Masthead Logo

Global Business & Development Law Journal

Volume 7
Issue 1 *Symposium: Doing Business in Central and Eastern Europe*

Article 13

1-1-1994

A Comparison of the Right to Organize and Bargain Collectively in the United States and Mexico: NAFTA's Side Accords and Prospects for Reform

Charles W. Nugent
University of the Pacific, McGeorge School of Law

A Comparison of the Right to Organize and Bargain Collectively in the United States and Mexico: NAFTA's Side Accords and Prospects for Reform

TABLE OF CONTENTS

I. INTRODUCTION

The appeal of Mexico for the U.S. manufacturer lies in its abundant supply of productive, low-wage labor. In Mexico's export industries, labor productivity typically operates at 80 to 100 percent of U.S. levels, yet the average total compensation for the Mexican worker, including benefits, is only $2.35 per hour.[1] U.S. labor leaders argue that this disparity between Mexican productivity and wages results from the lax enforcement of labor standards, denying Mexican workers organizational and collective bargaining rights that U.S. workers take for granted.[2]

Since 1965, the *maquiladora*[3] program has encouraged U.S. manufacturers to exploit Mexico's favorable labor market.[4] Under the program, Mexico exempts foreign-owned *maquiladoras* from paying import duties on raw materials used in manufacturing, provided that all finished products are exported.[5] U.S. tariff schedules create further incentives for *maquiladora* operation by imposing import duties only on the value added to products originating in the United States by Mexican processing or assembly.[6]

With the recent passage of the North American Free Trade Agreement (NAFTA),[7] which calls for the phased elimination of all trade barriers on the North American continent, a *Wall Street Journal* poll confirmed that forty percent of leading U.S. corporations are considering relocating at least some production to Mexico within the next several years.[8] Labor costs will be central to this

1. JEROME I. LEVINSON, THE LABOR SIDE ACCORD TO THE NORTH AMERICAN FREE TRADE AGREEMENT: AN ENDORSEMENT OF ABUSE OF WORKER RIGHTS IN MEXICO 1 (1993).

2. *See* Todd Robberson, *Mexico's Unions at Issue: Organizing Dispute Is Grist for NAFTA Debate*, WASH. POST, Oct. 28, 1993, at A31 (discussing the view of U.S. labor leaders that inadequate enforcement of labor standards is a primary cause of the wage-productivity differential in Mexico).

3. *Maquiladoras* are export-oriented processing and assembly plants.

4. Stephen Lerner, Comment, *The Maquiladoras and Hazardous Waste: The Effects Under NAFTA*, 6 TRANSNAT'L LAW. 255, 257 (1993). "Maquila refers to the process of production or assembly operations; the factory within which the operations are housed is called a *maquiladora*." Susanna Peters, Comment, *Labor Law for the Maquiladoras: Choosing Between Workers' Rights and Foreign Investment*, 11 COMP. LAB. L.J. 226, 226 n.3 (1990). The *maquiladora* program is also referred to as the "in bond" industry because foreign firms have to post a bond for capital brought from outside but used in Mexico. *Id.*

5. Lerner, *supra* note 4, at 257.

6. *See* Tariff Schedule of the U.S. (TSUS) (1984) items 806.30, 807.00. Tariff item number 806.30 limits the duty to the value of foreign processing of metals, excluding precious metals to be exported for processing and returned to the United States for further processing. Lerner, *supra* note 4, at 257 n.24. Tariff item number 807.00 limits "the duty upon the full value of the imported products, less the value of the U.S. fabricated components contained therein, to imported items assembled in foreign countries with fabricated components that have been manufactured in the United States." *Id.*

7. North American Free Trade Agreement [hereinafter NAFTA]. All references to NAFTA are to the December 17, 1992 draft.

8. Harley Shaiken, *Will Manufacturing Head South?*, TECH. REV., Apr. 1993, at 28. The poll was based on information obtained from corporate executives employed by 455 leading U.S. corporations. *Id.*

decision.[9] Since future labor costs in Mexico can be directly affected by the organizational and collective bargaining rights of workers,[10] business owners considering relocation should have a basic understanding of the relative protection of these rights afforded by Mexican labor law.[11]

