

# UNITED STATES

## 1. GENERAL INTRODUCTION

### A. BASIC LABOR POLICY

Section 1 and Section 7 of the *National Labor Relations Act* set forth the central precepts of U.S. labor law.

Section 1 states: “It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”

Section 7 provides that: “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”

The *Labor Management Relations Act* of 1947 added to Section 7 the clause “and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agree-

ment requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).”

Because U.S. labor law protects “concerted activities” and “mutual aid or protection,” employees do not have to be involved in trade union activity to be protected by the law. Indeed, intent to unionize is not required as long as employees act in concert.

The central mechanism under in U.S. law for protecting workers’ rights to organize, to bargain collectively and to strike is found in sections 8(a) and (b) of the *National Labor Relations Act*, which define unfair labor practices (ULPs). An unfair labor practice violates the law and is subject to the remedies provided by the Act.

## B. LABOR LAW JURISDICTION

United States labor laws dealing with private sector employees fall almost entirely within federal jurisdiction. Under the “Commerce Clause” in Article I, Section 8 of the *United States Constitution*, federal law prevails over state laws on matters of interstate commerce — an extremely broad jurisdiction in the complex modern U.S. economy.

U.S. labor laws dealing with private sector employees are enforced by federal government authorities and by federal courts. Occasional state efforts to pass legislation on labor relations matters are most often struck down by the courts as preempted by federal law. The states are permitted a limited legislative or law enforcement role where predominantly local interests are at stake, such as preventing picket line violence. In addition, fields not covered by federal legislation can be the subject of state legislation. Agricultural workers are an example; they are often covered by state law.

**In Canada, the federal role is limited and labor law is primarily a provincial responsibility. Mexico has a single *Federal Labor Law* (FLL) which was enacted under authority granted to the federal government by the states of the Mexican Federation. Enforcement of the FLL is divided between federal and state authorities, generally on the basis of the type of industry or service in question. In both nations, the law designates certain commercial or industrial sectors of national scope that fall under federal jurisdiction.**

### C. LEGAL SOURCES OF LABOR RIGHTS

Common law traditions influenced the development of the legal system in the United States.

The common law tradition did not develop doctrines recognizing the right to organize, to bargain collectively and to strike, and constitutional recognition of those rights is limited (see below). As a result, most U.S. labor law is based on statutes. Statutes also establish administrative agencies and tribunals to ensure the enforcement of labor rights.

Once a statute takes effect, U.S. administrative law provides two methods of applying it. One is called “rulemaking” — enacting regulations based on the language of the statute before adjudication of any cases. The purpose of rulemaking is to advise parties how the law has been interpreted and will be applied. The second method, “adjudication,” proceeds by deciding individual cases by applying the statute to the facts of the case.

U.S. labor relations statutes set out few detailed standards on freedom of association, protection of the right to organize and the right to strike. Instead, labor law has generally developed through *case law*, as administrative tribunals and courts interpret constitutional and statutory law as they apply to specific cases that come before them. Through adjudication, courts and tribunals play a central role in the development of U.S. labor law.

Case law establishes precedents that guide parties, tribunals and courts. Decisions of higher courts are considered binding by lower courts within the same jurisdiction. Case decisions may also carry persuasive weight outside of the particular jurisdiction. A decision of the U.S. Supreme Court is considered as a definitive interpretation of the law both by lower courts and administrative tribunals. Of course, every new case contains unique facts and circumstances, creating a constant shifting of nuance and interpretation of the law. Tribunals may also undertake a basic shift in policy, reversing the precedent of earlier cases. Similarly, courts may adopt a different interpretation of the law and reverse earlier decisions.

**Except in Quebec, the Canadian legal system also developed out of the English common law tradition. The legal systems of Quebec and Mex-**

**ico arose from a civil law tradition, which places more emphasis on statutory codes than on judicial or administrative tribunal precedents.**

### *1) Constitutional Sources*

The U.S. Constitution makes no specific mention of the right to organize, to bargain collectively or to strike. The First Amendment of the U.S. Constitution (1789), however, protects freedom of assembly, free speech and the right to petition the government for redress of grievances. Laws or regulations that violate these rights may be struck down as unconstitutional by the Supreme Court of the United States. The 14th Amendment (1866) and its mandate for “equal protection of the law” applies the *Bill of Rights* (the first 10 amendments to the Constitution) to the individual states. Moreover, each state has its own constitution and bill of rights providing equivalent guarantees. The U.S. Supreme Court has specifically interpreted the First Amendment to protect labor organizing, workers’ political and legislative action, peaceful picketing, and other lawful trade union activity.<sup>1</sup>

In practice, constitutional guarantees are not absolute. Courts have upheld limitations on assembly, speech and other aspects of the right of association in the labor organizing context on such grounds as protecting public safety or the property rights of employers. Moreover, U.S. constitutional rights generally do not offer direct protection against the actions of private parties. Rather, they protect only against interference by government action. Constitutional rights do not directly govern relations between private parties and cannot be enforced against private parties.

**Canada’s *Charter of Rights and Freedoms* is silent on specific labor rights. Constitutional protection for labor rights can be found only in their recognition as aspects of the more general rights of freedom of association, assembly and expression which are found in the Charter. Like the U.S. Constitution, the Canadian Charter does not offer protection against the actions of private parties. In contrast, Mexico’s Constitution contains guarantees of the right to organize and the right to**

<sup>1</sup> See *Hague v. C.I.O.*, 307 U.S. 496 (1939); *Thornhill v. Alabama*, 310 U.S. 88 (1940).

**strike, as well as extensive constitutional norms on wages, hours and working conditions which are intended to protect workers. These constitutional rights and norms are directly binding upon public and private employers.**

## *2) Statutory Sources*

Landmark federal legislation in the 20th century set the framework for protection of workers' rights to organize, to bargain and to strike. The key statutes are listed below in chronological order. (Note that American laws often carry the name of their congressional sponsors and are often referred to by those names.)

The *Railway Labor Act* of 1926 (RLA) established the right of workers in the railroad industry to organize and bargain collectively through representatives of their own choosing. The Act covered only railway labor because of the central importance of rail transportation to the national economy. The RLA was extended to workers and employers in the air transportation sector in 1936. Today, nearly one million U.S. workers are covered by the RLA. Appendix 4A provides an overview of the key features of the regime created by the RLA.

The *Norris-LaGuardia Act* of 1932 outlawed employment contracts requiring that workers promise never to join a union. Such "yellow-dog" contracts, as they were called, were a common device used by employers to prevent union organizing. The Norris-LaGuardia Act also sharply constrained the ability of employers to obtain injunctions as a strike-breaking measure. In addition it relieved union leaders of criminal and civil liability for the acts of union members unless the leaders participated in or ratified the acts.

The *National Labor Relations Act* of 1935 (NLRA or Wagner Act) extended to most private sector employees "the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or

protection.” The NLRA created a new concept in U.S. law: the unfair labor practice. The Act defined and made unlawful five unfair labor practices by employers. The NLRA also established the National Labor Relations Board (NLRB) to administer the Act.

The *Labor Management Relations Act* of 1947 (LMRA or Taft-Hartley Act) amended the NLRA, retaining the key rights and responsibilities of the Wagner Act but introducing important limitations on the rights to organize, to bargain collectively and to strike. The amended NLRA retained the five employer unfair labor practices and included a new category of union unfair labor practices. It permitted “employer free speech” to campaign against union organization.

The Taft-Hartley amendments also allowed individual states to enact “right-to-work” laws prohibiting union security agreements (by which a union and an employer agree to require payment of union dues by all represented employees). Finally, the amendments prohibited “secondary boycotts,” by which workers involved in a “primary” labor dispute apply pressure against “secondary employers” and seek solidarity action by workers at a supplier or customer of their own employer.

The *Labor Management Reporting and Disclosure Act* of 1959 (LMRDA or Landrum-Griffin Act) established a “bill of rights” for individual union members in internal union affairs, including a right to democratic elections of union officers. The Act also set forth detailed financial reporting and disclosure requirements for unions.

Today, the *National Labor Relations Act*, as amended by the *Labor Management Relations Act*, and the *Labor Management Reporting and Disclosure Act* comprise the most important federal labor laws governing private sector labor-management relations. Other laws, such as the *Fair Labor Standards Act*, the *Occupational Safety and Health Act* and the *Equal Pay Act*, address minimum wage, hours of work, child labor, workplace safety, nondiscrimination in employment, and other labor standards.

**The Canadian federal jurisdiction and the 10 provinces each have a comprehensive labor relations statute governing workers’ rights to organize, to bargain collectively and to strike. These 11 jurisdictions also have separate legislation on labor standards. Mexico’s single *Federal***

***Labor Law* covers industrial relations matters as well as labor standards and most other aspects of employment.**

### *3) Rulemaking*

In general, the National Labor Relations Board does not engage in rule-making. Therefore, there is no common practice of communicating proposed changes in rules and regulations in advance for public comment. The Board decides particular cases brought before it through charges by private parties. In some exceptional instances, the NLRB undertakes rulemaking by publishing proposed rules for advance notice and public comment.

## D. THE INDIVIDUAL EMPLOYMENT RELATIONSHIP

Common law principles of “master-servant” relations, where the “master” held both authority over and responsibility for the “servant,” governed the employment relationship in the United States from the earliest colonial periods. Until the early 19th century, individual workers could be bound by an employment contract for years without an opportunity to seek new employment under better terms. The courts gradually overturned this form of employment because it did not suit a growing market economy. By the 1830s, the shift in judicial opinions created the “employment-at-will” doctrine of freely contracted individual employment. Under this doctrine, employment is a voluntary relationship unregulated by the government. The employee agrees to work under the direction and control of the employer, and the employer agrees to provide compensation for work performed. For most workers, there is no written contract of employment. The employment-at-will relationship still predominates in the United States for the majority of workers not covered by collective bargaining agreements.

In its classic formulation, the at-will doctrine permits either a worker or an employer to terminate an employment relationship at any time for “a good reason, a bad reason or no reason at all.” No severance pay or other form of indemnification is required under U.S. law.

There are three basic exceptions to the at-will rule. First, a written contract of employment can contain conditions for terminating the relationship. Professionals and executives often have such individual contracts of employment, as do the approximately 16 percent of the American workforce (12 percent in the private sector) covered by collective bargaining agreements. Most collective bargaining agreements contain a “just cause” standard for discharge, which provides a recourse to neutral, binding arbitration in disputed cases.

Second, the employment-at-will doctrine is superseded by statutes that prohibit certain forms of discrimination in employment or require advance notice of workplace closures. For example, U.S. laws prohibit discrimination based on concerted activity (including union organizing), race, color, sex, age, national origin, religion and disability. Protection against discrimination generally covers all employees in both the private and public sectors. Federal antidiscrimination statutes provide exemptions for small enterprises, but such firms are usually covered by state and local antidiscrimination measures. Requirements for advance notice of plant closings or mass layoffs apply only to employees of large firms.

Third, exceptions can be created by courts applying state laws or directly by state statute. Courts in some jurisdictions have established a “public policy” exception to the at-will rule. For example, an employee fired for refusing to perform an illegal act may be reinstated. Some courts have also found an implied contract of employment requiring just cause for discharge. In employee handbooks an implied “covenant of good faith and fair dealing” under common law principles may also provide a basis for the reinstatement of workers who were unfairly discharged.

Court-fashioned exceptions to the at-will rule remain limited. Individual employees must bring private lawsuits to challenge a discharge. The costs and risks of litigation make such challenges rare. In several states, however, statutes have been enacted that codify public policy exceptions and other variations from the at-will doctrine. For example, in several states employers are prohibited from discharging an employee for reporting illegal activity to public authorities. These prohibitions are commonly referred to as “whistle-blower protections.” Among the 50 United States, only Montana — a lightly populated, rural state with lit-

the industrial employment — has enacted a statute creating a just cause standard for discharge covering all private sector employees in the state, with a right of action in state courts.

Labor and employment law specialists generally agree that the traditional at-will employment relationship is gradually being eroded by the effects of broadened antidiscrimination laws and the accumulation of court decisions and state laws which carve out exceptions to the at-will rule. Nonetheless, the employment-at-will doctrine remains the prevailing basis of the individual employment relationship in the United States.

**The at-will employment doctrine does not apply to employment relationships in Mexico or Canada. Mexican law establishes a set of limited and specific just causes for terminating any individual's employment, whether or not the individual is covered by a collective bargaining agreement. Any worker may bring a claim of unjustified discharge before a labor tribunal. Canadian employees covered by collective agreements (approximately 35 percent of the labor force) can generally have their employment terminated only for "just cause." Statutory notice of termination requirements are applicable to all employees, as are antidiscrimination laws and a common law judicial requirement of reasonable notice (or pay in lieu of notice) for any termination of an employment contract which is for an indefinite term.**

#### E. EXCLUSIONS FROM COVERAGE

Under the *National Labor Relations Act*, legal protection for the right to organize, to bargain collectively and to strike is afforded to those falling within the definition of an "employee." The definition excludes agricultural workers, domestic workers, managers, supervisors, confidential employees, independent contractors, and employees covered by the *Railway Labor Act*.

**Most Canadian jurisdictions are more expansive than the United States in their labor law coverage, including front-line supervisors and contractors in a position of economic dependence (often referred to as "dependent contractors") within the definition of "employee" under the law. Mexican labor law covers any person who personally performs**

**subordinate work for another individual or legal person in return for remuneration, except family members employed in a family enterprise.**

## 2. LEVELS OF PROTECTION – SUBSTANTIVE LABOR LAWS

### A. LABOR PRINCIPLE 1 – FREEDOM OF ASSOCIATION AND THE RIGHT TO ORGANIZE

#### *1) Legal Foundations*

Although the U.S. Constitution does not contain specific guarantees of labor rights, the U.S. and state constitutions do provide protection for freedom of association by protecting rights of assembly, free speech and petitioning the government for redress of grievances. Moreover, the constitutions of some states specifically guarantee the right of state employees to organize. Because U.S. constitutional guarantees apply only to government action, constitutional protections do *not* apply to the actions of private parties. Affirmative legislation is required to protect freedom of association and the right to organize in the private employment context. The key statutes protecting freedom of association and the right to organize in the private sector are outlined in section 1C, above, and are discussed in more detail below.

