

Key Review: Panlof Commission

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REPORT AND RECOMMENDATIONS

Executive Summary

Commission on the Future of
Worker-Management Relations

December 1994

Report and Recommendations: Executive Summary

The Commission on the Future of Worker-Management Relations was appointed by Secretary of Commerce Ronald H. Brown and Secretary of Labor Robert B. Reich to address three questions:

"1. What (if any) new methods or institutions should be encouraged, or required, to enhance work-place productivity through labor-management cooperation and employee participation?

2. What (if any) changes should be made in the present legal framework and practices of collective bargaining to enhance cooperative behavior, improve productivity, and reduce conflict and delay?

3. What (if anything) should be done to increase the extent to which work-place problems are directly resolved by the parties themselves, rather than through recourse to state and federal courts and governmental bodies?"

Over its twenty months of work, the Commission heard testimony and evaluated the experiences of many employers and employees, and received advice for answering its charge from many groups and individuals. This testimony, and various survey and other evidence, guides the recommendations and suggestions that we offer to the Secretaries, and to the nation.

As reported in the Commission's May 1994 Fact-Finding Report, there is a solid base of experience on which to build more cooperative and productive workplace relations in the

United States -- the innovative partnerships in collective bargaining and the array of employee involvement programs operating in many workplaces across the country. There are also disconcerting patterns -- increased earning inequality, difficulties for contingent workers, increased litigation, rigid and complex regulations, and conflict in union organizing campaigns.

Our recommendations build on the positive experiences with productive and cooperative worker-management relations, support their adoption in additional employment settings, and encourage further experimentation and learning. At the same time we face squarely and propose remedies for the problems of too much conflict, litigation, inequality, and regulatory complexity.

We take an integrated approach to modernizing American labor and employment law and administration for the future. Taken together, these recommendations give workers and managers the tools and flexibility to do what they say they want to do and are capable of doing to improve workplace performance. We recommend flexibility in employee participation while insuring respect for workers' rights to choose unions, if desired. We encourage the development and use of fair systems for resolving disputes quickly closest to their source without going to court or to a government agency. We propose to modernize labor law to deliver through a prompt and simplified process what the law promises: a free choice for workers on whether or not to join a union of their choosing. Our proposals define employees and employ-

ers in ways consistent with economic reality. We encourage continued learning and dialogue among private and public sector leaders to improve the quality of policy making on employment issues.

The Commission could not address all the problems or proposed solutions presented to us. This does not imply that those left out are unimportant or not valid. Instead, some need to be left to other groups and to further discussion. Moreover, the recommendations we offer here are presented as starting points for improving the workplace experiences and results for all Americans.

The full set of recommendations are contained in the separate sections of this report. Here we present fifteen key conclusions and recommendations as they relate to each of our three charges.

1. New Methods or Institutions to Enhance Workplace Productivity

The evidence presented to the Commission is overwhelming that employee participation and labor-management partnerships are good for workers, firms, and the national economy. All parties want to encourage expansion and growth of these developments. To do so requires removing the legal uncertainties affecting some forms of employee participation while safeguarding and strengthening employees' rights to choose whether or not they wish to be represented at the workplace by a union or professional organization. Accordingly we recommend:

(1) Clarifying the National Labor Relations Act (NLRA) and its interpretation by the National Labor Relations Board (NLRB) to insure nonunion employee participation programs are not found to be unlawful simply because they involve discussion of "terms and conditions" of work or compensation as long as such discus-

sion is incidental to the broad purposes of these programs. At the same time, the Commission reaffirms the basic principle that these programs are not a substitute for independent unions. The law should continue to make it illegal to set up or operate company-dominated forms of employee representation.

(2) Updating the definitions of supervisor and manager to insure that only those with full supervisory or managerial authority and responsibility are excluded from coverage of the law. We further recommend that no individual or group of individuals should be excluded from coverage under the statute because of participation in joint problem-solving teams, self-managing work groups, or internal self-governance or dispute resolution processes.

(3) Reaffirming and extending protections of individuals against discrimination for participating in employee involvement processes and for joining or drawing on the services of an outside labor or professional organization.

These recommendations are linked to those that follow in important ways. In addition to eliminating the legal uncertainties associated with many of the forms of employee participation underway today, these changes allow and encourage use of worker-management participation in applying government regulations to the workplace and resolving disputes through private resolution procedures. Moreover, these changes remove the threat that workers might lose the protections of collective bargaining by taking on supervisory or managerial responsibilities. These changes, therefore, should open up workplaces to a variety of new experiments with employee participation and labor-management partnerships and bring the benefits of these innovations to more workers and workplaces.