This comment compares the rights of workers to organize and bargain collectively in the United States and Mexico.[12] It contrasts U.S. and Mexican legal protection of these fundamental worker rights as the two countries begin the process of economic integration. Part II provides an overview of the respective labor laws as codified,[13] while part III discusses the practical application of these laws.[14] Part IV addresses the possible effects of new legislation, changing policies, and current social trends on the labor climate.[15] Part V concludes that the U.S. perception of Mexico as an oppressive country with poor labor standards reflects a lack of understanding of the Mexican workplace, as well as an unwarranted confidence in worker protections available under U.S. labor laws.[16]

---

9. This comment does not address the numerous considerations beyond labor costs which bear on the decision to operate a Mexican *maquiladora*. For an overview of relevant foreign investment and transfer of technology issues related to *maquiladora* operation, see JOSE MOSCOSO, LEGAL ASPECTS OF DOING BUSINESS IN LATIN AMERICA 65-91 (1980). For a discussion of various nonlabor costs associated with relocation to Mexico, see *Establishing an Office in Mexico*, 3 Mex. Trade & L. Rep. (Int'l Trade Info. Corp.) No. 9 (Sept. 1993).

10. *See* LABOR LAW CASES AND MATERIALS 520-21 (Archibald Cox et al. eds., 1990) [hereinafter LABOR CASES] (recalling the results of a 1984 survey concluding that unionization can have a significant wage impact and substantially increase the proportion of compensation allotted to fringe benefits).

11. The term "labor law" refers to statutory provisions and the interpretation thereof concerning union organization and collective bargaining rights of workers. *See* LABOR CASES, *supra* note 10, at 1. "Labor law" should be distinguished from "employment law," involving individual worker rights in the workplace under statutory and common-law principles. *See* EMPLOYMENT LAW CASES AND MATERIALS 2 (Mark A. Rothstein et al. eds., 1992). An analysis of the comprehensive rights of workers in the United States and Mexico is beyond the scope of this comment. For a overview of Mexican worker rights, see Ann M. Bartow, Comment, *The Constitution, the Trade Unions, and the Maquiladoras: The Rights of Workers in Mexico*, 11 COMP. LAB. L.J. 182 (1990). For an overview of U.S. employment laws, see MARTHA W. HAMMER, EMPLOYMENT REGULATIONS: OVERVIEW AND UPDATE (1993).

12. For the purposes of this comment, the right to organize is defined as the right of workers freely and without impediment to establish and to join organizations of their own choosing to further and defend their interests. North American Agreement on Labor Cooperation, annex 1 [hereinafter Supplemental Agreement]. All references to the Supplemental Agreement are to the September 13, 1993 draft. The right to bargain collectively is defined as the right of organized workers to engage freely in collective bargaining on matters concerning the terms and conditions of employment. *Id.*

13. *See infra* notes 17-116 and accompanying text.

14. *See infra* notes 117-62 and accompanying text.

15. *See infra* notes 162-235 and accompanying text.

16. *See infra* notes 236-45 and accompanying text.

II. THE RIGHT TO ORGANIZE AND BARGAIN COLLECTIVELY

A. *Sources of Law*

The U.S. Constitution does not expressly protect the rights of U.S. workers to organize and bargain collectively.[17] In fact, early Supreme Court cases evinced hostility towards the labor movement, striking down protective labor legislation as impairing the right to individual freedom of contract.[18] It was not until the great depression of the 1930s, during which the middle classes became more sympathetic toward the objectives of organized labor, that courts began to reconsider the constitutionality of federal labor laws.[19]

In 1935, Congress enacted the National Labor Relations Act (NLRA),[20] which was narrowly upheld against a constitutional challenge in 1937.[21] Section 7 of the NLRA declared the official labor policy of the United States. "[E]mployees 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 concerted activities for the purpose of collective bargaining or other mutual aid or protection."[22]

The NLRA, as amended in 1947 by the Taft-Hartley Act[23] to protect employers against certain abusive union practices, is still the primary source of U.S. labor law for businesses "affecting commerce."[24] Its provisions were intended to insure free employee choice in the selection of representatives by

---

17. David L. Gregory, *The Right to Unionize in the United States, Canada, and Mexico: A Comparative Assessment*, 10 HOFSTRA LAB. L.J. 537, 539 (1993).

18. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905) (holding that New York could not prohibit private agreements to work more than a specified number of hours); Adair v. United States, 208 U.S. 161 (1908) (finding unconstitutional a federal law which prohibited employers from requiring employees to sign yellow-dog contracts, obligating employees not to join a labor union); Coppage v. Kansas, 236 U.S. 1 (1915) (invalidating a Kansas statute which prohibited yellow-dog contracts).

19. Gregory, *supra* note 17, at 541. For an excellent account of the deplorable conditions facing U.S. workers in the early 1900s which led to the enactment of protective labor legislation, see LEON STEIN, THE TRIANGLE FIRE (1962).

20. 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-69 (1993)).

21. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (holding that the NLRA was a constitutional exercise of federal commerce power, and that the certification of a representative union did not abridge Jones & Laughlin's right to freedom of contract).

22. 29 U.S.C. § 157 (1993).

23. 61 Stat. 136 (1947) (current version at 29 U.S.C. §§ 151-69 (1993)).

24. The NLRA § 2(6) defines "commerce" as:

> [T]rade, traffic, commerce, transportation, or communication among the several states, or between the District of Columbia or any Territory of the United States and any other State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same state but through any other state or any Territory or the District of Columbia or any foreign country.

29 U.S.C. § 152(6) (1993). NLRA § 2(7) defines the term "affecting commerce" as "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." *Id.* § 152(7) (1993).

providing remedies for unfair labor practices interfering with the rights identified in section 7.[25] The NLRA also created a National Labor Relations Board (NLRB), with authority to resolve representation and unfair labor practice disputes.[26] Investigation and prosecution of complaints under the NLRA is vested in the office of an appointed general counsel.[27]

In contrast to the United States, where labor unions had to fight an exhaustive battle to secure legislative protection, the right to organize and bargain collectively in Mexico is constitutionally guaranteed.[28] The Mexican Constitution of 1917, drafted after the successful overthrow of dictator Porfiro Diaz, is a remarkable statement of social goals and standards concerning work.[29] For example, in addition to protecting employee organizational rights, the constitution also requires employers to provide employees with a safe workplace,[30] adequate instruction,[31] and mandatory childbirth and maternity leave.[32]

Title VI of the Mexican Constitution, entitled "Labor and Social Security," declares the official Mexican labor policy, "[E]very person is entitled to suitable work that is socially useful. Toward this end, the creation of jobs and social organization for labor shall be promoted in conformance with the law."[33]

In an effort to achieve these goals, the constitution has been amended almost 400 times since 1917.[34] In 1970, the Mexican congress incorporated the constitution's broad statements of social and labor policy into the 1970 Federal Labor Law, currently the primary source of Mexican labor law.[35] The 1970 Federal Labor Law is designed to "ensure harmony and social justice in the relations between workers and employees."[36] Its provisions effectuate the policies enunciated in the Mexican Constitution by creating comprehensive substantive and procedural guidelines for the resolution of both individual and collective labor disputes.[37]

---

25. *Id.* § 151 (1993).

26. *Id.* § 153(a) (1993). The NLRB rules and regulations are set forth at 29 C.F.R. §§ 102-214 (1993).

27. *Id.* § 153(d) (1993). The general counsel, as well as the five members of the NLRB, are appointed by the President with the advice and consent of the Senate. *Id.*

28. CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [Constitution] art. 123 (Mex.), *translated in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 88 (Albert P. Blaustein & Gisbert H. Flanz trans., 1982) [hereinafter MEX. CONST.].

29. FREDERICK MEYERS, MEXICAN INDUSTRIAL RELATIONS FROM THE PERSPECTIVE OF THE LABOR COURT 3 (1979).

30. MEX. CONST., *supra* note 28, art. 123, § 15.

31. *Id.* art. 123, § 13.

32. *Id.* art. 123, § 5.

33. *Id.* art. 123.