#### *2) The Formation and Dissolution of Unions*

U.S. federal law protects the right of two or more employees to form a union. This right belongs solely to workers. Neither recognition by the employer nor prior authorization, registration or other official act by the government is required to form a union.

Only two workers are necessary to form a union — whether they are the only employees of the employer or part of a larger workforce. Union members can elect officers, collect dues, establish a union constitution, obtain property, engage employees, hold meetings, assist workers in legal proceedings outside the workplace, or otherwise act to defend their interests.

Members of a union determine whether and when it should be dissolved.

The legal existence of a union is not by itself sufficient to require an employer to bargain or to conclude a collective bargaining agreement. Rather a union must obtain bargaining rights, which are normally obtained through union representation elections conducted by the National Labor Relations Board (see Acquisition of Bargaining Rights, section 2B.2, below). The election process is a method of determining whether a majority of employees in an “appropriate bargaining unit” (see section 2A.2, below) desire representation for purposes of collective bargaining. If so, the law will compel the employer to bargain. Even if a majority of workers do not vote in favor of a union in such an election, or if an election never takes place, workers retain the right to form a union and engage in protected concerted activity. The right to organize exists independently of any such election. In practice, certification by the NLRB as a result of an election is by far the most common means by which workers organize a union, since their objective is to achieve a collective bargaining agreement.

### *3) Legal Status of Unions*

Section 301 of the LMRA creates a private right of action for unions to sue or be sued for the enforcement of contracts. In addition, the U.S. Supreme Court has held that unions may sue or be sued as legal entities in the federal courts in any action involving the application of federal law to a union.

### *4) Union Self-Governance*

Unions are governed by the terms of their own constitutions. Union members have the power to create and amend their union’s constitution. Unions are free to determine their own course of legal, political and strategic action, provided that they comply with their constitutions, as well as with laws regarding internal union democracy (see Freedom of Association within Unions, section 2A.7, and Protections against Interference, section 2D, below), laws restricting the purposes for which

union dues may be spent (see *Union Membership and Dues*, section 2A.6, below) and general laws governing economic and political activity.

### *5) Union Political and Legislative Activity*

Trade union political action is a vital aspect of freedom of association. Workers and unions in the United States have a constitutional right (regulated by statutes) to engage in electoral and legislative activities.

U.S. unions often endorse candidates for public office and work to have favored candidates elected by distributing handbills to their members and local communities, organizing volunteer “phone banks” to telephone voters urging a favorable vote, and providing financial support to candidates. Most unions do not endorse political parties. The law places certain restrictions on the use of union dues for political expenditures (see *Union Membership and Dues*, below). Resources from union dues may be used, however, for nonpartisan legislative and voter education campaigns.

Unions participate in the legislative process by persuading legislators to introduce prolabor bills, meeting with legislators to persuade them to support prolabor bills (“lobbying”) and testifying at legislative committees in support of prolabor bills. Many unions also develop “grass roots” campaigns to undertake similar activities at the local level. Finally, unions often mobilize their members to participate in demonstrations, marches, rallies and other forms of peaceful assembly and free expression protected under the First Amendment of the Constitution.

### *6) Union Membership and Dues*

An individual employee cannot be compelled to become a union member under U.S. principles of freedom of association. However, a union and an employer may generally negotiate an “agency shop” or “union security” clause requiring nonmembers of the union to pay, as a condition of employment, equivalent fees for representation. Such employees are often referred to as “agency fee payers.” An employee cannot be terminated from employment for refusing to join the union as long as he or she tenders agency fee payments.

In a majority of states, trade unions may negotiate union security clauses. However, the LMRA amended the NLRA to permit states to prohibit such contract clauses under state statutes, commonly referred to as “right-to-work” laws. Twenty-one states, most in the southern region of the United States, have enacted right-to-work laws. These laws generally provide that an employee may not be required to pay agency fees as a condition of employment. Unions are nonetheless legally obligated to represent each employee in the bargaining unit, regardless of the employee’s union membership status and regardless of whether the employee pays any agency fees to support such representation. While unions represent more than 20 percent of employees in states where union security agreements are permitted, unions represent fewer than 10 percent of employees in right-to-work states.

In 1988, the U.S. Supreme Court decided that an agency fee payer may not be compelled to pay dues which go to expenses other than those “necessarily or reasonably incurred for the purpose of performing the duties of an exclusive bargaining representative,” which the court found to be limited to collective bargaining, administering collective bargaining agreements, and union administration.<sup>2</sup> Where a nonmember objects to the expenditure of his or her dues money on activities other than those, such as expenditures on political and legislative activities or on some types of union organizing activities, the union must reduce his or her dues by the portion devoted to such purposes. Courts have been faced with the task of deciding on a case-by-case basis which expenses are necessary to a union’s duties as exclusive bargaining representative.

**In both Canada and Mexico, unions may negotiate agreements with employers requiring employees to be union members as a condition of employment. In Mexico the *Federal Labor Law* requires employers to deduct from union members’ pay and remit to the union ordinary union dues payments. Most Canadian jurisdictions require that collective agreements contain “Rand Formula” clauses if the union opts for one. Rand Formula clauses do not require union membership but do require that all bargaining unit members pay regular union dues. All but one Canadian jurisdiction allow unions to decide whether and how to spend dues revenue from both union members and nonmembers for**

<sup>2</sup> *Communications Workers v. Beck*, 487 U.S. 108 (1988).

**political purposes. As long as unions do not interfere in religious matters, unions in Mexico enjoy autonomy in making spending decisions.**

### *7) Freedom of Association within Unions*

The *Labor Management Reporting and Disclosure Act* (LMRDA) establishes rules for internal union democracy. The Act provides union members with the following rights:

- free speech rights in union affairs;
- the right to vote on union dues;
- the right to run for union office;
- the right to obtain the union's charter and bylaws;
- the right to receive a copy of the collective bargaining agreement;
- the right to obtain an accounting of union finances; and
- the right to union elections free of intimidation or fraud and other procedural guarantees.

The Act also requires labor organizations to file with the Labor Department annual financial reports detailing salaries, expenses, sources of income, use of contractors, etc. These records are available to the public.

**Canada does not regulate internal union democratic processes as closely as the United States. Most Canadian jurisdictions require unions to provide their members with a copy of the union's audited financial statements and prohibit unions from retaliating against bargaining unit members for exercising labor law rights by seeking their dismissal under union security clauses. Most of the other rights provided to U.S. unionists under the LMRDA are left to be voluntarily included in the constitutions of Canadian unions. In Mexico a union member may be lawfully expelled from a union only by a two-thirds majority vote of the union's membership, following procedures set out in the FLL and any procedures established by the union's constitution. The Mexican Constitution protects workers against dismissal for joining or attempting to form a union. Workers dismissed pursuant to a closed shop union security clause (known as an "exclusion clause" in Mexican labor law discourse) for joining or supporting another union, during the formation or registration of that union, may seek reinstatement or severance pay**

**by filing a claim with the relevant CAB. In addition, Mexican labor law provides a mechanism by which the membership can convoke a general meeting of the union if the board of directors fails to do so and requires that the board of directors provide members every six months with accounts of the administration of the union's assets.**

## B. LABOR PRINCIPLE 2 – THE RIGHT TO BARGAIN COLLECTIVELY

### *1) Legal Foundations*

The U.S. Constitution does not specifically address the right to bargain collectively. During the 19th century and into the early 20th century, efforts by workers and unions to engage in collective bargaining were often treated as criminal conspiracies or restraints of trade. During and after the First World War, however, governmental hostility to collective bargaining began to yield to the reality of industrial conflict, especially in the railroad industry. American workers' mass organizing and political movements of the 1930s succeeded in normalizing collective bargaining as a method of industrial relations.

The *Railway Labor Act* of 1926 (RLA) gives railroad industry employees the right to bargain collectively through representatives of their own choosing and establishes the duty of industry employers to "make and maintain agreements concerning rates of pay, rules and working conditions." Since 1936, the RLA has also applied to airline industry labor relations. An overview of the RLA is provided in Appendix 4A.

The *National Labor Relations Act* of 1935 (NLRA) grants employees the right "to bargain collectively through representatives of their own choosing" and "to engage in other concerted activities for the purpose of collective bargaining." Section 1 of the NLRA declares the policy of the United States as "encouraging the practice and procedure of collective bargaining" and "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." The NLRA makes it an unfair labor practice (ULP) for an employer to interfere with

those rights or “to refuse to bargain collectively with the representatives of his employees.”

The *Labor Management Relations Act* of 1947 (LMRA or Taft-Hartley Act) created a new group of union ULPs analogous to employer ULPs, such as a union’s refusal to bargain. The LMRA also created the Federal Mediation and Conciliation Service (FMCS) to assist unions and employers in the collective bargaining process.

The principal features of U.S. law on collective bargaining are:

- the right of workers to bargain;
- the duty of employers to bargain;
- the requirement of proof of union majority representative status before bargaining rights and duties attach to the union and the employer;
- certification of majority status by the National Labor Relations Board, which affords protection to the union as bargaining representative;
- exclusive representation by the certified union (i.e., the union has the exclusive right to bargain on behalf of the employees that it represents and to conclude an agreement on their behalf); and
- minimal government intervention in bargaining, limited to mediation (except in national emergencies).

Canadian collective bargaining laws are similar to U.S. laws. In Canada, however, a majority of jurisdictions give unions the right to certification by “card-check” (verifying that a majority of workers have voluntarily signed cards designating a union to represent them) rather than by an election. Canadian law creates a system in which the governments intervene more directly in the bargaining process than in the United States. Canadian law also specifies certain clauses that must be contained in a collective bargaining agreement.

Mexican labor law contains the principles of majority status and exclusive representation, but it does not create a duty to bargain collectively. Instead, it creates a context to stimulate bargaining by guaranteeing the right to organize and the right to strike. Voting to determine majority status may take place if one union challenges another for title to a collective contract. In deciding such challenges, a CAB may supervise a vote of the workers, known as a *recuento*, in order to obtain evidence of union majority support. A *recuento* will not necessarily be conducted if other evidence is sufficient to prove majority support.

**Mexican law establishes requirements for the content of a collective contract agreement and makes conciliation mandatory once a union has delivered notice of its intention to strike.**

## *2) Acquisition of Bargaining Rights*

A union cannot compel an employer to bargain collectively except in the following circumstances: (1) the employer voluntarily recognizes a union's evidence that it has the support of a majority of bargaining unit employees; (2) the union's majority support is certified as the result of an NLRB election in which a majority of those casting ballots vote to be represented by the union; or (3) the Board issues a bargaining order in response to employer unfair labor practices (see The Gissel Doctrine, below). In practice, a certification election is the usual means by which workers seek to achieve a collective bargaining agreement. Once a union has acquired bargaining rights, the employer is required to bargain in good faith for the purpose of concluding a collective bargaining agreement.

### (i) Petitioning for an Election

The NLRA speaks only of representatives "designated or selected" by workers for the purpose of collective bargaining. The Act does not specify the method for designating representatives. Strictly speaking, an election is not necessary to determine a union's majority status and the employer's obligation to bargain. Cards signed by a majority of workers without coercion, or any other objective measure of employees' will, are sufficient in principle to establish majority status.

In practice, however, U.S. employers generally dispute a union's claim of majority status and its demand to bargain by asserting a "good-faith doubt" about the union's majority status. The National Labor Relations Board does not require an employer to recognize a union's majority support based only on signed membership cards, and there is no inquiry into the good faith of the employer's doubt. The employer may petition the NLRB for an election to determine majority status or the employer may do nothing and refuse to deal with the union. The union may seek to pressure the employer for recognition through appeals for public support or collective

action. A union striking for recognition must petition the NLRB for an election within 30 days of the start of the strike.

A union may petition the NLRB to conduct an election when it has obtained cards from 30 percent of the employees that it seeks to represent designating the union as their collective bargaining representative. American unions generally seek the support of a substantial majority of employees before seeking certification. They do this for two reasons. First, unions commonly receive a lower percentage of votes in an election than the percentage of signed cards obtained. Second, the NLRB may obligate the employer to bargain in good faith without an election (see The Gissel Doctrine, below) if the union can demonstrate it at one time had the support of a majority of the employees it seeks to represent.

In recent years, some U.S. unions have negotiated agreements with some employers which require the employer to recognize the union as the employees' bargaining agent at unorganized sites on the basis of more expeditious processes than NLRB elections, such as proof of membership cards signed by a majority of the employees that they seek to represent at the site in question. Such agreements may be achieved through collective bargaining, where the union already represents a substantial portion of the employer's workers, or by seeking public support or otherwise pressing employers to agree to such terms.

**In a majority of Canadian jurisdictions, signed cards may serve as the basis for certification without need for an election. In Mexico a union requires a minimum of 20 members in order to obtain registration. "Registration" in Mexico is not the same as "certification" in the United States and Canada. Registration gives a union the legal capacity to enter into contracts and act as a party to legal proceedings. It is obtained through an administrative procedure which does not require proof that the union represents a majority of any group of workers. Once registered, a union can demand a collective contract from an employer and give a strike notice to induce bargaining and/or conciliation or arbitration by government authorities.**

## (ii) Appropriate Bargaining Unit

When a union petitions for an election, it must specify which group of employees it seeks to represent. This group is referred to as a "bargaining

unit.” Upon receipt of an election petition, the NLRB is empowered by Section 9(b) of the NLRA to determine whether the unit sought by the union is appropriate. The employer may challenge the union’s proposed bargaining unit with its own proposed unit. The NLRB regional office will then conduct a hearing and decide which employees make up an appropriate bargaining unit and are entitled to vote in the election. If the employer and union reach an agreement on the scope of the proposed bargaining unit and the agreement is approved by the regional director, a hearing is unnecessary. Unions may decide to compromise on some aspects of scope in order to expedite the election process.