2. Changes in Collective Bargaining to Enhance Cooperation and Reduce Conflict and Delay

The evidence reviewed by the Commission demonstrated conclusively that current labor law is not achieving its stated intent of encouraging collective bargaining and protecting workers' rights to choose whether or not to be represented at their workplace. Rectifying this situation is important to insure that these rights are realized for the workers who wish to exercise them, to de-escalate workplace conflicts, and to create an overall climate of trust and cooperation at the workplace and in the broader labor and management community. Accordingly, the Commission recommends:

(4) Providing for prompt elections after the NLRB determines that sufficient employees have expressed a desire to be represented by a union. Such elections should generally be held within two weeks. To accomplish this objective we propose that challenges to bargaining units and other legal disputes be resolved after the elections are held.

Beyond the reversal of the Supreme Court's decision in *Lechmere* so that employees may have access to union organizers in privately-owned but publicly-used spaces such as shopping malls, access questions are best left to the NLRB. The Commission urges the Board to strive to afford employees the most equal and democratic dialogue possible.

(5) Requiring by statute that the NLRB obtain prompt injunctions to remedy discriminatory actions against employees that occur during an organizing campaign or negotiations for a first contract.

(6) Assisting employers and newly certified unions in achieving first contracts through an upgraded dispute resolution system which provides for mediation and empowers a tripartite

advisory board to use a variety of options to resolve disputes ranging from self-help (strike or lockout) to binding arbitration for relatively few disputes.

(7) Encouraging railroad and airline labor and management representatives to implement their stated willingness to seek their own solutions for improving the performance of collective bargaining in their industries.

These changes are essential to de-escalating the level of conflict, fear, and delays that now too often surround the process by which workers decide whether or not to be represented on their jobs. We distilled our recommendations down to these basic and simplified changes in the law and procedures from an extensive array of proposals offered to the Commission in this area. Therefore, it is vitally important to monitor the effects of these recommendations over time to see if they are adequate to achieve the goals stated in our national labor law and shared by the American public.

3. Increase the Extent to which Workplace Problems are Resolved by the Parties.

The Commission's findings and recommendations regarding workplace regulations, litigation, and dispute resolution fall into three categories: (1) encouraging development of high quality private dispute resolution procedures, (2) encouraging experimentation with workplace self-regulation procedures in general and with specific reference to workplace safety and health, and (3) protecting the employment rights and standards of contingent workers.

The Commission endorses and encourages the development of high quality alternative dispute resolution (ADR) systems to promote fair, speedy, and efficient resolution of workplace disputes. These systems must be based

on the voluntary acceptance of the parties involved. The courts and regulatory agencies should hold these systems accountable for meeting high quality standards for fairness, due process, and accountability to the goals and remedies established in the relevant law. The Commission also encourages experimentation with internal responsibility systems for adapting workplace regulations to fit different work settings. Accordingly, we recommend:

(8) Encouraging regulatory agencies to expand the use of negotiated rule making, mediation, and alternative dispute resolution (ADR) procedures for resolving cases that would otherwise require formal adjudication by the agency and/or the courts.

(9) Encouraging experimentation and use of private dispute resolution systems that meet high quality standards for fairness, provided these are not imposed unilaterally by employers as a condition of employment.

(10) Encouraging individual regulatory agencies (e.g., OSHA, Wage and Hour Division, EEOC, etc.) to develop guidelines for internal responsibility systems in which parties at the workplace are allowed to apply regulations to their circumstances.

America's workplaces must be made safer and more healthful and workers' compensation costs need to be reduced. Workplace safety and health is an ideal starting point for experimenting with internal responsibility systems for meeting public policy objectives, given the long-standing and widespread experience with employee participation and labor-management committees in safety and health matters and the shared interests all parties have in improving safety and health outcomes. Evidence presented to the Commission shows that properly structured joint committees and participation plans can significantly improve safety and health protection. Accordingly, we recommend:

(11) Developing safety and health programs in each workplace that provide for em-

ployee participation. Those workplaces that demonstrate such a program is in place with a record of high safety and health performance would receive preferential status in OSHA's inspection and enforcement activities.

The growth of various forms of contingent work poses opportunities for good job matches between workers with differing labor force attachments and employers needing flexibility in response to changing market conditions. At the same time, some contingent work arrangements relegate workers to a second class status of low wages, inadequate fringe benefits, lack of training and, most importantly, loss of protection of labor and employment laws and standards. This is a very complex set of developments for which adequate data are not yet available to do more than address the most obvious problems. Our recommendations are therefore cautious in this area, recognizing the need to continue to monitor and evaluate the labor market experiences of all forms of contingent work and to derive policy recommendations as these data and analyses become available. Accordingly, we recommend:

(12) Adopting a single definition of employer for all workplace laws based on the economic realities of the employment relationship. Furthermore, we encourage the NLRB to use its rule-making authority to develop an appropriate doctrine governing joint employers in settings where the use of contract arrangements might otherwise serve as a subterfuge for avoiding collective bargaining or evading other responsibilities under labor law.