34. Gregory, *supra* note 17, at 545.

35. Ley Federal Del Trabajo [Federal Labor Law], D.O., *translated in* COMMERCIAL LAWS OF THE WORLD; MEXICO: LABOR LAWS 1 (Foreign Tax Law Publishers, Inc., 1993) [hereinafter 1970 Federal Labor Law].

36. *Id.* para. 2.

37. Bartow, *supra* note 11, at 188.

The 1970 Federal Labor Law is interpreted by a Federal Labor Court (FLC) with exclusive jurisdiction over labor disputes relating to twenty-one industries deemed of national interest.[38] Otherwise, federal jurisdiction is concurrent with that of the Mexican states,[39] although the federal government retains exclusive power to legislate in labor matters.[40]

The FLC is roughly the Mexican equivalent of the NLRB in the United States. It is distinguishable from the NLRB in that employers or labor organizations may apply to the FLC to act as a conciliation and arbitration board for binding resolution of labor disputes.[41] Unlike the NLRB which is comprised of members appointed by the President with the advice and consent of the Senate,[42] the members of the Mexican FLC include equal numbers of elected representatives of workers and of employers, and a representative of government.[43]

B. Union Representation and Collective Bargaining

Both U.S. and Mexican labor law systems are designed to protect the right of workers to choose freely a bargaining representative and negotiate a collective bargaining agreement on a level playing field with their employers.[44] Thus, while both countries encourage voluntary agreement between labor and management, they also provide statutory mechanisms requiring employers to bargain with duly selected employee representatives.

In the United States, an employer may voluntarily recognize a union that is "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes."[45] Voluntary recognition establishes a union as the employees' exclusive bargaining representative, and obligates both union and employer to negotiate a collective bargaining agree-

38. *See* MEYERS, *supra* note 29, at 9. The industries under federal jurisdiction are: textiles; electricity; cinematography; rubber; sugar; mining; metals and steel; hydrocarbons; petrochemicals; cement; lime; automobiles and parts; chemicals; cellulose and paper; oils and vegetable fats; packed, canned, or packaged foods; bottled or canned beverages; railroads; woods products; flat, smooth or etched glass, and glass bottles; and tobacco. MEX. CONST., *supra* note 28, art. 123.

39. Mexico is a federal, democratic, representative republic composed of states which are sovereign in all that concerns their internal government, but united in federation according to constitutional principles. MARTINDALE-HUBBELL INTERNATIONAL LAW DIGEST, MEXICO 3-4 (1994).

40. MEYERS, *supra* note 29, at 8.

41. 1970 Federal Labor Law, *supra* note 35, para. 604.

42. 29 U.S.C. § 153(a) (1993).

43. 1970 Federal Labor Law, *supra* note 35, para. 593.

44. *See supra* notes 22, 30 and accompanying text (stating the official labor policies of the U.S. and Mexico respectively). The phrase "level playing field" is a term of art, referring to the objective of equalizing the relative bargaining positions of management and labor. *See, e.g.*, Limbach Co. v. Sheet Metal Workers Int'l, 949 F.2d 1241 (1991) (describing the "level playing field" created by Congress under the NLRA).

45. 29 U.S.C. § 159(a) (1993). "Recognition is a voluntary act by an employer to create and enter into a collective bargaining relationship with a labor organization, and it generally does not involve the NLRB and its processes." JOHN D. FEERICK ET AL., NLRB REPRESENTATION ELECTIONS 109 (2d ed. 1986).

ment.[46] The employees may file an exception if there is good faith doubt as to whether the recognized union in fact has majority approval.[47] Absent voluntary recognition, a union may petition the NLRB to hold a representation election.[48] A valid petition must be supported by signed authorization cards[49] from at least thirty percent of the employees in an "appropriate bargaining unit."[50] This "showing of interest" authorizes the union to commence a representation proceeding.[51]

Prior to the holding of a representation election, both union and employer have the right to campaign vigorously in an effort to influence the vote.[52] The campaign process is tempered, however, by an extensive battery of NLRB precedents designed to limit improper interference with employee freedom of choice.[53] Assuming that these "laboratory conditions"[54] for a valid representation election are satisfied, a victorious union may be certified by the NLRB.[55] Certification establishes a union as the exclusive bargaining representative for a period of one year, which may be extended to three years by the terms of a collective bargaining agreement.[56] Individual employment contracts are barred unless provided for in the collective bargaining agreement, and rival unions

---

46. 29 U.S.C. § 159(a) (1993).