In general, a “community of interest” of workers and common management control of labor relations policy covering those workers within the enterprise are required for a bargaining unit to be found “appropriate.” The practice within an industry will typically be taken into account. Within these guidelines, an appropriate unit might, in certain circumstances, be a narrow one, such as workers in one department or one occupation at a single facility. On the other hand, an appropriate unit in another case might cover all departments and all nonsupervisory occupations in more than one facility or even nationwide. Bargaining units are generally confined to a single employer. The Board may approve a multiemployer bargaining unit in which a group of employers agrees to be bound in collective bargaining by group actions and a union representing a majority of the workers of each of such employers agrees to bargain collectively with that group.

Supervisory employees are excluded from coverage under the NLRA. There are often disputes between employers and unions as to whether certain employees are really “work leaders,” who share a community of interest with other employees, rather than supervisors, whose community of interest lies with management.

**Canadian law defines an appropriate bargaining unit in a similar fashion. Low-level supervisors are normally included in a unit. In Mexico, the type of workers that a union may represent depends on the type of union (craft, enterprise, industrial, etc.). Confidential employees such as managers, supervisors, and workers in a position of trust may not be represented by the same union as other employees.**

### (iii) The Representation Election Campaign

Once the bargaining unit is determined, a date for an election is set. The NLRB normally seeks to arrange an election within 42 days of the filing of the petition. The union is provided with a list of employee addresses during an NLRA election so that the union may contact employees at home.

The period preceding the election is generally one of intensive campaigning by the union and employer. Some employer conduct during an election campaign (such as discharging a leader of the pronounion campaign for union activities or making threats of reprisal if the union wins the election) might rise to the level of an unfair labor practice. A meritorious ULP charge (see NLRB Enforcement Procedures, section 3B, below) will delay the election until it is settled or litigated, unless the charging party consents to go forward with the election and resolve the ULP case later.

### (iv) Secret Ballot Elections

NLRB agents conduct a secret ballot election at the workplace (although dispersed workers might instead have a mail ballot). The employer and the union are entitled to have election observers present at the polling places and at the tabulation of ballots. The observers can challenge the votes of those they believe are not eligible to vote. Challenged votes are segregated for a later determination whether they would affect the final results.

The average number of elections has decreased from more than 7,000 per year in the 1960s and 1970s to approximately 3,800 in the 1990s. Unions currently win approximately one-half of NLRB elections.

### (v) Election Objections

Depending on the results, the union or the employer may file objections to the election. NLRB case law requires “laboratory conditions” at elections, meaning “conditions as nearly as ideal as possible, to determine uninhibited desires of employees”<sup>3</sup> with respect to union representation (see Protections against Interference, section 2D, below). Campaign conduct that might not amount to an unfair labor practice can still de-

<sup>3</sup> *General Shoe Corp.*, 77 NLRB 124 (1948).

stroy the laboratory conditions for an election. The NLRB may order a new election if it finds merit in such objections to the election. In practice, NLRB election campaigns are normally as hard-fought and passionate as any political campaign, with charges of unfair tactics, misleading propaganda and other misconduct commonly raised by both the union and management.

(vi) The Gissel Doctrine

The NLRB and the courts have fashioned an important legal doctrine affecting the right to organize and the right to bargain, known as the Gissel doctrine.<sup>4</sup> When an uncoerced majority of workers has designated the union as their bargaining representative and the employer commits unfair labor practices that tend to undermine the union's majority and make a fair election impossible, the NLRB may issue a bargaining order without an election. This order requires the employer to bargain in good faith with the union as if the union had won an election.

**Most Canadian jurisdictions have enacted legislative provisions empowering the labor board to order automatic certification without majority support in cases where ULPs by the employer have rendered the board unable to ascertain the true wishes of the employees. Bargaining orders are not an issue in Mexico. There, workers may register a union regardless of whether the union represents a majority of any group. Once registered, a union may seek to negotiate a collective contract. When an employer is asked by a union to sign a collective contract and refuses to do so, the workers may exercise their right to strike, subject to mandatory conciliation and other legal requirements. In practice, this generally compels the employer to engage in bargaining and conclude a collective contract with the union.**

(vii) NLRB Rulings Not Self-Enforcing

Although the NLRB is the labor law enforcement agency that decides whether an employer or a union has violated the law, the Board cannot enforce its own decisions. If parties refuse to comply with a Board order,

<sup>4</sup> See *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

enforcement must occur through the judicial system. By way of example, a union organizing effort sometimes follows this course:

- 1) the union wins the NLRB election;
- 2) the employer files objections to the election accusing the union of improper tactics in the election process;
- 3) the NLRB rules against the employer and issues a bargaining order;
- 4) the employer refuses to bargain;
- 5) the union files a ULP charge alleging refusal to bargain;
- 6) the regional director issues a ULP complaint.

The ULP procedure then begins (see section 3, Government Enforcement, below), with the general counsel prosecuting the case through a trial before an administrative law judge, an appeal to the NLRB, and appeals from the Board to the federal courts, which may or may not enforce the Board's order. Only a final ruling by a court is enforceable. In practice, the availability of numerous appeals can mean that a union election victory is followed by extended litigation before the employer is finally compelled to bargain. The cycle of litigation can begin all over again with new ULP charges of refusal to bargain in good faith. In recent years, the NLRB's general counsel has sought to reduce litigation delays by bringing a motion for summary judgment in response to appeals of ALJ decisions to the NLRB.

#### (viii) The One-Year Rule

Regardless of the outcome, no new election may be held within one year of an earlier election in any given bargaining unit. If the union wins and is certified as the exclusive representative of employees, it has a one-year period in which its representation rights cannot be disturbed. The employer is obligated to bargain in good faith during this period.

**Canadian labor law generally provides that where a union's application for certification is unsuccessful, the union may be temporarily barred from making another application for certification in respect of substantially the same bargaining unit. The length of the bar varies by jurisdiction but is most often less than one year. Canadian labor legisla-**

tion typically gives a newly certified union a secure period of one year during which to negotiate a first collective agreement. In Mexico, a registered union can at any time seek support from members of the union that holds title to an existing collective contract and make an application to the relevant Conciliation and Arbitration Board to obtain title to the collective contract.

### *3) The Collective Bargaining Process*

Collective bargaining can be initiated by the union or by the employer to conclude a first collective agreement or to modify, terminate or replace an existing one. Collective bargaining is normally initiated by one party delivering a “notice to bargain.” Notice to bargain can be delivered at any time following certification of a union as a new bargaining agent. Notice to bargain modifications to, or the termination or renewal of, an existing contract must generally be delivered 60 days prior to the expiration date of the agreement. In the event that the agreement contains no expiration date, notice must be delivered 60 days prior to the proposed date to alter or terminate the agreement. The party giving notice must also give advance written notice to the Federal Mediation and Conciliation Service.

#### (i) Obligation to Bargain

##### *“Good Faith Bargaining” Requirement and the “Refusal to Bargain” ULP*

Section 8(d) of the *National Labor Relations Act* defines collective bargaining as the obligation to bargain “in good faith” with respect to wages, hours and other terms and conditions of employment and to execute a written contract to incorporate any agreement reached. The Act specifies that “such obligation does not compel either party to agree to a proposal or require the making of a concession.” Section 8(a)(5) of the Act makes it a ULP for an employer “to refuse to bargain collectively with the representatives of his employees.” Section 8(b)(3) of the Act makes a union’s refusal to bargain a ULP.

The duty to bargain does not compel the parties to reach a collective agreement. They are simply required to meet at reasonable times, without unreasonable delays, and to negotiate in good faith. Dilatory tactics

such as refusing to meet and confer at reasonable times and intervals, sending a representative with inadequate authority to bargain, or imposing numerous or unreasonable conditions upon initiating negotiations or the final execution of a contract have been found to breach the good faith bargaining obligation. Similarly, the employer may not negotiate with any other union, bypass the union to deal directly with employees, or deal individually with employees, since Section 9(a) of the *National Labor Relations Act* makes the union chosen by a majority of workers the exclusive representative of the employees for collective bargaining purposes. The union has the duty and the right to represent all employees in the bargaining unit. Within these largely procedural obligations, however, the parties remain free to bargain hard and to disagree.

The duty to bargain continues during the term of the collective bargaining agreement unless it has been discharged or waived. Matters which were neither discussed nor embodied in any of the terms and conditions of a collective bargaining agreement remain subject to the duty to bargain. In practice, the parties often negotiate a clause (commonly referred to as a “zipper clause”) waiving the right to bargain about terms and conditions of employment during the term of a collective bargaining agreement.

### *Surface Bargaining*

Surface bargaining is the term applied to a practice by an employer of going through the motions of bargaining without intending to reach an agreement.

Surface bargaining can occur in any labor negotiation, but usually arises in the context of a newly certified bargaining unit where management resisted the organizing effort. Surface bargaining is an unfair labor practice because it is a refusal to bargain in good faith. Since surface bargaining involves subjective motivation rather than obvious external conduct, such cases are among the most difficult to prosecute.

**Canadian labor laws also contain a “good faith bargaining” obligation with an equivalent unfair labor practice of breach of the duty to bargain. In contrast, Mexican law does not contain the unfair labor practice concept. It does not impose a duty to bargain. Instead, by protecting workers’ right to strike, the law seeks to induce bargaining by giving workers the right to strike if the employer refuses to conclude a collective contract with their union.**

**Canadian and Mexican labor laws also uphold the principle of exclusive representation by a single union for the relevant bargaining unit. As in the United States, there may be two or more unions that bargain with the employer, but not for the same categories of workers in a given workplace.**

### (ii) Disclosure of Information

Under U.S. law, the duty to bargain in good faith includes the duty to provide relevant information to the other party for collective bargaining. The duty applies to requests for information relevant to any mandatory subject of bargaining (see Scope of Bargaining and Contents of Collective Bargaining Agreement, below).

In practice, most unions send detailed information requests to employers prior to bargaining, covering all major aspects of employment conditions. As long as the information sought is relevant, employers must respond. The NLRB and the courts have given a broad interpretation to the relevance requirement, providing unions with a valuable bank of information for bargaining purposes.

Disputes over information requests are sometimes grounds for a ULP charge by a union that the employer has refused to bargain in good faith. Such disputes over information requests may also serve as grounds for a ULP strike by workers (see Unfair Labor Practice Strikes and Economic Strikes, in section 2C.5, below).

### (iii) Changes to Working Conditions during Negotiations

An important feature of U.S. collective bargaining law is that the employer is not permitted to change any terms or conditions of employment without first engaging in good faith bargaining with the union. A unilateral change prior to a genuine impasse having been reached constitutes a ULP of refusal to bargain. A genuine bargaining impasse exists only when each party has fully bargained over and complied with information requests with respect to all mandatory issues (see Scope of Bargaining and Contents of Collective Bargaining Agreement, below), but the parties are still apart and unwilling to make further substantive concessions. This rule against unilateral changes by the employer continues

to apply even when a collective bargaining agreement has expired, except that an employer may at that point refuse to honor obligations that were created by the collective bargaining agreement, such as deduction of union dues and participation in the arbitration of grievances.

After a true impasse has been reached, the employer may unilaterally implement all or part of its final proposal to the union. At that point, the union must either take strike action or work under the terms unilaterally imposed by the employer. In practice, the workers will sometimes work under the imposed terms while carrying out informational picketing or other actions to press the employer to return to negotiations.

**In all Canadian jurisdictions, an employer may not alter terms and conditions of employment from the time at which either party gives notice to bargain a collective agreement until the parties have completed the conciliation process and are in a legal strike or lockout position. At that point, the employer may impose unilateral changes in terms and conditions of employment, provided that those changes do not constitute an attempt to undermine or interfere with the union.**

Under Mexican law an employer may not unilaterally change the terms of a collective contract or an individual employment contract. Once filed with the relevant CAB, a collective contract that meets basic legal requirements for minimum contents is treated as a judicial order of the CAB itself and is enforceable as such. Collective contracts generally have an unlimited duration. A union may strike in response to unilateral changes to a collective contract. In cases of economic necessity a collective contract may be suspended or terminated, subject to CAB approval, if the employer can prove the existence of one of the legally recognized grounds for such measures.

#### (iv) Scope of Bargaining and Contents of Collective Bargaining Agreement

##### *Freedom of Contract*

Under U.S. labor law, no clause of a collective bargaining agreement is required by law, and neither the NLRB nor the courts can impose any clause of an agreement on either the union or the employer. Parties may voluntarily submit contract negotiation disputes to binding arbitration, but this mechanism is rarely used in U.S. labor relations. The negotiat-

ing parties normally go to the brink of a strike or lockout, then ultimately compromise in a settlement.

**Canadian laws specify several clauses that must be contained in every collective agreement. Mexican law stipulates a number of subjects that a collective contract must address, such as wage rates, hours of work, rest days and vacation leave.**

### *Mandatory Subjects of Bargaining*

In the United States, the obligation to bargain extends only to “mandatory subjects of bargaining.” The NLRB and the courts have developed this concept to a high degree of nuance, but the controlling factor is the subject’s relevance to wages, hours and working conditions. Parties are required to bargain over mandatory subjects, but may refuse to bargain over other “permissive” subjects.

