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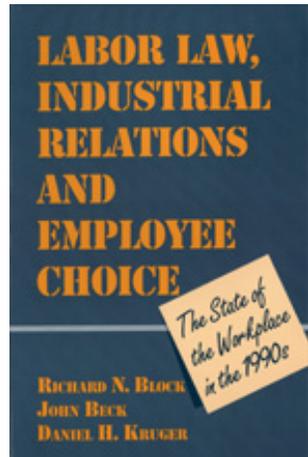
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## Introduction and Overview

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**Labor Law, Industrial Relations and Employee Choice: The State of the Workplace in the 1990s: Hearings of the Commission on the Future of Worker-Management Relations, 1993-94**

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## Introduction and Overview

The past two decades of industrial relations experience have had the cumulative effect of a widespread realization that discussion and debate over the nation's labor laws and their administration are needed. Concerns have been growing about the costs to society of labor conflict, and questions have been raised as to whether there is a role for labor legislation in encouraging labor-management cooperation in order to enhance the global competitiveness of U.S. firms.

In response to this accumulation of concerns, the Secretaries of Commerce and Labor in 1993 created the Commission on the Future of Worker-Management Relations, often referred to as the Dunlop Commission, as it was chaired by former U.S. Secretary of Labor John Dunlop. The task of the Commission was to investigate the current state of worker-management relations and labor law and make recommendations concerning changes that may be needed to improve productivity through increased worker-management cooperation and employee participation in the workplace.

A widely diverse set of experiences was presented as public testimony before the Commission in 1994. Representatives of labor, management, government, academia, and the general public presented a picture of considerable variation in current labor relations practice. The whole of this testimony, however, pointed to the need for a continued public discourse about labor law, and quite possibly, the need for fundamental change. Labor law, as it has been developed since the Wagner Act in 1935, has always been based on the concept of the parties—individual workers, unions, and management—making choices. The Dunlop Commission hearings pointed up a new range of choices being explored by workers and managers and the frustration of some of the traditional choices originally designed into the law.

We believe that the Dunlop Commission hearings recorded the dominant issues in industrial relations today, and that the testimony offers a unique opportunity to understand the state of labor-management relations in the United States in the 1990s. The purpose of this book is to capture the essence of the hearings and make it accessible to the industrial relations community, to policy makers, and to the general public.

### **Historical Background**

Union membership in the United States has shown great historical variation. Membership rose fairly steadily between 1897 and 1904, as the internal structure of the movement attained some stability with the advent of the American Federation of Labor. Strong business conditions also led to an increase in the power of union membership. Eventually, unionization reached a high of about 12 percent of the nonagricultural labor force in 1904, and remained at about 11 percent through 1916. World War I and its aftermath increased the rate to about 19 percent by 1921. Boom business conditions brought about by the war and government policy to encourage labor peace had much to do with the success of unions during this period (Block and Premack 1983; Troy 1965).

The 1920s were a decade of decline for unions due to the recession of 1920-1923, employer welfare capitalism in the middle 1920s, post-war government pressure on left-wing activities emanating from the Russian Revolution, and the onset of the depression. Unionization reached a post-World War I low point of 10.7 percent in 1930. The early New Deal legislation that provided some support for unionization was associated with a slight increase in the rate of unionization, to about 13.3 percent in 1935 (Block and Premack 1983; Troy 1965).

The passage of the Wagner Act in 1935 was clearly associated with a significant increase in unionization. Between 1935 and 1941, the unionization rate increased 10 points, to 23 percent of the labor force. Another significant increase was associated with World War II. By the end of the war, unionization had increased to about 30 percent of the labor force. During the war, the encouragement to unionization provided by the Wagner Act was augmented by the pro-collective bargain-

ing policies of the War Labor Board, designed to avoid strikes that would disrupt the war effort (Troy 1965; "Termination Report of the National War Labor Board" 1947; Taylor 1948; Witte 1946).