47. *Id.* § 159(c)(1)(A) (1993).

48. *Id.* The procedures for such petitions are set forth at 29 C.F.R. § 102.60 (1993).

49. Authorization cards used for selection of a bargaining representative are cards designating the union as the representative of the signatory. Feerick, *supra* note 45, at 73 n.2. By signing one of these cards, an employee authorizes the union to be his or her exclusive bargaining representative. David S. Shillman, Note, *Non-Majority Bargaining Orders: The Only Effective Remedy for Pervasive Employer Unfair Labor Practices During Union Organizing Campaigns*, 20 U. MICH. J. L. REF. 617, 618 n.3 (1987).

50. 29 C.F.R. § 101.18(a)(3) (1993). The union must claim recognition as the bargaining agent for the employees involved in a unit appropriate for collective bargaining. *Id.* The appropriateness of the unit is left to NLRB discretion. LABOR CASES, *supra* note 10, at 280. Relevant factors include: mutuality of interest, history of collective bargaining, employee desires, and extent of employee organization. *Id.* at 281.

51. 29 C.F.R. § 101.18 (1993). NLRB procedures for representation proceedings are set forth at 29 C.F.R. §§ 102.60-.72 (1993). Pursuant to section 3(b) of the NLRA, the NLRB has delegated to its Regional Directors the power to determine the appropriateness of bargaining units, as well as to investigate and provide for hearings and to determine whether a question of representation exists. *Id.* § 101.21 (1993).

52. Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1775 (1983).

53. *See, e.g.*, Peerless Plywood Co., 107 N.L.R.B. 427 (1953) (prohibiting employer campaign speeches on company time within the 24-hour period prior to an election); Excelsior Underwear Inc., 156 N.L.R.B. 1236 (1966) (requiring the employer to file voter eligibility lists with the Regional Director of the NLRB). *See generally* ROBERT WILLIAMS, NLRB REGULATION OF ELECTION CONDUCT (2d ed. 1985) (outlining the legal protection of the right to self-organization under the NLRA).

54. The "laboratory conditions" test was developed in General Shoe Corp., 77 N.L.R.B. 124 (1948). The NLRB stated that the representation election process was to "provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees." *Id.* at 127.

55. 29 C.F.R. § 102.69 (1993). The regional director will supervise the election and certify the results. *Id.* An aggrieved party may request NLRB review of election results. *Id.* § 102.71(a) (1993).

56. LABOR CASES, *supra* note 10, at 273.

generally may not challenge the certified union during the period of exclusive representation.[57]

Mexican labor law contains no provisions comparable to those in the United States regarding representation elections.[58] This is because Mexican law does not require a union to obtain majority approval prior to becoming the certified representative of a unit of employees.[59] In Mexico, an employer who hires workers belonging to a legally recognized union "shall be required, at the request of the union, to conclude a collective bargaining agreement with such union."[60] If the employer refuses to sign the agreement, "the workers may exercise the[ir] right to strike."[61] In order to be legally recognized, a Mexican union must be an "association of workers . . . for the study, aim[,] and defense of their respective interests."[62] Although governmental authorization is not required to establish a union,[63] formation requires membership of at least twenty employees in active employment.[64] Also, in order to be competent to represent employees at arbitration hearings or negotiate a collective bargaining agreement, a union must be registered with the Ministry of Labor and Social Welfare.[65]

Where multiple unions seek to negotiate a collective bargaining agreement covering a single unit of employees, the agreement "shall be made with the union that represents the greater number of members employed in the enterprise or establishment."[66] The provisions of the collective bargaining agreement "shall apply to all persons working in the enterprise or establishment, whether or not they are members of the union party to the agreement."[67] Thus, the legally

57. *Id.* Exceptions to the certification and contract bar rules include situations where a union is unable or unwilling to represent a unit of employees, known as a defunct union, where a local union votes in open meeting to disaffiliate from its parent because of intra-union conflict, known as a schism, and where changes in circumstances have occurred due to expansion or changes in the employer's operations. *Id.* at 275-76.