An important distinction between mandatory and permissive subjects relates to decisions by employers to close or transfer all or part of their operations. The Supreme Court has defined matters that lie at “the core of entrepreneurial control” as nonmandatory subjects that are left to employer discretion, as long as they are unrelated to labor costs. Although the “effects” of such decisions are a mandatory bargaining subject, the decision itself is not subject to negotiation. On the other hand, a decision that turns on labor costs or other issues related to wages, hours and working conditions could fall within the mandatory subject scope.<sup>5</sup>

**Neither Canadian nor Mexican law has an equivalent to the U.S. doctrine of mandatory and permissive subjects of bargaining.**

### (v) Conciliation, Mediation and Arbitration of Bargaining Disputes

#### *Federal Mediation and Conciliation Service (FMCS)*

The FMCS was created by the Taft-Hartley Act of 1947 “to assist parties to labor disputes . . . to settle such disputes through conciliation

<sup>5</sup> See *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964); *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

and mediation.” The FMCS may undertake mediation and conciliation only if both parties request its involvement in the bargaining dispute. A union or an employer seeking to modify or terminate a collective bargaining agreement must notify the other party and the FMCS and any state mediation body of such intention. An FMCS mediator normally calls both parties as the contract nears its expiration to check on the status of negotiations and to offer mediation services if the parties jointly agree to request mediation.

The FMCS has no enforcement power. It can serve only as a mediator and conciliator, attempting to persuade the parties in a collective bargaining dispute to compromise their differences and reach an agreement. The FMCS can make recommendations to the parties but cannot arbitrate the dispute.

The FMCS employs a staff of mediators at its headquarters in Washington, D.C., and in regional offices around the country. Mediators are usually experienced labor negotiators with a background in union or management activity. Mediators normally use a “shuttle diplomacy” method of bridging communication between the employer and the union when bargaining has broken down or a strike has erupted. Most state governments also have a mediation and conciliation office which provides similar services for private sector parties located in the state, even when the parties are within federal labor law jurisdiction. Federal and state mediators generally coordinate their activities to avoid duplication of effort.

U.S. labor law does not provide for mandatory arbitration of collective bargaining disputes although parties may voluntarily agree to arbitration.

**A majority of Canadian provinces and the federal jurisdiction provide for a mandatory conciliation process and access to binding arbitration of a first-contract dispute where a newly formed union is unable to achieve a negotiated agreement with the employer. In Mexico, conciliation by the relevant CAB is mandatory once a union delivers notice of its intention to strike. In addition, once a union has filed a strike notice with the CAB, it has the choice of submitting the dispute to the CAB for settlement or going forward with the strike.**

#### (vi) Extension of Agreement Coverage

There is no provision in U.S. labor law for extension by law of collective bargaining agreement terms to workers outside the bargaining unit.

**In Canada, only Quebec provides for extension of collective agreement coverage. On the other hand, law-contracts which extend negotiated terms of employment to cover an entire sector or region are an important feature of Mexican labor law.**

#### *4) Enforcement of Collective Bargaining Agreements*

##### (i) Binding Effect of Collective Bargaining Agreements

A collective bargaining agreement is legally enforceable by either party (the union or the employer). Its terms govern relations between the parties unless they are waived or amended by mutual agreement.

##### (ii) Enforcement Procedures

Collective bargaining agreement obligations can be enforced through three different mechanisms: (1) grievance and arbitration under the terms of an arbitration clause contained in the collective agreement; (2) filing of a complaint with the NLRB; or (3) court action.

#### *Arbitration*

Private arbitration under the terms of a collective bargaining agreement is the most common recourse available to private parties in the U.S. labor relations framework. Most collective bargaining agreements contain a “no-strike” clause forbidding a work stoppage while the contract is in effect and providing for arbitration of disputes that concern the rights and obligations contained in the agreement. Disputes arising under the contract are normally first subject to a grievance procedure, in which union and employer representatives attempt to resolve differences. Most grievances are resolved in this manner.

Unresolved grievances are generally submitted to a neutral arbitrator. Labor arbitration is an entire system of private jurisprudence in U.S. industrial relations. Arbitrators are private citizens, not government officials. The method of selection of an arbitrator and the powers of the arbitrator are usually established by the contract's arbitration clause, not by laws or regulations.

If necessary, an arbitrator's award can be enforced by obtaining a court order. Courts will generally enforce such awards. Indeed, case law has established that arbitrators' awards must be enforced even if the arbitrator's interpretation of the collective bargaining agreement is ambiguous or would differ from the court's decision on the merits of the dispute. Courts will overturn an arbitrator's decision only if it violates the law or an overarching public policy, if it exceeds the authority granted by the parties in their arbitration clause, or if it is inconsistent with the essence of the contract. Such cases are rare.

#### **Box 4.1**

##### **Arbitration — “Private Jurisprudence” in U.S. Labor Relations**

Arbitral decisions over the past 50 years of U.S. labor relations constitute a body of private law that guides current decision making. Although each case presents new facts and there is no application of precedent as at common law, there is a *de facto* pattern of deciding similar cases in a similar manner.

Two principal arbitration services serve as a source of arbitrators in labor-management matters. The American Arbitration Association (AAA) is the primary private organization of arbitrators. Arbitrators must meet standards established by the AAA to be included on the AAA roster of arbitrators. The second organization is the Federal Mediation and Conciliation Service (FMCS), which maintains a list of private arbitrators (not FMCS mediators, who are government employees) from which parties to a collective bargaining agreement may select an arbitrator. FMCS arbitrators must meet FMCS standards. Many arbitrators are on both the AAA and the FMCS lists.

Some companies and unions agree in their labor contract to forego AAA or FMCS procedures for selecting an arbitrator and instead agree on a permanent arbitrator or panel of arbitrators to handle all their arbitra-

tions. Most such permanent panelists are experienced arbitrators who are also on the AAA and FMCS lists. Arbitrators conduct thousands of labor arbitrations each year in the United States.

### *National Labor Relations Board (NLRB)*

A refusal by an employer to deal with an alleged violation of the collective bargaining agreement through contractual grievance and arbitration provisions can be the subject of a refusal-to-bargain charge. The courts have held that collective bargaining is a continuing process, which includes day-to-day adjustments in working rules, resolution of problems not covered by existing agreements, and the protection of employee rights already secured by the terms of an agreement. However, charges relating to collective bargaining agreement violations are often subject to the NLRB's deferral doctrine, described below.

### *NLRB Deferral Doctrine*

Compared with ULP cases taken to the NLRB or lawsuits in federal district courts, arbitration is generally faster and less expensive. Most grievances (complaints that the opposite party to a collective bargaining agreement has breached that agreement) submitted to arbitration are resolved in three to six months, compared with possibly years of litigation before the NLRB or the courts. The NLRB has developed a "deferral" doctrine by which the Office of the General Counsel will defer ULP cases alleging violation of the collective bargaining agreement pending completion of the grievance-arbitration procedure, by which such cases are susceptible to private arbitration under a collective bargaining agreement.

### *Courts*

Section 301 of the LMRA creates a private right of action in federal district court for an alleged violation of a collective bargaining agreement. This means that either party may sue for breach of a collective bargaining agreement and seek any remedy available under statutory and common law rules. A Section 301 suit is often preferable to a ULP charge because the remedies of a federal district court order — including financial damages — are self-enforcing. However, because of the costs and time involved in such suits, they are in practice undertaken only in cases involving very large amounts of money or important but intractable issues.

### *5) Successor Employers*

When a business with a collective bargaining obligation is sold, U.S. labor law requires the new owner to bargain in good faith with the union for a new collective bargaining agreement, as long as a majority of the former company's union-represented workers are employed by the new owner. There is no obligation, however, to extend the terms and conditions of the former contract, unless the new employer is really an "alter ego" of the old one, meaning that the new employer has substantially identical management, business purpose, operation, equipment, customers and supervision, as well as ownership. A new employer is not required to hire the employees of its predecessor. However, it is an unfair labor practice for a successor employer to refuse to hire its predecessor's employees because of their union membership or activities or to avoid recognition of and bargaining with the union.

**Canadian and Mexican laws require terms and conditions of collective agreements and collective contracts, respectively, to carry over to an employer continuing the business of a previous employer. The new employer assumes all rights and obligations created by the contract with the union.**

### *6) Obligations of Unions towards Represented Workers*

U.S. labor law imposes a "duty of fair representation" on the union, requiring it to represent bargaining unit members in contract negotiations and in the administration of a collective agreement without hostile discrimination, fairly, impartially, and in good faith. A violation of the duty of fair representation can give rise to an unfair labor practice charge against the union. In practice, the NLRB and the courts have created a high threshold for proving a violation of the duty of fair representation, leaving wide discretion to the union in managing its negotiations and contract administration.

**Canadian law provides for a similar duty of fair representation. In Mexico, Article 375 of the *Federal Labor Law* requires unions to represent their members in defending their individual rights unless the individual chooses to act directly and without the assistance of the union.**

### *7) Termination of Bargaining Rights*

A union may lose its certification under certain circumstances. It may be decertified by a majority vote of bargaining unit members. U.S. law permits workers to change their collective bargaining representative or to decertify their bargaining representative and revert to nonunion status. The NLRB will conduct a decertification election if it receives a petition voluntarily signed by at least 30 percent of the employees in the bargaining unit. However, there are certain restrictions on the holding of such elections. First, no election may be held if a certification or decertification election has been held in that bargaining unit within the preceding year. Second, to enhance stability in bargaining relationships, the NLRB has devised a “contract bar” rule. This rule precludes any election for a new union to replace an incumbent union or for the decertification of an existing union for the first three years of a collective bargaining agreement. A representation petition for a new union or a decertification petition must be filed 60 to 90 days before the expiration of the existing contract. An employer, supervisor or other agent of the employer may not file a petition for a decertification election.

**Canada’s labor laws provide for similar methods of decertifying or changing the bargaining representative. Under Mexican labor law any duly registered union may challenge another union’s title to a collective contract at any time by filing a claim to that title with the relevant CAB. If an incumbent union does not prove its majority support during such a proceeding, it will lose title to the collective contract and thus lose the right to administer and negotiate revisions to it.**

### C. LABOR PRINCIPLE 3 – THE RIGHT TO STRIKE

#### 1) *Legal Foundations*

The United States Constitution does not explicitly address the right to strike. Instead, legislation has established rules for strike activity.

##### (i) The Labor Injunction in U.S. Labor History

Throughout the 19th century and the early 20th century, many U.S. legislatures and courts treated strikes as a criminal conspiracy or restraint of trade. One phenomenon peculiar to Anglo-American labor law history, critical in understanding U.S. treatment of the right to strike, is the so-called “labor injunction.”

Labor injunctions were widely used in the 19th century and early 20th century at the behest of employers to break strikes. Injunction proceedings often took place *ex parte*, without an opportunity for workers or unions to be heard. Many judges also held union leaders personally liable, both criminally and civilly, for the acts of union members. The judicial repression of strikes deeply affected organized labor’s views and later gave way to legislation on the right to strike.

In the 1920s and 1930s, sustained political efforts by workers and their allies achieved greater protection of the right to strike, culminating in the Norris-LaGuardia Act of 1932 and the *National Labor Relations Act* of 1935. In later legislation, Congress demonstrated greater interest in protecting employers’ interests and those of “neutral” third parties by enacting legislation governing workers’ right to strike.

##### (ii) Norris–LaGuardia Act and *National Labor Relations Act* Policy

In the collective bargaining context, where workers seek better terms and conditions of employment in a first contract or in a new contract, workers’ right to strike is relatively unfettered. Workers’ right to engage in “concerted activities” for “mutual aid or protection,” including collectively withholding their labor, is protected by the basic provisions of the Norris-LaGuardia Act and the *National Labor Relations Act*. In general, U.S. law provides that workers cannot be discriminated against for exer-

cising this right, nor can employers obtain labor injunctions from judges to halt a strike. Section 7 of the *National Labor Relations Act* declares the right of workers to engage in “concerted activities” for “mutual aid or protection” and underscores this point in Section 13: “nothing in this Act shall be construed so as either to interfere with or impede or diminish in any way the right to strike.”

### (iii) Federal Preemption

U.S. federal law on the right to strike is paramount and preemptive in its scope and enforcement. For example, when in 1992 the state of Wisconsin enacted a state law prohibiting the permanent replacement of strikers within the state, federal courts ruled that the state act was preempted by federal law and voided the state statute.

States, counties and municipalities do have a critical ancillary role affecting the right to strike because they enforce public safety provisions governing the conduct of strikes. State courts can issue civil injunctions to stop violence, trespassing or other public safety disturbances in the course of an otherwise legal strike. Local police and, much less commonly, the National Guard (which is under control of the governor of a state) may be deployed to guarantee access to and from work sites for managers, nonstriking employees, replacement workers, suppliers and others crossing the picket lines of striking workers. State and local police and prosecutors also have jurisdiction over picket line violence and other unlawful activity.

### 2) *Protected Strike Activity*

As noted above, Section 7 of the *National Labor Relations Act* protects the right of employees to engage in concerted activities, including the right to strike. The National Labor Relations Board and U.S. courts have ruled that certain types of strike activity are not protected by that section. In particular, partial strikes (such as concerted refusals to perform overtime work), concerted production slowdowns, intermittent work stoppages, and minority strikes conducted without the authorization of a certified or voluntarily recognized majority bargaining representative are treated as unprotected. As a result, an employer is free to take disciplinary action against employees involved in such strikes.