Small increases in unionization continued after the war through the early 1950s. The rate of unionization peaked at approximately 35 percent in 1955. Since then, unionization has steadily declined. In 1995, approximately 16.5 percent of the U.S. labor force was represented by unions. A somewhat deeper examination shows that this rate is propped up by the high rate of unionization (43.5 percent) in the public sector. Private sector unionization was at about 11.4 percent, comparable to the level of unionization in the mid-1920s, when there was no legislation in the United States protecting workers' rights to organize. The decline in unionization from 1955-1994 is unprecedented in the United States, and shows no signs of abating (Troy 1965; Meltz 1990; Chaison and Rose 1991; *Daily Labor Report* No. 28, 1992, pp. B-1 to B 5; U.S. Department of Labor 1996).

Indeed, the United States ranked 22 out of 24 OECD countries in the rate of unionization in 1988, with a unionization rate of 16.8 percent. Only Spain, at 16 percent, and France at 12.8 percent ranked below the United States in the OECD study. By contrast, major U.S. competitors such as Canada, Germany, and Japan had unionization rates of 34.6 percent, 33.8 percent, and 26.8 percent, respectively (OECD 1991).

As a result of this long-term decline in unionization, the United States is in one of those critical periods in its history when ferment in the industrial relations community suggests that it may be time to reexamine industrial relations institutions. The first such critical period was 1933-47. During this fifteen-year period, an economic depression and widespread strike activity resulted in the passage of the National Labor Relations (Wagner) Act, which was designed to create a system for peacefully determining whether employees wished to be represented by a union and to raise the standard of living of workers by allowing them to bargain collectively with their employer.

During that period, labor and management, with the intervention of the World War II War Labor Board, established many of the industrial relations mechanism and principles that are still in use. However, employers continued to advocate for changes in the Wagner Act that they contended would bring balance into the industrial relations system. This pressure, in combination with a rash of strikes in 1946,

resulted in the passage of the Taft-Hartley Act of 1947 over the veto of President Harry Truman.

The thirty-year period following Taft-Hartley was one of overall stability in industrial relations. By the late 1940s, collective bargaining was well-established, especially in the manufacturing and transportation industries. Moreover, these industries exhibited remarkable economic prosperity. With little foreign competition, manufacturing continued to generate large profits and high standards of living for workers. Regulation generally prevented the entry of nonunion competitors and permitted price stability in transportation, a situation that resulted in high wages for unionized workers and high profits for employers.

As noted, however, hidden under this stability were some trends that suggested the industrial relations system was moving towards a crisis. Private sector unionization rates began a steady decline from a high of roughly 35 percent in the mid 1950s. Interpretations of the National Labor Relations Act by the courts and the National Labor Relations Board were making it increasingly difficult for unions to organize (see chapter 2). By the late 1970s, an increasingly competitive economic environment was causing management to question the established practices within industrial relations. While some firms responded to changes in the competitive environment by cooperating with unions, others engaged in conflict, attempting to eliminate unions representing their employees.

Since the late 1970s, unions have experienced increasing difficulties within the industrial relations system. Although the economic environment has no doubt been responsible for part of the decline in the fortunes of unions, it has become increasingly clear, first to unionists and then to many neutral observers, that the nation's labor law is a major contributing factor. While private sector industrial relations in the United States is affected by many phenomena, labor law is likely the factor that affects it most directly. The law applies to all of the parties, whereas the effect of economic conditions can vary from firm to firm. In addition, the law contains compulsion—once one party invokes its procedures, the other party must go along. Third, the law is very public and open to all. Legal decisions are reported, and attorneys are very aware of them. Thus, these decisions can be used to argue for or against future conduct in labor relations.

Just as employers became concerned about the state of industrial relations in the late 1930s and early 1940s—concerns that were reflected in the Taft-Hartley Act—unions have also developed legislative initiatives to address their concerns.