58. Although the law does not require that representation elections be held, such an election was recently held at the *Plásticos Bajacal* plant in Tijuana. *See* Sebastian Rotella, *Border Assembly Plant Vote Tests Labor Rights in Mexico*, L.A. TIMES, Jan. 2, 1994, at B14. The election, which was overseen by the Baja California State Board of Conciliation and Arbitration, was Tijuana's first union election in 13 years at a *maquiladora*. *Id.*

59. 1970 Federal Labor Law, *supra* note 35, para. 387.

60. *Id.*

61. *Id.*

62. *Id.* para. 356.

63. *Id.* para. 357.

64. *Id.* para. 364. Article 364 of the 1970 Federal Labor Law provides:

> Unions shall be formed by not less than twenty workers in active employment or by not less than three employers. For the determination of the minimum number of workers, those whose employment contracts were terminated or in whose cases notices of dismissal were given at any time during the thirty days preceding the date on which the application of registration of the union is made and the date on which such registration is granted, shall be taken into account.

Id.

65. *Id.* para. 365.

66. *Id.* para. 388.

67. *Id.* para. 396.

recognized union with the most support becomes the exclusive bargaining representative of the unit of employees, with or without majority approval.[68]

These Mexican procedures, as compared to the U.S. representative election process, significantly increase the likelihood of union representation.[69] The absence of election campaigns and majority approval requirements should render employer efforts to dissuade employees in the exercise of their constitutional rights largely ineffectual. Indeed, a Mexican union may obtain a legal right to represent a unit of employees before an employer is even aware of organizational efforts. This seems to reflect an assumption that unions are the appropriate mechanism for equalizing the bargaining positions of labor and management.

It is also worth noting that, unlike the NLRA, the Mexican 1970 Federal Labor Law requires the employer to enter into a collective bargaining agreement upon request by the certified union.[70] Where the employer refuses to negotiate a collective bargaining agreement, the union may submit the dispute to the FLC.[71] The court becomes in effect a binding arbitration board, setting reasonable terms for the parties to resolve disputes.[72] This differs markedly from U.S. labor laws requiring only that the employer meet and confer in "good faith" with a certified union, in an effort to conclude a collective bargaining agreement covering terms and conditions of employment.[73] The NLRB cannot require the parties to agree to specific terms of a collective bargaining agreement, or submit a dispute to binding arbitration.[74]

C. Protecting the Rights of Workers

To effectuate the policies of their respective labor laws, the NLRB and the Mexican FLC have authority to fashion appropriate remedies for unlawful labor practices. Since the NLRA was designed to encourage democratic representation

---

68. Bartow, *supra* note 11, at 194.

69. *See Fact Sheet: Labor Conditions in Mexico*, U.S. DEPT. OF STATE DISPATCH, Nov. 1, 1993, *available in* LEXIS, News Library, NAFTA File [hereinafter *Fact Sheet*]. In 1990, the formal sector labor force, those working in legally registered firms, was 26 million of Mexico's population of 82 million. *Id.* About 30% to 36% of the labor force was organized. *Id.* The comparable U.S. figure is 14%. *Id.*

70. 1970 Federal Labor Law, *supra* note 35, para. 387.

71. MEYERS, *supra* note 29, at 26.

72. *Id.*

73. 29 U.S.C. § 158(d) (1993). For an exhaustive study of the requirement of good faith in collective bargaining, see Archibald Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958). The duty to bargain in good faith has been defined as an "obligation . . . to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement." N.L.R.B. v. Montgomery Ward & Co., 133 F.2d 676, 686 (9th Cir. 1943). "As long as there are unions weak enough to be talked to death, there will be employers who are tempted to engage in the forms of bargaining without the substance. The concept of good faith was brought into the law of collective bargaining as a solution to this problem." LABOR CASES, *supra* note 10, at 1412-13.