**Canadian labor law protects a wider range of strike activity, including partial and intermittent strikes. Canadian unions may lawfully strike, however, only to conclude a collective agreement and only once statutory conciliation, mediation and notice requirements have been met. Mexican labor law limits the definition of a strike to “the mere act of suspending work” and thus does not protect work slowdowns.**

### *3) Regulation of the Right to Strike*

U.S. workers and unions are relatively free to engage in peaceful strike action without interference by the employer or intervention by the state. No law mandates requirements or conditions for workers to begin, sustain or end a strike. However, the law makes certain types of strike unlawful, mandates that unions provide certain types of notice, allows for no-strike clauses to be included in collective agreements, and allows for injunctions against strikes in “national emergencies.” The *Railway Labor Act* establishes somewhat different procedures and regulations for strikes in the airline and railway industries (see Appendix 4A).

#### (i) Unlawful Strikes

The Taft-Hartley Act (the *Labor Management Relations Act* of 1947) amended the *National Labor Relations Act* to make it unlawful to strike to achieve certain purposes.

The most important of these restrictions are contained in Section 8(b)(4) of the NLRA, which basically prohibits union actions against neutrals in a labor dispute. Section 8(b)(4) prohibits workers and unions from inducing or engaging in work stoppages or refusing to handle products for such purposes as: (1) forcing any employer or self-employed person to join any labor or employer organization; (2) requiring a neutral third party to cease doing business with an employer with whom the union has a labor dispute; (3) forcing an employer to recognize a union when another union has already been certified as the representative of its employees; or (4) forcing an employer to assign particular work to employees in a particular union (unless the employer is failing to comply with a certification or order of the NLRB determining

the bargaining representative of employees performing such work). A strike to force an employer to designate a multiemployer organization as its bargaining representative violates other subsections of Section 8(b), as does a strike seeking to force an employer to pay for services which are not performed or are not to be performed.

#### (ii) Notice Requirements

A union must give 60 days' advance notice to the employer of its intention to modify or terminate an existing collective bargaining agreement. It must also provide notice of the existence of a bargaining dispute to the Federal Mediation and Conciliation Service within 30 days after providing such notice. Section 8(d)(4) of the NLRA bars strikes by a union that has failed to provide the required notice to the FMCS until 60 days after that notice is eventually filed. If any strike action is taken within a required notice period, striking workers lose their status as employees for the purpose of protection against unfair labor practices and the right to vote in representation elections until such time as they are reemployed by the employer.

In addition to those general notice requirements, amendments to the NLRA in 1974 covering the health care sector established special advance notice requirements for strikes in the private sector health care industry, including 10 days' advance notice by health care unions of an intent to strike.

#### (iii) No-Strike Clauses

In the United States, the vast majority of collective bargaining agreements contain a no-strike clause barring work stoppages while the contract is in effect. The normal *quid pro quo* for the no-strike clause is an arbitration clause, in which the employer agrees to submit disputes that arise during the contract term to binding arbitration before a private arbitrator under terms of reference established by the contract. Most strikes occur after the expiration of a contract when the employer and the union cannot reach agreement on a new contract.

**No-strike clauses and the arbitration *quid pro quo* in American labor contracts are products of agreement between the parties. In contrast, Canadian labor laws require no-strike and compulsory arbitration clauses in every collective bargaining agreement. Statutes will apply the requirement if it is not contained in the agreement. Mexican law does not restrict the right to strike but requires that formal advance notice of strikes be given and that, once such notice is given, the union and the employer attend CAB conciliation hearings. It also permits a union that has given a strike notice to submit the dispute giving rise to the notice to the CAB for resolution.**

(iv) National Emergencies

Sections 206 to 210 of the LMRA create an exception to the Norris-La-Guardia Act, permitting labor injunctions where a strike creates a “national emergency.” Under these provisions, if the President believes that an actual or threatened strike or lockout will imperil “the national health or safety,” he or she may appoint a board of inquiry to investigate the issues in dispute and report publicly on them. Upon receiving this report, the President may direct the Attorney General to seek a court injunction against the strike or lockout. Section 208 of the LMRA gives the court jurisdiction to issue an injunction if it finds that the threatened or actual strike or lockout: (1) affects all or a substantial part of an industry engaged in interstate or international commerce or engaged in the production of goods for commerce; and (2) will “imperil the national health or safety.” If an injunction is issued, the parties must resume bargaining with the aid of the Federal Conciliation and Mediation Service. Sixty days after the issuing of the injunction the board of inquiry must submit a further report on the current status of the bargaining dispute and on the employer’s last offer of settlement. Within 15 days of that report the NLRB must conduct a vote of the affected employees on that offer. Subsequent to the election the injunction must be dissolved. The national emergency provisions of the LMRA have been used in a number of industries, including steel, coal, atomic energy, maritime transport, and telecommunications.

(v) Airline and Railroad Industries

The *Railway Labor Act* establishes different requirements and regulations of the right to strike in the airline and railway industries. A summary of these conditions is included in Appendix 4A.

(vi) Strike Votes

No U.S. law requires a strike vote or a vote by workers on an employer's last contract offer before strike action is taken or after a strike has begun. As a matter of democratic practice, however, most unions' constitutions and bylaws require a strike vote, some requiring a two-thirds majority to launch a strike. The government plays no role in overseeing such votes.

**In Mexico, once a strike has started, employers, workers, or interested third parties may request that the CAB certify the legal "existence" of the strike. This requires the CAB to determine, among other things, whether a majority of workers support the strike, for which purpose a strike vote of workers (called a *recuento*) may be held in order to determine whether the strike enjoys majority support. If the strike does not enjoy majority support it will be declared "nonexistent," and work must be resumed. In Canada, federal law and most provincial laws require mandatory strike votes.**

*4) Picketing and Other Supportive Action*

Peaceful picketing, handbilling and other concerted activities are generally protected under the *National Labor Relations Act*. Many such activities also benefit from constitutional protection against state interference with freedom of expression. However, the NLRA restricts some union actions, such as "secondary boycotts."

(i) Secondary Boycotts

U.S. law on secondary boycotts is a significant limitation on the scope and impact of the right to strike. Section 8(b)(4) of the *National Labor Relations Act* makes unlawful any form of "secondary boycott" by a U.S.

union. Secondary boycotts are a type of action by workers or their union which seeks to influence an employer by bringing economic or social pressure to bear on those who deal with that employer.

On the other hand, the Supreme Court has held that the NLRA does *not* prohibit peaceful handbilling, unaccompanied by picketing, that urges customers and consumers not to patronize a neutral employer. The Court has also held that a union can, in most situations, lawfully picket a secondary employer for the limited purpose of persuading customers or consumers not to buy the products of the primary employer.

Unions can be subject to lawsuits for financial damages and to ULP charges for secondary boycott activity. Many strike-related ULP charges are filed by employers against unions and union members for secondary boycotts. The general counsel is required by Section 10(l) of the NLRA to immediately seek an injunction in federal court against any secondary boycott by a union.

#### **Box 4.2**

##### **Secondary Boycotts by Farmworkers**

Although farmworkers' unions in the United States are generally disadvantaged by their exclusion from federal labor relations laws (they can organize only under state laws, where such laws exist), they have an advantage in this area since they are free to seek secondary boycotts both by unions and consumers. Some farmworkers' unions were able to gain a foothold in the agricultural sector because they were able to organize consumer boycotts of large grocery store chains in major U.S. cities.

#### *5) Striker Replacement*

The Supreme Court enunciated an important rule which affects the right to strike in the 1938 Mackay Radio case, when it held that an employer may permanently replace striking workers engaged in an economic strike.<sup>6</sup> It is fairly common today for U.S. employers to threaten to employ permanent replacements in the event of a strike.

<sup>6</sup> See *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

An exception to the rules permitting permanent replacement of strikers applies where a strike is undertaken to protest an employer's unfair labor practices. In such cases, strikers cannot be permanently replaced (see Unfair Labor Practice Strikes and Economic Strikes, below).

Striking workers who are permanently replaced under the Mackay doctrine are not terminated from employment. Rather, they remain on a recall list and must be offered employment if a position becomes available.

U.S. trade unionists and their allies argue that the right to strike necessarily implies that all striking workers should have the right not to be permanently replaced in response to strike action and that this right should not be limited to strikes provoked by an employer's ULPs. Employers counter that their right to permanently replace economic strikers maintains balance in the test of economic force between the parties. Proposals to amend U.S. labor law to overturn the Mackay decision and bar the permanent replacement of striking workers have been strongly debated in the U.S. Senate twice during the 1990s. In both attempts, the efforts were filibustered, and supporters of reform were unable to muster the 60 percent vote needed to cut off the filibuster and proceed to a vote.

**Canadian labor laws do not permit the permanent replacement of strikers. British Columbia and Quebec prohibit most forms of temporary replacement of strikers as well. Mexican law requires a company to cease operations during a strike, except as necessary to maintain equipment and preserve raw materials. The law requires the members of the union on strike to perform these tasks and makes the union responsible for the installations of the company during the strike.**

#### (i) Unfair Labor Practice Strikes and Economic Strikes

U.S. labor law makes a critical distinction between strikes provoked by an employer's unfair labor practice and strikes motivated by workers' economic interests in improved wages, benefits or working conditions. A ULP strike has greater protection under the law, since workers engaged in a ULP strike cannot be permanently replaced under the Mackay doctrine. They may be temporarily replaced, but they must be reinstated, displacing any temporary replacement workers, when they decide to end their strike and return to work.

In practice, many unions file ULP charges when they begin a strike. The union hopes to prevail on the ULP charge to protect strikers against permanent replacement. A final decision by the NLRB or by the courts on the ULP case may not be forthcoming for a period of months or years, and so striking workers cannot be certain that their action is protected. However, an equivalent risk exists for the employer: if it replaces strikers, and years later a final ruling of the NLRB or a court of appeals finds that they are ULP strikers, the employer must rehire the strikers and pay back wages and other expenses for the period of the strike.

#### D. PROTECTIONS AGAINST INTERFERENCE

##### *1) Prohibition of Employer Unfair Labor Practices*

The central instrument for protecting the rights to organize, to bargain collectively and to strike under U.S. law is the prohibition of five unfair labor practices in Section 8(a) of the *National Labor Relations Act*. A ULP violates the law and is subject to the remedies provided by the Act.

**Canadian labor law also rests on the prohibition of defined unfair labor practices. Mexican labor law does not define unfair labor practices as such. While some prohibitions are stated, Mexican law relies on detailed affirmative declarations of what employers, employees and unions must do rather than what they must not do, establishing sanctions and remedies for noncompliance.**

Section 8(a)(1) of the *National Labor Relations Act* makes it a ULP to “interfere with, restrain or coerce” employees engaged in concerted activity, including union activity. For example, prohibiting employees from distributing pronion literature on their own time and in nonwork areas may be unlawful interference with workers’ organizing rights. Examples of employer behavior found to be coercive include the following: (1) polling or interrogating individual employees about their voting intentions in a potential representation election; (2) threatening to withdraw economic benefits during a representation election campaign; (3) attempting to influence the election of union officials; and (4) placing employees or union organizers engaged in union activity under surveillance.

Threatening to close a workplace if the workers form a union is also an example of unlawful coercion. However, courts have allowed employers to make predictions as to the effects that they believe unionization will have.<sup>7</sup>

**Canadian law treats most employer statements which link the job security of employees to their choice to unionize as unfair labor practices.**

Section 8(a)(2) seeks to guarantee the independence of trade unions by making it an unfair labor practice to dominate or interfere with the formation or administration of a labor organization or to contribute financial or other support to it. Section 8(a)(2) of the Act bars the creation of “company unions” controlled by management and used to prevent genuine trade union organizing. Section 8(a)(2) also prevents an employer from assisting one union among rival unions seeking to represent its employees. An employer who has been notified of a valid petition for a representation election must refrain from recognizing and bargaining with any rival unions until the outcome of the election has been determined.

While some employers claim that Section 8(a)(2) and its continued enforcement by the NLRB impede the formation of labor-management cooperation committees, unionists insist that the clause is necessary to prevent a resurgence of company unions. Proposals to reform Section 8(a)(2) have been sharply debated in the U.S. Congress in recent years.

Section 8(a)(3) of the Act protects workers’ right to organize and carry on concerted activities by prohibiting discrimination against workers who engage in lawful union activities. The Act provides for reinstatement and back pay (or other “make-whole” remedies) for workers who are discharged or otherwise discriminated against for such activity. An employer will be found to have discriminated if antiunion reasons were a substantial or motivating factor in its decision. Where an employer closes a part of its operations with the motive of chilling unionism in the remainder of its operations or transfers some or all of its operations to avoid collective bargaining obligations under the Act, the employer commits an unfair labor practice under Section 8(a)(3).

<sup>7</sup> For a fuller treatment of this issue, see Commission for Labor Cooperation, *Plant Closings and Labor Rights* (Dallas: Secretariat of the Commission for Labor Cooperation, 1997).

Discharging workers for attempting to organize a union is one of the most common ULPs in the United States and has increased sharply in recent decades. For example, during the 1950s, reinstatement offers to remedy discharges of workers in violation of Section 8(a)(3) were found in less than 5 percent of union elections. By the 1980s, that figure had risen to 28 percent.<sup>8</sup> Moreover, reinstatement offers do not reflect all ULP discharges, since many workers are offered and accept back pay or some other compensation without being offered reinstatement, and some ULP discharges are not reported to the NLRB.

**In most Canadian jurisdictions any presence of an antiunion motive will render a discharge unlawful, and the worker will be reinstated with back pay. In Mexico, workers can be discharged only for limited and specific causes, which do not include union activity.**

Section 8(a)(4) makes it unlawful to retaliate against a worker for giving testimony or otherwise availing himself or herself of the protection of the NLRA.

Section 8(a)(5) makes it unlawful for an employer to refuse to bargain with a majority collective bargaining representative of its employees. In addition, the duty to bargain prevents an employer from unilaterally altering terms and conditions of employment prior to an impasse in collective bargaining. The Act includes prohibitions against other actions by employers which interfere with the ability of a union to represent its bargaining unit members (see *Obligation to Bargain*, in section 2B.3, above).