(13) Adopting a single definition of employee for all workplace laws based on the economic realities of the employment relationship. The law should confer independent contractor status only on those for whom it is appropriate — entrepreneurs who bear the risk of loss, serve multiple clients, hold themselves out to the public as an independent business, and so forth. The law should not provide incentives for misclassification of employees as independent contractors, which costs federal and state treasuries large sums in uncollected so-

cial security, unemployment, personal income, and other taxes.

Implementing the recommendations in this report would open up employment policy and practice to a period of experimentation and opportunities for further learning. To channel this learning into constructive policy making we recommend:

(14) Creating a National Forum on the Workplace involving leaders of business, labor, women's, and civil rights groups to continue discussing workplace issues and public policies. In addition, we recommend establishment of a national Labor-Management Committee to discuss issues of special concern to the future of collective bargaining and worker-management relations. We encourage development of similar forums in communities, states, and industries to further promote grass roots experimentation and learning.

(15) Improving the data base for policy analysis of workplace developments, evaluation of labor-management experiments in the private sector, and for assessment of the economic condition of contingent workers. This requires amalgamation of existing data sets within the NLRB and Department of Labor, and among these and other agencies as well as coordination of research on workplace topics for the National Forum and other interested parties.

The Challenges Ahead

From the views presented to us emerged a vision of the Workplace of the 21st Century that is shared widely across all sectors of society and the workforce. These goals appear at the end of this Executive Summary. Achieving some of them requires updating and modernizing labor and employment law; others can be addressed through changes in administrative processes to give more power and flexibility to the parties at the workplace to govern their

relationships and solve problems closest to the source. All will require leadership and sustained commitment to learning and experimentation on the part of individual workers and the labor and management leaders who shape employment practices. We urge that progress toward achievement of these goals be assessed systematically on a continuous basis and the results shared widely with the American public.

We can summarize the challenges facing America to improve the quality and performance of workplace relations quite simply. They are to sustain the momentum underway in the most innovative workplaces, to bring these innovations to and share their benefits among more workers and managers, and to overcome the countervailing forces that stand in the way of achieving the goals of the 21st Century workplace. We see three such countervailing forces, two of which are reflected directly in the charges to this Commission and in our recommendations.

The first of these countervailing forces is the high level of conflict and tension surrounding the process by which workers decide whether or not to be represented by a union for the purpose of collective bargaining. Our recommendations should result in a significant de-escalation of these conflicts and a restoration of workers' promised rights in this area, and thereby improve the overall climate for cooperative labor-management relations.

The second countervailing force is the frustration that managers experience in trying to respond to complex workplace regulations and mounting litigation, and that workers experience in trying to enforce their legal rights on the job. Our recommendations provide workers and managers with the tools and flexibility to replace the command and control system of regulation and the litigious system for enforcing rights with opportunities for greater self-governance and private, high quality, dispute resolution.

The third force limiting the momentum toward higher quality workplaces was highlighted

in our Fact Finding Report but its solution lies well beyond the mandate of this Commission. We refer here to the widening earnings inequality and stagnant real earnings that have characterized the American labor market over the past ten to fifteen years. While the Commission makes no direct recommendations focused on this serious problem, a number of our recommendations should contribute to reducing this growing disparity. Among these recommendations are our support for increased training at the workplace; increased opportunities for em-

ployee participation to enhance productivity, quality, and worker development; protections against the use of contractors or contingent workers to evade responsibilities under labor and employment law; and changes to provide workers the opportunity for representation and collective bargaining if they want it.

The recommendations of this Report are designed to contribute to the achievement of the goals and relationships required for the 21st Century workplace.

GOALS FOR THE 21ST CENTURY WORKPLACE

1. Expand coverage of employee participation and labor-management partnerships to more workers and more workplaces and to a broader array of decisions.
2. Provide workers an uncoerced opportunity to choose, or not to choose, a bargaining representative and to engage in collective bargaining.
3. Improve resolution of violations of workplace rights.
4. Decentralize and internalize responsibility for workplace regulations.
5. Improve workplace safety and health.
6. Enhance the growth of productivity in the economy as a whole.
7. Increase training and learning at the workplace and related institutions.
8. Reduce inequality by raising the earnings and benefits of workers in the lower part of the wage distribution.
9. Upgrade the economic position of contingent workers.
10. Increase dialogue and learning at the national and local levels.

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