In 1976-77, the AFL-CIO spearheaded an unsuccessful campaign for labor law reform. The Labor Law Reform Act of 1977 failed to survive a filibuster in the U. S. Senate in the face of strong business opposition to the legislation's attempt to speed up the election process and increase penalties on parties found in violation of labor laws.<sup>1</sup>

A second union-supported initiative to change the nation's labor laws started in 1989 when legislation was proposed to end the use of permanent replacement workers during labor disputes. First introduced as a bar to the use of replacements for the first ten weeks of a strike, the legislation was reintroduced as a flat ban in 1990. The legislative history on this issue came to an abrupt end in July of 1994 with two failed cloture votes in the U. S. Senate. Thus, the measure died, although it had passed the House of Representatives with a wide majority in 1993 and would have been signed by President Clinton (*Daily Labor Report*, various issues).

Just as unions had bitterly opposed the Taft-Hartley changes in the late 1940s, employers opposed the labor law changes of the late 1970s and early 1980s. The difference, however, is that employers were successful in their opposition, while unions were unsuccessful.

### **Commission on the Future of Worker-Management Relations**

The Commission on the Future of Worker-Management Relations was created in March 1993 in response to an accumulation of concerns. There were growing fears that the nation's labor laws were neither adequately addressing the rights of employees to organize and bargain collectively, nor supporting the emerging structures and understandings being built in both union and nonunion workplaces to advance employee voice and satisfaction.

The creation of such a commission is a rare event. This is only the second governmental commission appointed in this century to take a broad-based look at employment relations in the United States; the

United States Commission on Industrial Relations was established in 1912 and issued its final report in 1915. In addition, in 1947 the National Planning Association appointed the Committee on the Causes of Industrial Peace to undertake case studies of cooperative collective bargaining relationships. An excerpt from the final reports of each of these two bodies demonstrates the ongoing nature of many of the comments and concerns highlighted in this volume.

*Excerpt from the Final Report of the U. S. Commission on Industrial Relations (1915):*

A more serious and fundamental charge is, however, contained in the allegation by the workers that in spite of the nominal legal rights which have been established by a century long struggle, almost insurmountable obstacles are placed in the way of their using the only means by which economic and political justice can be secured, namely combined action through voluntary organization....

As a result, therefore, not only of fundamental considerations but of practical investigations, the results of which are described in detail hereinafter, it would appear that every means should be used to extend and strengthen organizations through the entire industrial field. Much attention has been devoted to the means by which this can best be accomplished, and a large number of suggestions have been received. As a result of careful consideration, it is suggested that the commission recommend the following action:

1. Incorporation among the rights guaranteed by the Constitution of the unlimited right of individuals to form associations, not for the sake of profit but for the advancement of their individual and collective interests.
2. Enactment of statutes specifically protecting this right and prohibiting the discharge of any person because of his membership in a labor organization.
3. Enactment of a statute providing that action on the part of an association of individuals not organized for profit shall not be held to be unlawful where such action would not be unlawful in the case of an individual.
4. That the Federal Trade Commission be specifically empowered and directed by Congress, in determining unfair methods of competition to take into account and specially investigate the

unfair treatment of labor in all respects, with particular reference to the following points:

- (a) Refusal to permit employees to become members of labor organizations.
  - (b) Refusal to meet or confer with the authorized representatives of employees.
5. That the Department of Labor, through the Secretary of Labor or any other authorized official, be empowered and directed to present to the Federal Trade Commission, and to prosecute before that body all cases of unfair competition arising out of the treatment of labor which may come to its attention.
  6. That such cases, affecting as they do the lives of citizens in the humblest circumstances, as well as the profits of competitors and the peace of the community, be directed by Congress to have precedence over all other cases before the Federal Trade Commission.<sup>2</sup>

*Excerpt from the Final Report of the Committee on the Causes of Industrial Peace:*

In the Committee's statements introducing each "Case Study" some basic causes of industrial peace have been listed. The list has varied and been expanded as the studies accumulated. It has one distinguishing characteristic. Each cause on the list refers to attitudes and approaches which the parties themselves have consciously adopted or helped to achieve. Furthermore, each was important in explaining the degree of industrial peace found in the specific case. It is worth repeating the complete list here.