## *2) Prohibition of Union Unfair Labor Practices*

Section 8(b) of the Act protects workers against certain actions by unions. Section 8(b)(1) of the Act makes it a ULP for a union to “restrain or coerce” employees in the exercise of rights guaranteed by Section 7 of the Act. This protects certain worker rights to refrain from

<sup>8</sup> Annualized averages for each decade. See Commission on the Future of Worker Management Relations, *Fact Finding Report* (Washington DC: U.S. Department of Labor and U.S. Department of Commerce, 1994), at page 84.

union membership and concerted activity or to change union allegiance. For example, a union may not fine or otherwise penalize a member for seeking to resign from the union during a strike or for opposing incumbent union officials in intraunion politics. Similarly, a union which makes threats of violence against those supporting a rival union commits an unfair labor practice. Section 8(b)(2) makes it a ULP in some circumstances for a union to cause an employer to discriminate against an employee in violation of Section 8(a)(3). Section 8(b)(4) makes it unlawful for a union to require employees covered by a union shop to pay an “excessive or discriminatory” membership fee.

### *3) The “Laboratory Conditions” Requirement*

In addition to prohibitions on unfair labor practices, the National Labor Relations Board enforces a requirement of “laboratory conditions” during union representation elections. This requirement has been defined as “conditions as nearly as ideal as possible, to determine uninhibited desires of employees”<sup>9</sup> during union representation elections. The Board will set aside and rerun elections where laboratory conditions are not met. In practice, the laboratory conditions doctrine prohibits only the most aggressive forms of campaigning, leaving a wide scope for misleading and derogatory campaign propaganda. The Board will intervene if a party uses forged documents to render voters unable to recognize propaganda. It has also intervened when a party engaged in electioneering at a polling place once the polls had opened, when a party exacerbated racial tensions through inflammatory racial statements, and when a party made threats of violence.

### *4) Civil Rights and Protection*

Without civil and political rights there can be no normal exercise of trade union rights. The U.S. Constitution provides fundamental civil

<sup>9</sup> *General Shoe Corp.*, 77 NLRB 124 (1948).

and political rights to U.S. residents. Like other U.S. residents, unions and union members have full freedom of assembly, provided that the exercise of this freedom does not pose a real and present danger of substantial harm to property or physical safety. Unionists have the freedom to travel within and outside the country that is granted to all residents and have the right to attend national and international trade union meetings with full freedom and independence. Similarly, unions and employees have the constitutional right to express their views and opinions publicly and to receive or impart information through any media, like other U.S. residents.

Unions and employees engaged in union activity, like all U.S. residents, enjoy freedom from search and seizure of their property without a judicial warrant issued following a determination that reasonable and probable cause exists to believe that evidence for criminal proceedings will be found on the premises. Similarly, unionists enjoy constitutional freedom from arbitrary arrest or detention without a warrant and without charges being brought. Unions and their members are entitled to police protection from assault, injury, and damage to property and to full protection of the criminal laws which prohibit inflicting such harms.

### 3. GOVERNMENT ENFORCEMENT

#### A. THE NATIONAL LABOR RELATIONS BOARD (NLRB) – STRUCTURE

The principal U.S. government agency that enforces private sector labor relations laws is the National Labor Relations Board (NLRB), often just called “the Board” in U.S. labor discourse. The NLRB structure actually contains three independent entities: (1) the five-member Board itself; (2) the Office of the General Counsel; and (3) the Division of Administrative Law Judges (ALJs).

The Board employs some 2,000 attorneys, field examiners, and support staff at its headquarters in Washington, D.C., and 33 regional offices around the country. A regional director heads each regional office and makes critical decisions in matters that come before the office. Re-

gional directors and their staff handle representation issues on behalf of the five-member Board. Regional directors also deal with ULP cases under the supervision of the independent general counsel.

### *1) The Board*

The President of the United States appoints five members to the NLRB. Each appointment must be confirmed by the U.S. Senate. As a matter of custom, no more than three members of the Board belong to the same political party. The Board has two distinct functions: hearing appeals of decisions by administrative law judges (ALJs), and supervising representation elections to certify a union's majority status.

**Mexico's CABs and several Canadian provincial labor boards are tripartite in their composition, with representatives of government, labor and management.**

#### (i) Supervision of Certification Elections in Representation Cases

Through its regional offices, the NLRB oversees secret ballot elections in workplaces where workers seek to prove majority support for collective bargaining. Under the authority of the Board, NLRB elections are conducted by regional directors and regional office staff. The Board establishes the rules for conducting such elections and reviews objections to the election. Such complaints of unfair campaign and election tactics are distinct from ULP proceedings (see The "Laboratory Conditions" Requirement, section 2D.3, above.)

#### (ii) Appeals from ALJ Decisions in ULP Cases

The NLRB sits as an appeals panel that reviews the decisions of administrative law judges in ULP cases. In this role, the Board is a tribunal reviewing the written record of the trial and the written decision of the ALJ. Decisions of the NLRB are themselves appealable to federal appeals courts and may eventually be appealed from there to the U.S. Supreme Court.

## *2) Office of the General Counsel*

The independent Office of the General Counsel is the main enforcement agency for the right to organize, to bargain collectively and to strike. The general counsel is appointed by the President of the United States for a four-year term and must be confirmed by the Senate.

The NLRB's general counsel is generally considered the most powerful single post in the agency structure. The general counsel enforces the ULP provisions of the law, receiving and investigating all ULP charges through the regional office staffs. Such charges may be filed by workers, unions or employers at any of the NLRB's regional offices. If the general counsel finds merit in the charge, a complaint will be issued against the charged party. If the general counsel does not find merit, the charge is dismissed. The refusal to issue a complaint after receiving an unfair labor practice charge is not reviewable by the Board or by the courts.

In effect, the NLRB Office of the General Counsel is the gatekeeper for enforcement of federal labor law on industrial relations. If the general counsel issues a complaint, the resources of the agency (and thereby the power of the federal government) are then applied to prosecution of the case before an administrative law judge, before the Board, and in the courts. The general counsel enforces the Act on behalf of the people of the United States, not just on behalf of the charging party.

## *3) Division of Administrative Law Judges*

The third branch of the NLRB is the Division of Administrative Law Judges. ALJs are independent of the five-member Board and of the Office of the General Counsel. Although they are appointed by the Board, they receive lifetime appointments and may be removed only for gross misconduct. They serve as trial judges in ULP cases, presiding over hearings where documentary evidence and testimony of witnesses are presented by counsel for the Office of the General Counsel and by counsel for the charging party and the respondent. After a hearing, the ALJ issues findings of fact and rulings of law based on the evidence. The ALJs' decision is commonly appealed to the Board by the losing party.

## B. NLRB ENFORCEMENT PROCEDURES - UNFAIR LABOR PRACTICE PROCEEDINGS

### *1) Investigation*

ULP processes are initiated by a party's filing a charge with the Board. Acting under the authority of the general counsel, the regional director first conducts an investigation of the alleged violations set out in the ULP charge. The investigation includes taking sworn statements. It also allows extensive opportunity for union or employer counsel to submit position papers and to argue orally on their client's behalf for the issuance of a complaint or for the dismissal of the charge.

### *2) Complaint or Dismissal*

Based on the investigation, the regional director then decides whether it is reasonable to believe that a ULP may have been committed. The regional office issues a complaint if it finds that the charge is "meritorious" — if the findings of a preliminary investigation support the facts as alleged in the charge and if the facts as alleged would constitute a ULP. If not, the regional director will recommend that the charging party withdraw the charge. Charges may be withdrawn without prejudice to the right of the charging party to refile charges relating to the same matters, possibly on the basis of new or additional evidence or allegations. If the charging party refuses to withdraw an unmeritorious charge, the regional director will dismiss it. Dismissals can be appealed only to the general counsel. The regional director often convinces the charging party to withdraw the charge prior to dismissal. About one-third of all ULP charges are found to be meritorious after a preliminary investigation. (In several regional offices of the Board, a large volume of charges involve individual employee grievances, often by Postal Service employees who are within NLRB jurisdiction. These charges are generally deferred to arbitration by the regional office and are not listed as meritorious. Thus, the true rate of meritorious charges is higher than one-third.)

### *3) Settlement Efforts*

While the Act does not specifically mandate a mediation or conciliation role for the NLRB in connection with ULPs, regional offices are encouraged by the general counsel to seek voluntary compliance through settlement between the regional director and the charging and charged parties. There is no provision in the law for arbitration of such matters.

More than 90 percent of all meritorious ULP charges are disposed of through settlement rather than by litigation. Parties' reasons for settling cases are diverse. Their decision to settle is often based on an assessment of the strength of their case. Settlements might also be driven by the potential costs of litigation, the length of time required to litigate a case, the economic circumstances of the employees concerned, and the reasonableness of a settlement offer.

### *4) ALJ Hearing*

If the parties do not settle a complaint, the case goes forward to a trial of the facts before an administrative law judge. The ALJ hears the examination and cross-examination of witnesses. Three attorneys usually participate in ALJ hearings: counsel for the Office of the General Counsel, counsel for the employee or the union, and counsel for the employer.

The ALJs evaluate witnesses' credibility, examine documents and other exhibits for their probative weight, make findings of fact, and draw conclusions of law. They issue a written decision in the case, deciding whether the charged party has committed an unfair labor practice. If so, the ALJ orders a remedy.

### *5) Appeal to the NLRB*

ALJ decisions may be appealed to the Board for a review of the record in the case. The Board can affirm or reverse, in whole or in part, the ALJ's decision. In complex or novel cases, the Board might hear oral arguments by parties to the case.

### *6) Non-Self-Enforcement of NLRB Decisions*

Decisions of the NLRB are not self-enforcing. A party may choose not to appeal a Board ruling and, at the same time, not comply with the ruling. The Board must then initiate proceedings for enforcement in a federal appeals court. The court will then review the Board's decision based on the record in the case.

Testing the NLRB's decision through deliberate noncompliance with an order is a common practice under U.S. labor law. Many employers believe that the courts are more sympathetic to property rights and other employer interests than the Board. Some judicial circuits are considered more likely than others to reverse the NLRB. An employer upset with a decision of the NLRB who does business in one of these judicial circuits will often seek to file an appeal there. Decisions by U.S. circuit courts of appeal may conflict with each other, resulting in variations in labor law enforcement in the different judicial circuits until the issue is resolved by the Supreme Court.

**The decisions of Canada's federal and provincial labor boards are immediately enforceable as judicial orders upon filing of the decision in the appropriate superior court. Quebec's Labour Court is a judicial body whose orders are immediately enforceable. The orders of Mexico's CABs are judicial orders and immediately enforceable as such.**

### *7) Section 10(j) Injunctions*

Section 10(j) of the NLRA permits the general counsel, upon issuing an unfair labor practice complaint, to seek an injunction from a federal district court judge in order to obtain an interim remedy for the complaining party. An injunction is a special court order based on principles of equity at common law granting immediate remedial action while a case proceeds through the normal litigation process. In practice, injunctions have been sought only in extraordinary cases, where the general counsel believes that irreparable harm might result from the normal delays of litigation. A 1979 memorandum by the general counsel sets out various

fact situations, divided into 14 categories, in which injunctive relief will be sought.<sup>10</sup>

**Canada's federal and provincial labor boards (in Quebec, the Office of the Labour Commissioner and the Labour Court) are generally more integrated than the U.S. NLRB in their structure and functioning. Most boards have labor relations officers or investigation officers who summarily investigate and attempt to settle cases prior to hearings. If settlement efforts are unsuccessful, the board holds a single set of hearings and issues a final decision. Most boards will reconsider such decisions only in unusual cases. The board's decision is generally not appealable to the courts. Mexico's Conciliation and Arbitration Boards are also structured to process cases in a single administrative proceeding, in contrast to the NLRB's multiplicity of divisions and stages of treatment.**

### C. DEPARTMENT OF LABOR (DOL)

The NLRB enforces laws regarding labor-management relations and unfair labor practices in that context. The U.S. Department of Labor enforces the *Labor Management Reporting and Disclosure Act's* provisions regarding rights of individual union members and internal union democracy, as well as financial reporting and disclosure requirements for unions.

#### *1) Complaint Proceedings*

Complaints involving alleged violations of union members' rights under the LMRDA and unlawful tactics in union elections may be filed at certain regional DOL offices and are investigated by regional DOL agents. If a complaint is found to have merit following an investigation of the alleged violation, there is not a further administrative proceeding, as with the NLRB. Instead, the Department of Labor files a lawsuit in federal district court to seek appropriate sanctions or remedies.

<sup>10</sup> NLRB GEN. *Counsel Memo* No. 79-77.

### *2) Monitoring of Compliance*

While enforcement of the LMRDA generally takes place in response to complaints, DOL regional offices also monitor unions' compliance with financial requirements of the law through audits of labor organizations' financial books and records.

### *3) Settlement Efforts*

As is the case with most labor law enforcement efforts, the Department of Labor seeks voluntary compliance with LMRDA requirements. There is no provision for arbitration of such matters. Unresolved complaints go forward to litigation in federal district courts.

## 4. RIGHTS OF PRIVATE ACTION

Three avenues for private action are available to workers and unions to secure statutory rights to organize, to associate freely, to bargain collectively and to strike: the NLRB, the U.S. Department of Labor, and the federal district courts.

### A. ACCESS TO ADMINISTRATIVE TRIBUNALS

#### *1) The National Labor Relations Board (NLRB)*

The NLRB is available to private parties (workers, unions, employers) under two lines of statutory authority. First, private parties may petition the NLRB under Section 9 of the NLRA for an election to determine whether a majority of the workers in a bargaining unit desire representation for the purpose of collective bargaining (thus determining whether the employer's duty to bargain arises). Second, private parties may allege unfair labor practices, thus setting in motion the NLRB mechanisms for determining ULPs under Section 8 of the NLRA.

