

12. Although the social costs may be less than in the situation of a plant closing, they may not be negligible. If the permanently replaced employees are older and less employable outside the firm than their replacements, they may have fewer labor market options than the employees who replaced them. To that extent their jobs search is more

likely to place a burden on the community than the job search of the permanent replacements.

13. This legal uncertainty would also increase the incentive to litigate, thus increasing the use of public legal resources.

14. 112 N.L.R.B. 1080 (1956).

15. 192 N.L.R.B. 837 (1981).

16. It is reasonable to believe that one of the reasons for the overwhelming success of arbitration as a means of resolving disputes arising under collective agreements is because Courts may overturn arbitration awards on only the narrowest of grounds; i.e., that the arbitrator has exceeded his or her authority, that the arbitration award does not draw its essence from the collective bargaining agreement, or that the award is contrary to public policy. A reviewing court may not substitute its judgement for the judgement of the arbitrator merely because the court disagrees with the arbitrator's interpretation of the agreement or the arbitrator's conclusions from the record. See United Steelworkers of America v. Enterprise Wheel and Car Corp., 80 S. Ct. 1358 (1960) and United Paperworkers International Union v. Misco, 108 S. Ct. 364 (1987).

17. For a rigorous critique of the Board's current guidelines for reviewing arbitration awards, see Patricia Greenfield "The NLRB's Deferral to Arbitration Awards Before and After Olin: An Empirical

Analysis", Industrial and Labor Relations Review, Vol. 42, No. 1 (October, 1988), pp. 34-49.

18. At the same time, it is likely that arbitration outcomes following deferral are less inimicable to workplace cooperation that the result of formal litigation that might arise, for example, in judicial suits over breach of contract claims. For both parties, arbitration represents a more expeditious and less costly avenue of dispute intervention. Thus, a one-day hearing typical in arbitration can be contrasted with the days, if not weeks, expended in preparing for and arguing a case before district and appellate courts. Furthermore, the decision reached by arbitration is much more likely to be accepted by the parties than a court decision. The arbitration outcome is a method of resolution that the parties themselves have anticipated and agreed to in the collective bargaining agreement. On the other hand, the court award is that issued by a political appointee and, if accepted, is normally agreed to not voluntarily but under compulsion and out of the parties' recognition that a failure to do so will lead to potential citation for contempt. Additionally, the arbitrator, unlike a judge, is selected by both parties for his/her expertise and integrity as a neutral. To the degree that the arbitrator's award is grounded in logic and faithful to the agreement it may be accepted, even by the losing party.

19. While there were less than 200 such cases filed annually in the 1970's, there currently exists over 20,000 such cases pending in state courts. Simultaneously, the number of EEO cases has remained

extraordinarily large with approximately 119,000 charges being filed at both state and federal levels in 1986 and 1987 (Westin and Feliu, 1988).

20. Some research supports the notion that grievance procedures in a firm can contribute to employee morale that might be reflected in lower rates of turnover and increased productivity (Spencer, 1982; Katz, Kochan, and Gobielle, 1983; Ichniowski, 1986).

21. 360 U.S. 203 (1959).

22. 230 N.L.R.B. 275 (1983).

23. Schnelting v. Coors Distributing Co., 729 S.W. 2d 12 (MO. App. 1987).

24. Title v Bloomfield School District 156 Mich. App. 52 1986; ..lexander v Gardner Denver Company 415 U.S. 361 (1976).

25. See, pp. 24-29, above, and associated endnotes.

26. Section 203(d) of the Labor-Management Relations Act states, in relevant part: "(f)inal adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

27. It is not coincidental that these are the same reasons that underlie Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act, under which the courts may require that union members who wish to file suit against their union under that statute first

exhaust internal union remedies not to exceed four months. See Detroy v. American Guild of Variety Artists, 286 F.2d 75 (CA 2, 1961), cert. den. 366 U.S. 929 (1961).

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