1. There is full acceptance by management of the collective bargaining process and of unionism as an institution. The company considers a strong union an asset to management.
2. The union fully accepts private ownership and operation of the industry; it recognizes that the welfare of its members depends upon the successful operation of the business.
3. The union is strong, responsible, and democratic.
4. The company stays out of the union's internal affairs; it does not seek to alienate the workers' allegiance to their union.
5. Mutual trust and confidence exist between the parties. There have been no serious ideological incompatibilities.

6. Neither party to bargaining has adopted a legalistic approach to the solution of problems in the relationship.
7. Negotiations are problem-centered—more time is spent on day-to-day problems than on defining abstract principles.
8. There is widespread union-management consultation and highly developed information sharing.
9. Grievances are settled promptly, in the local plant whenever possible. There is flexibility and informality within the procedure.<sup>3</sup>

Between May 1993 and April 1994, the Commission on the Future of Worker-Management Relations (the Dunlop Commission) held eleven national hearings and six regional hearings. The national hearings were held in Washington, D.C. The six regional hearings were held in Louisville, East Lansing (Michigan), Atlanta, San Jose (California), Houston, and Boston. Those testifying included representatives from all strata of the industrial relations community: corporate CEOs, international union presidents, corporate human resources officials, plant managers, first-line supervisors, regional and local union officials, union organizers, and hourly workers, both unionized and non-union. The result was a true cross-section of day-to-day industrial relations life in the United States that only a governmental body with the status of a national commission could assemble.

This volume differs from the Commission's "Fact-Finding Report" and "Report and Recommendations" in two fundamental ways. First, although we would hope that this volume will inform the policy debate on the law of labor-management relations, it is not designed to put forth detailed policy recommendations, which was the mission of the Commission.

Second, as in most documents designed to create policy recommendations, the Commission in its "Fact-Finding Report" and "Report and Recommendations" was only able to briefly summarize and highlight the evidence and testimony that form the basis of its recommendations. It was our view that the details of this evidence represented a rare window into the variation that was thought to exist in labor-management relations in the United States. A policy-oriented summary did not do it justice. The purpose of this volume is to do what the Commission could not do—make the richness of that testimony available in an orga-

nized, accessible format to the business, labor, and policy communities in the United States.

This book does not address all possible issues arising under labor law. Most notably, it does not address unfair and illegal tactics by unions during organizing drives. No evidence of such tactics was brought before the Commission. While such actions by unions may occur, the absence of any strong movement to amend Section 8(b) of the National Labor Relations Act (the provisions creating union unfair labor practices), suggests that the current provisions in the NLRA regulating union behavior in organizing campaigns are serving their intended purpose.

This effort was undertaken with the knowledge of the Commission. In order to maintain the independence of the authors and of the Commission, no member of the Commission had any involvement in the preparation or review of the manuscript. The book is the sole responsibility of the authors and does not necessarily reflect the views of the Commission on the Future of Worker-Management Relations, the W.E. Upjohn Institute for Employment Research, or the Michigan State University School of Labor and Industrial Relations.

Chapter 2 of the book will place the subsequent chapters in their legal, historical, economic, and industrial context, demonstrating that the essence of the industrial relations system is the protection of employee choice to be represented by a union, or not to be represented by a union. Specifically, chapter 2 will discuss how the U.S. industrial relations system can produce wide variation in employment relations practices revolving around the matter of employee choice. Chapter 3, based on the transcripts of the hearings, will focus on innovative employment relationships in which employers respect employee choice, both to be represented by a union and to choose to remain non-union. Chapter 4, also based on the transcripts, discusses some examples of how the law permits employers to interfere with and infringe upon employee choice. Chapter 5 will discuss some conclusions and policy implications.

## NOTES

1. The story of the Labor Law Reform Act of 1977-78 is chronicled in issues of the *Daily Labor Report* for that time period.

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2. *Final Report of and Testimony Submitted to Congress by the Commission on Industrial Relations Created by the Act of August 23, 1912*, Vol. I, Washington, DC: Government Printing Office, 1915, especially pp. 61, 67-68.

3. *Causes of Industrial Peace Under Collective Bargaining*, Clinton S. Golden and Virginia D. Parker, eds., New York: Harper & Bros., 1955, p. 47.