An individual employee who files a charge on his or her own behalf, without any involvement by a union, typically does not hire a lawyer. If a complaint is issued on the charge, an attorney representing the Office of the General Counsel works with the employee in presenting the complaint. When a union is involved, a union attorney often joins the case, with full rights to subpoena witnesses and documents and to engage in examination and cross-examination of witnesses. As the charged party the employer has the full rights of a litigant party, including representation by counsel and rights of appeal to the Board and to the courts. (For more detail on NLRB processes, see section 3, above.)

**Labor relations laws in Canada and Mexico are also complaint-driven. Government agencies do not conduct inspections or otherwise monitor compliance with laws on organizing, collective bargaining and striking. Rather, they receive and respond to charges and complaints filed by private actors in labor affairs.**

## *2) Department of Labor (DOL)*

Unions and individual union members have access to certain regional offices of the Department of Labor, where they may file complaints alleging violation of the *Labor Management Reporting and Disclosure Act*. Generally, only the DOL is empowered to file a lawsuit regarding internal union election procedures. (For more information on DOL processes, see section 3, above.)

## B. ACCESS TO COURTS

As a general proposition, private parties do not have access to courts to directly enforce rights to organize, bargain collectively or strike. Instead, the NLRB is empowered to bring action in courts to vindicate private rights when administrative proceedings have not resolved the matter.

A specific exception to this rule is found in Section 301 of the *Labor Management Relations Act*. Section 301 of the LMRA creates a private right of action in federal district court for an alleged violation of a col-

lective bargaining agreement. A Section 301 suit can be preferable to a ULP charge because the remedies of a federal district court order — including financial damages — are self-enforcing.

An individual represented by a union may also sue his or her union in federal court for breach of the duty of fair representation.

## 5. PROCEDURAL GUARANTEES AND REMEDIES TO ENSURE ENFORCEMENT

### A. DUE PROCESS

#### *1) Procedural Protections*

Regional directors of the NLRB are required to carefully investigate any objective evidence that is offered by a charging party in support of unfair labor practice charges. If the regional director decides to dismiss the charges, the NLRB will send a dismissal letter to the parties. The letter will include a summary report setting forth the reasons for dismissing the charges, unless the charging party requests that the report be excluded.

If an unfair labor practice complaint or a dispute concerning representation under the NLRA is not settled by agreement of the parties, a hearing is held. Constitutional and statutory rules of due process apply to hearings under the NLRA.

Parties have the right to present evidence and make submissions relevant to their case and to know and respond to the case of other parties. Hearings are open to the public. Parties may be represented by counsel, obtain compulsory process for production of witnesses and documents, examine and cross-examine witnesses under oath, and rely on rules of evidence. Section 8(a)(4) of the *National Labor Relations Act* makes it an unfair labor practice for an employer to discriminate against an employee because he or she has filed charges or given testimony in an NLRB proceeding.

In a ULP case, notice of ULP charges must be given to the charged party, and the general counsel has the burden of proving an unfair labor practice.

An order may be issued only on the basis of the record of evidence ad-  
duced at the hearing. Transcripts of proceedings and other records in the  
case are publicly available. The decision must include findings and con-  
clusions along with the reasons or bases for them on all material issues of  
fact or law presented in the record.

**In most Canadian jurisdictions, the burden of proof in an unfair labor  
practice case involving discrimination for union activity generally rests  
with the employer, who must prove that it had no antiunion animus in  
acting as it did. In Mexico, the law is similarly protective. The burden  
of proof always falls on the employer. The employer must prove that its  
motive for discharging a worker falls within the statutory definitions of  
just cause. Under the FLL, any ambiguity must be resolved in favor of  
the worker.**

## *2) Independence and Impartiality of Decision Makers*

Members of the NLRB are appointed by the President of the United  
States on the advice and consent of the U.S. Senate for renewable five-  
year terms. The five-year term endures even if the presidency changes.  
Board members may be removed by the President only upon notice and  
following a hearing, and only for neglect of duty or malfeasance in of-  
fice. ALJs are appointed by the Board and receive lifetime appointments.  
ALJs may be removed only for gross misconduct and may be subject to  
discipline or reduction in pay by the NLRB only for just cause after the  
opportunity for a hearing before a tribunal independent of the Board.  
The general counsel is appointed by the President on the advice and  
consent of the Senate for a term of four years.

Board members and ALJs must be free of bias. They must not hold  
any personal interest by which they would stand to gain or lose by a de-  
cision and must not prejudge the facts of a case nor show personal bias  
or clear favoritism towards a party. Detailed regulations prohibit and re-  
quire disclosure of real or apparent conflicts of interest on the part of  
Board members, the general counsel, and Board employees.<sup>11</sup> A party

<sup>11</sup> 49 C.F.R. Sec. 29.

may, at any time following the designation of an ALJ to hear a case and before the filing of the ALJ's decision, request that the ALJ withdraw on grounds of personal bias. If the ALJ does not disqualify himself or herself and withdraw from the proceeding, the ALJ must state this ruling and the grounds for it on the record. A court may later overturn any NLRB order based upon ALJ findings made in a hearing rendered unfair by the ALJ's bias.

Adjudicators and NLRB employees may not receive any *ex parte* communications from any person or entity outside of the NLRB or from the general counsel concerning the merits of any pending representation or ULP case. *Ex parte* communications are oral or written communications not on the public record with respect to which reasonable prior notice to all parties is not given.

## B. APPEALS AND JUDICIAL REVIEW

The five-member NLRB acts as an appeals tribunal in ULP cases (see section 3, Government Enforcement, above). Parties may appeal the ALJ's decision to the Board, which reviews the record and may affirm or reverse, in whole or in part, the ALJ's ruling. Decisions of the NLRB are appealable to federal appeals courts and may be appealed from there to the U.S. Supreme Court by a writ for *certiorari*.

Decisions by a regional director refusing to issue a complaint or to settle a case with the charged party may be appealed only to the general counsel. The general counsel's refusal to issue a complaint or to overturn a settlement is not reviewable, either by the NLRB or by the courts.

**Decisions by Canada's labor boards are generally final and may not be appealed to the courts. However, they may be subject to judicial review on constitutional or administrative law grounds. These grounds are quite restricted, and the courts have often stated that they should exercise restraint when asked to review the decisions of labor relations boards. Decisions of Mexico's CABs are usually final and are subject to judicial review only on an action for *amparo*. Such action may be based only upon certain limited grounds, the most important of which are error of law, breach of due process, and exceeding legally authorized power.**

### C. SANCTIONS AND REMEDIES

U.S. labor law is remedial, not punitive. It does not provide for civil or criminal sanctions or penalties in ULP cases. An employer or union that commits an unfair labor practice is generally ordered to “cease and desist” from unlawful conduct and post for 60 days a notice in the workplace or the union office promising not to repeat the conduct. Steps must also be taken to restore the *status quo ante*, such as reinstatement and back pay for workers discharged for organizing or a return to the bargaining table in refusal-to-bargain cases. In back pay awards for workers, the amount of any interim earnings obtained by the worker is deducted from the back pay paid by the employer.

The NLRB has fashioned other remedies specific to particular types of legal violation. For example, in cases of flagrant employer violations during union organizing campaigns, the Board has ordered employers to grant the union access to company bulletin boards, to give the nonemployee union organizers reasonable access to employees in nonworking areas on nonworking time, or to give the union equal time and facilities to respond to company messages to employees concerning union representation (see also The Gissel Doctrine, in section 2B.2, above).

With respect to internal union affairs, the *Labor Management Reporting and Disclosure Act* is remedial, like the NLRA, not punitive. In cases of improper election procedures, generally a court will order a new internal union election to be supervised by the Department of Labor.

After all appeals are exhausted, any “final order” under the NLRA as amended or the LMRDA is enforceable under the police power of the United States government. Failure to comply with the order amounts to contempt of court. Responsible individuals could then be incarcerated until compliance is fulfilled, or their assets may be seized to satisfy a monetary order, such as back pay to workers.

## 6. PUBLICATION MEASURES

### A. PUBLICATION OF LAWS, REGULATIONS, PROCEDURES AND ADMINISTRATIVE RULINGS

Labor laws, administrative regulations and internal agency rules and procedures of the NLRB and the Department of Labor are published and available to the public at government offices, public libraries and law libraries. Similarly, decisions by administrative law judges, the NLRB and the courts are all promptly published and available to the public. Statutes, regulations, rules, procedures and decisions are also generally available through online electronic sources. Several private publishing firms also produce these materials for sale and subscription.

### B. NOTICE AND OPPORTUNITY FOR COMMENT

Proposed changes in labor laws are published in advance and are available to the public upon request. Legislative committees of the U.S. House and Senate hold public hearings on proposed legislation to hear the views of interested parties. Most trade unions and management organizations maintain legislative offices to monitor proposed changes in the law, to meet with legislators on such bills, and to arrange for oral or written testimony at public hearings on the legislation.

## 7. PUBLIC INFORMATION AND AWARENESS

### A. AVAILABILITY OF PUBLIC INFORMATION

The NLRB ensures that public information is available concerning the right to organize, to bargain collectively and to strike. The Board publishes and makes available free publications, usually nontechnical brochures and other descriptive information, at all regional offices or upon written or telephoned request from any person.

In addition, the NLRB publishes a comprehensive annual report. The report provides an overview of the enforcement activities of the Board during the year, including summaries and analysis, organized by topic, of key Board or court decisions under the NLRA. It also provides detailed statistical data on the number and types of cases handled by the Board, the ways in which cases were concluded, and the median time which elapsed at each stage of the Board's proceedings. The report also places much of this data in historical perspective.

In the field, each NLRB regional office assigns attorneys or agents to act as "officer of the day" to handle telephone calls and to personally interview workers seeking advice about their rights under the Act.

## B. PUBLIC EDUCATION

Like all U.S. federal agencies, the NLRB maintains a public affairs office to respond to inquiries from the public and to provide detailed information to the press, trade unions, businesses, universities, and non-governmental organizations. The NLRB sponsors or participates in dozens of seminars, conferences, workshops, training sessions, and other events throughout the United States each year to share information with the public and with interested parties. The Department of Labor maintains similar functions through its various agencies.

## C. PRIVATE INFORMATION SOURCES

Information is also available from private publishing enterprises that specialize in reporting on government legal and regulatory affairs, including industrial relations issues. The Bureau of National Affairs, Inc., Commerce Clearing House, Inc., West Publishing Co., and other private publishers provide extensive materials that are subscribed to by labor law practitioners. These materials are also available in law libraries and many general public libraries.

The AFL-CIO and its affiliates, as well as independent unions, publish newspapers and reports with information on matters of organizing, bargaining and strikes from a trade union perspective. The U.S. Cham-

ber of Commerce, the National Association of Manufacturers, the Labor Policy Association, and other employer organizations similarly produce publications on these issues.

#### D. NAALC COOPERATIVE ACTIVITIES

The U.S. National Administrative Office, in collaboration with the NAOs of Mexico and Canada, has undertaken an extensive program of cooperative activities on industrial relations principles of the NAALC. Members and staff of the NLRB and DOL have participated in a number of these activities. Information on such programs can be obtained from the U.S. NAO.

## Appendix 4A

### AN OVERVIEW OF THE *RAILWAY LABOR ACT*

#### BASIC LABOR POLICY

The *Railway Labor Act* (RLA) is the key statute which governs labor relations in the railroad and airline industries in the United States, enacted in 1926. The central purpose of the RLA is to settle labor disputes so that they do not result in work stoppages which impair railroad and airline transportation. The RLA was to a significant extent the product of negotiated compromise and agreement between labor and management in the railway industry.

#### COVERAGE OF ACT

The RLA applies to rail and air common carriers and any entity owned or controlled by or under common control with such a carrier which performs transportation-related activities. Employees at the level of “subordinate official” and below are covered. Included within the scope of the term “subordinate official” are employees whose level of supervisory authority would render them “supervisors” under the NLRA and thus exclude them from the definition of covered employee under that statute. There are approximately 590,000 covered employees in the airline industry and 230,000 in the railroad industry. Approximately 65 to 70 percent of the airline employees covered by the RLA and 80 to 85 percent of those in the railroad industry are unionized.

#### ACQUISITION OF BARGAINING RIGHTS

Like the NLRA, the RLA enables unions to acquire collective bargaining rights either through voluntary recognition or through certification by a government agency as the majority representative of a group of employ-

ees. Under the RLA the National Mediation Board (NMB) makes certification determinations.

The certification process is invoked by requesting the investigation of a representation dispute by the NMB. The NMB has the duty and exclusive power to investigate such disputes. Only a labor organization or an employee may raise a representation dispute with the NMB. The RLA, unlike the NLRA, does not give employers standing in representation disputes.

Under the RLA the group or unit of employees represented by a union in collective bargaining is referred to as a “craft or class.” A craft or class must be system wide, that is, it must include all members of that group working for the carrier at all locations. The showing of interest necessary to raise a representation dispute is calculated on the basis of the number of employees in the craft or class. An application for certification must be accompanied by authorization cards signed by at least 35 percent of the employees in an unrepresented craft or class or a majority of a craft or class that is already represented by another union. (By contrast, under the NLRA a bargaining unit need only be appropriate for representation. It can take many forms and more often than not is confined to a single location, even if the employer is national in scope. Generally, the total showing of interest necessary to raise a representation dispute under the NLRA is smaller, only 30 percent of the initiating group.)

When the showing of interest requirement has been satisfied, the NMB generally holds elections to determine the outcome of representation disputes. Unlike elections under the NLRA, the vast majority of elections under the RLA are conducted by mail ballot. In standard NMB elections, a majority of the eligible voters must cast valid ballots in favor of union representation in order for the NMB to issue a certification, in contrast to NLRB elections, in which only a majority of those actually voting is required for the union to win.

There are other differences between the two Acts in their handling of representation elections. Under the NLRA, a party is barred from raising a question concerning representation during the first three years a collective bargaining agreement is in effect. The NMB utilizes a two-year certification bar and a one-year dismissal bar. Also, while unions are provided with a list of employee addresses during an NLRA election, unions generally are not entitled to such a list during an initial election under the RLA.

During an RLA election the NMB requires that “laboratory conditions” be maintained to allow a free choice by employees without employer interference. Employer conduct that might be allowed in an NLRB election will sometimes be deemed to violate the RLA.

## UNION MEMBERSHIP AND DUES

The subject of union security is treated differently than under the NLRA. Section 14(b) of the NLRA permits the application of state laws barring union security agreements (the so-called “right-to-work” laws). However, Section 2, Eleventh of the RLA preempts the application of all such laws and authorizes carriers and labor organizations to include in their collective bargaining agreements union security arrangements obligating employees to pay uniformly required dues and fees as a condition of continued employment. As under the NLRA, actual union membership is not required. Section 2, Eleventh also authorizes carriers and unions to agree that the employer can deduct union dues from the pay of each member of the craft or class represented by the union, provided that the member has authorized this deduction in writing.

As under the NLRA, employees who are part of a union-represented craft or class, but who are not members of the union, are not obligated to pay that part of dues assessments which goes to expenses other than collective bargaining and grievance handling activity.

## COLLECTIVE BARGAINING

### *Duty to Bargain*

Section 2, First of the RLA imposes a duty upon a carrier to deal with the representative of its employees with respect to rates of pay, rules and working conditions. That section also imposes upon both carriers and labor organizations the duty to exert every reasonable effort to make and maintain agreements. Both duties are judicially enforceable. Unlike the NLRB, the NMB has no direct role in such enforcement.

Collective bargaining is initiated under RLA by one party serving a

notice upon the other proposing changes to existing rates of pay, rules and working conditions. The notice may be to establish an initial collective bargaining agreement or to amend an existing agreement.

Collective bargaining agreements in the railroad industry generally do not expire but instead continue indefinitely, unlike most agreements made under the NLRA. However, as a device to prevent the overly frequent reopening of agreements, the parties in the railroad industry often include moratorium clauses in their agreements, insulating them from negotiations for a specified period. The same result is accomplished in the airline industry by use of duration clauses, which specify the date upon which all or part of the collective agreement may be amended.

### *Disclosure*

Unlike the NLRA, as a general rule the RLA does not impose an obligation upon a carrier to disclose information to a union representing its employees in collective bargaining.

### *Status Quo Obligations*

During the process of collective bargaining under the RLA there is a duty to maintain the terms and conditions of employment without change. Carriers may not change wages, hours or working conditions, and labor organizations may not strike or use other economic self-help. Some courts have ruled that carriers may alter wages, hours and working conditions during bargaining for an initial agreement. The *status quo* obligation is judicially enforceable through injunctive relief and, where appropriate, through make-whole remedies. Unlike the NLRB, the NMB has no role in enforcing this obligation.

### *Contents of Agreements*

The RLA contains no specific requirements as to the particular content of collective bargaining agreements, except that an arbitral tribunal must

be established in airline agreements (see Enforcement of Collective Bargaining Agreements, below). However, such agreements generally must address rates of pay, rules and working conditions in order to satisfy the parties' obligation under the RLA to make and maintain agreements pertaining to such matters.

### *Scope of Bargaining*

The Supreme Court has stated that the duty to bargain over “rates of pay, rules and working conditions” in Section 2, First of the RLA should be interpreted broadly. Some courts have ruled that the distinction between “mandatory” and “permissive” subjects of bargaining, which applies under the NLRA, also applies under the RLA. However, there is little case law on what might constitute permissive subjects under the RLA. The Supreme Court has decided that management is under no obligation to bargain over an employer's basic decision to go out of business, since this decision is a “management prerogative.”

### *Mediation and Arbitration*

Under the RLA, mediation functions are performed by the National Mediation Board. Either party can request mediation, and there is no minimum period of negotiation required before a request may be made. However, the NMB will encourage the parties to continue with direct negotiations if it believes that the request for mediation was premature.

If the parties are unable to agree and terminate bargaining, a 10-day waiting period begins, during which time either party may request mediation, or the NMB may directly proffer and initiate mediation. If neither happens within the 10-day waiting period, the parties become free to engage in economic self-help, including strike or lockout action.

The NMB has a wide discretion over when it may proffer interest arbitration and thus release the parties from mediation. Mediation generally continues longer than it does when conducted by the Federal Mediation and Conciliation Service in a dispute under the NLRA.

If interest arbitration is accepted by both parties, it is conducted pur-

suant to sections 7, 8 and 9 of the RLA. If either party rejects the proffer of arbitration, a 30-day cooling-off period begins during which the NMB continues mediation in the public interest.

The parties remain under an obligation to maintain the *status quo* until the cooling-off period expires. During this period the President of the United States may create an Emergency Board under Section 10 of the RLA, if the NMB believes that the dispute threatens substantially to interrupt interstate commerce to such a degree as to deprive any section of the country of essential transportation service. If this is done, terms and conditions of employment must remain unchanged and there may be no strike or lock-out until 30 days after the Emergency Board has rendered its report to the President. Thereafter, the *status quo* is lifted. In some cases Congress has enacted special legislation to dispose of the dispute.

### *Enforcement of Collective Bargaining Agreements*

The RLA distinguishes between what have become known as “major” and “minor” disputes. A minor dispute is one arising out of grievances or the interpretation or application of existing collective bargaining agreements. A major dispute is one over the making or amending of a collective bargaining agreement concerning rates of pay, rules or working conditions. Major disputes are subject to the notice, negotiation and mediation processes previously discussed in this appendix. Minor disputes are subject to compulsory arbitration under the RLA. As a general rule, self-help such as strike or lockout action is prohibited with respect to minor disputes.

The RLA establishes or provides for the establishment of tribunals, generally known as “adjustment boards” in the railroad industry, which are charged with the task of adjudicating minor disputes. Section 3, First establishes the National Railroad Adjustment Board, which is divided into four divisions defined by type of railroad work and consisting of equal numbers of employer and union representatives. Section 3, Second empowers carriers and unions to agree to establish system, group or regional boards of adjustment. In practice these boards are most often established by contract between an individual carrier and a single union and they usually consist of a carrier representative, a union representative and a neutral chair.

The National Railroad Adjustment Board has no jurisdiction over the airline industry. However, the RLA requires air carriers and unions representing their employees to create system, group or regional boards of adjustment having the same jurisdiction and power as such boards, under Section 3, Second.

Individual employees have no standing to invoke the creation of adjustment boards or, with the exception of the National Railroad Adjustment Board, to bring disputes before established boards except through labor organizations representing them. The decision of an adjustment board is essentially final and binding on the parties. It may be enforced by court action. Courts will generally set adjustment board orders aside only for failure of the board to comply with the RLA or to conform or confine itself to matters within its jurisdiction, for fraud or corruption by a member of the board or, in some court circuits, for failure of due process. Arbitration decisions by system boards in the airline industry are equally final and binding.

The powers of the courts may be invoked to ensure the disputants' compliance with the RLA's machinery for the settlement of both major and minor disputes.

### *Obligations towards Represented Workers*

Unions have a duty to fairly represent the workers in a craft or class for which they have bargaining rights, that is, without arbitrariness, discrimination or bad faith. The duty is the same under the RLA as it is under the NLRA. In fact, the duty was first articulated by the courts under the RLA.<sup>12</sup>

### RIGHT TO STRIKE

There are significant differences between the NLRA and the RLA as to how strikes are treated.

<sup>12</sup> The seminal case was *Steele v. Louisville and Nashville Railway Co.* 323 U.S. 192 (1944).

### *Regulation of the Right to Strike*

As noted above, under the RLA the mandatory mediation process preceding a strike is lengthy. It is intended to prevent or lessen the likelihood of a strike. However, once those processes are exhausted, the law imposes no special restrictions and does not require strike votes. Partial or intermittent or selective strikes are not prohibited under the RLA as they are under the NLRA. Of course, strikes must be conducted in a peaceful and otherwise lawful manner.

### *Picketing and Other Supportive Action*

A union may publicize its dispute with a carrier prior to exhausting the mediation process, provided that in doing so it does not disrupt the carrier's operations. Once mediation has been completed and the subsequent cooling-off period has elapsed, unions may exert a range of secondary pressures generally not available to their counterparts under the NLRA. Unions may picket or boycott another carrier in an effort to put pressure on the primary carrier with which they have a dispute.

### *Striker Replacements*

As under the NLRA, the RLA permits a carrier to replace economic strikers permanently before the strike ends, and there is no obligation to terminate permanent replacements after the strike ends. A temporary replacement may be displaced before the end of a strike by an economic striker who offers to return to work unconditionally. Whether a replacement is permanent or temporary has been the subject of some litigation and turns upon the facts of each case.

## PROTECTIONS AGAINST INTERFERENCE

Like the NLRA, the RLA prohibits certain employer actions which interfere with the right of employees to organize, bargain collectively and

strike. Section 2 of the RLA prohibits carriers from influencing, interfering with or coercing employees in the choice of their representatives; denying or questioning in any way the right of its employees to join, organize or assist in organizing the labor union of their choice; interfering with the organization of its employees; using its funds in maintaining or assisting or contributing to any labor organization; influencing or coercing employees in an effort to induce them to join or not to join or remain members of any labor organization; or requiring any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization.

These prohibitions are incorporated into the employment contract of every employee covered by the RLA and may be enforced by court action brought by an employee or a union.

The jurisprudence under these prohibitions covers a range of employer actions similar to that covered by the NLRB's unfair labor practice jurisprudence. However, the courts are divided on the question of whether disciplining an employee will be unlawful under the RLA if the employer has any antiunion motivation or, as under the NLRA, only if that motivation was a substantial or motivating factor behind the employer's action. Courts have ordered reinstatement, back pay, restored benefits, and similar compensatory measures to remedy employer violations of the law. The lower courts are divided on the question of whether punitive damages can be awarded in such cases.

The National Mediation Board regulates conduct during representation investigations by requiring that "laboratory conditions" be maintained. The NMB has remedied violations of laboratory conditions primarily by ordering that elections be rerun and that employers post NMB notices stating the basic grounds for rerunning the elections. In serious cases the NMB may order that the rerun election be decided on the basis of the majority of ballots cast rather than by majority of the entire craft or class. The board has also reserved the power to order certification on the basis of union authorization cards in egregious cases. The prohibition on violating laboratory conditions applies both to employers and to unions, although the NMB has never set aside an election because a union acting alone tainted laboratory conditions.

As under the NLRA, the duty to bargain established by the RLA contains an implied prohibition on seeking to bypass a union which has ac-

quired bargaining rights by dealing directly either with individual employees or with another organization. Unlike the NLRA, the RLA does not expressly protect concerted activities, and thus protection for union activity must be found under one of the prohibitions or doctrines described above.

#### SUCCESSOR EMPLOYERS

The NMB's certification of a union as representative extends to the carrier's "successors and assigns." However, where a carrier is purchased by, merged into, consolidated with, or has its assets acquired by another carrier, the status of a union certified as majority collective bargaining representative for a craft or class may still come into question. In the event of a dispute over such matters, an affected union or employee may petition the NMB to resolve the dispute. If the NMB decides that the parties to the corporate transaction have created a new "single carrier," it will take different actions depending on the sizes of the merging crafts or classes. If the merger involves a large class merging with a much smaller class, it will extend the certification of the larger class's union to the smaller, while extinguishing the smaller group's certification. In cases where the merging crafts are of comparable size, the NMB will order an election. The NMB makes "single carrier" determinations on the basis of such factors as whether the previously separate carrier systems are held out to the public as a single carrier, whether management and labor relations operations have been combined, and whether there is a combined workforce. Union certifications may be extinguished only by order of the NMB following an investigation.

The NMB has issued merger procedures for both airlines and railroads under which it will decide whether a single carrier exists, whether unions' certifications will survive or be extinguished, and what the craft or class will be in the new single carrier. The effect of carrier restructuring upon existing collective bargaining agreements will depend upon the terms of those agreements and is not a matter over which the NMB will exercise jurisdiction directly. Such jurisdiction lies primarily with the courts and arbitration tribunals.

## FREEDOM OF ASSOCIATION WITHIN UNIONS

The internal union democracy and accountability requirements of the *Labor Management Reporting and Disclosure Act* apply equally to unions under the RLA and NLRA.

## TERMINATION OF BARGAINING RIGHTS

The question of how and under what circumstances bargaining rights may be terminated is treated differently under the RLA than it is under the NLRA. Under the RLA, there are no formal decertification procedures as such. In order to accomplish decertification, an individual or labor organization must file a petition for certification as the representative of the craft or class of employees in question. The NMB requires that an application for a represented craft or class be supported by authorization cards from a majority of the craft or class before holding a representation vote. If a majority of eligible employees fails to cast valid ballots in the election, a previously issued certification covering the craft or class effectively will be cancelled by the NMB. If the individual seeking decertification is successful in the election, he or she may renounce bargaining rights after one year, in which event the craft or class is effectively decertified.

## ADMINISTRATIVE AGENCIES AND RIGHTS ENFORCEMENT

The *Railway Labor Act* empowers the National Mediation Board to investigate and issue orders with respect to disputes over union representation. Like NLRB orders, NMB orders are not self-enforcing and must be enforced by court order. However, NMB actions are not subject to appeal and may be reviewed by courts only on very narrow grounds.

Rights under the RLA which are not subject to NMB representation dispute investigation or adjustment board adjudication are enforced directly by court action.