74. 29 U.S.C. § 158(d) (1993). NLRA § 8(d) provides that the obligation to bargain "does not compel either party to agree to a proposal or require the making of a concession." *Id.*

proceedings, U.S. laws prohibiting employer misconduct during initial organizational efforts are more elaborate than are those in Mexico.[75] In contrast, Mexican labor law provides much more protection to workers engaged in legitimate strike activity.[76]

1. Remedies for Abuse of Worker Rights

NLRA sections 8(a)(1) through 8(a)(5) make activity by the employer which interferes with the process of unionization and collective bargaining an "unfair labor practice."[77] Examples of unfair labor practices include discriminating in the terms and conditions of employment,[78] prohibiting union solicitation,[79] creating "employer-dominated" unions,[80] threatening adverse consequences of unionization or offering benefits to employees in exchange for union rejection,[81] or refusing to bargain with a certified union on a "mandatory" subject of bargaining.[82]

To redress these unfair labor practices, section 10(c) authorizes the NLRB "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter."[83] Ordinarily, this affirmative action takes the form of a cease and desist order requiring the employer to discontinue the unfair labor practice, or a reinstatement order, requiring the reinstatement of a wrongfully discharged employee.[84] Monetary awards are only appropriate where necessary to make an employee whole.[85] Indeed, employees discharged for union activities are even required to make a reasonable effort to mitigate losses by finding alternative work. Failure to make

75. *See infra* notes 77-96 and accompanying text. For a comprehensive treatment of the NLRB's remedies for all unfair labor practices, see P. WALTHER ET AL., NLRB REMEDIES FOR UNFAIR LABOR PRACTICES (2d ed. 1986).

76. *See infra* notes 97-116 and accompanying text.

77. 29 U.S.C. §§ 158(a)(1)-(5) (1993). The term "unfair labor practice" is not defined in the NLRA or in the case law, but represents a conclusion that the employer or union activity has violated the worker's rights to organize, bargain collectively, and engage in peaceful strikes outlined in NLRA § 7. *Id.*

78. LABOR CASES, *supra* note 10, at 227.

79. *Id.* at 118.

80. *Id.* at 198.

81. *Id.*

82. *Id.* at 386. A subject is "mandatory" if it falls within the statutory definition in section 8(d) of "wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d) (1993). The distinction is critical. *See infra* notes 97-104 and accompanying text. If the union calls a strike under a mistaken belief that the employer has refused to bargain as to a mandatory subject, the strike remains purely "economic" in nature and the employer has the right to permanently replace the striking workers. *See, e.g.*, N.L.R.B. v. Mackay Radio and Tel. Co., 304 U.S. 333, 345-46 (1938) (stating that an employer facing a purely economic strike rather than an unfair labor practice strike, is not bound to discharge replacement workers to create vacancies for returning strikers).

83. 29 U.S.C. § 160(c) (1993).

84. *Id.*

85. *See* Weiler, *supra* note 52, at 1791.

such an effort may result in potential earnings being deducted from back-pay awards.[86]

Where the employer has committed unfair labor practices so serious that they render a fair representation election impossible, the NLRB may issue an order, known as a bargaining order, requiring the employer to negotiate with the aggrieved union, even though the union has not won a secret ballot election.[87] Also, where the employer has failed to meet and confer in good faith with a duly elected union, the NLRB may issue an order requiring the employer to return to the bargaining table in an effort to conclude a collective bargaining agreement.[88] As noted earlier, however, the order may not compel any actual agreement on contract terms.[89]

These comprehensive remedies under the NLRA are not duplicated by the Mexican FLC. Mexican labor law does not require a union to gain majority support; therefore, it does not create a corresponding incentive for the employer to commit unlawful acts to inhibit such majority support from developing.[90] Similarly, because the FLC will act as a binding arbitration board as to terms of the collective bargaining agreement, remedies such as the bargaining order issued by the NLRB are not required.[91]

The 1970 Federal Labor Law does, however, attempt to discourage employer interference with employee organizational and collective bargaining efforts by protecting the individual employment contract.[92] Article 48 of the 1970 Federal Labor Law requires that nonprobationary employees employed by the same employer for more than one year and discharged due to union activities may apply to the FLC to be awarded three-months wages or reinstatement.[93] If reinstatement is not feasible,[94] the indemnification scheme mandates that workers receive six-months wages plus twenty days severance pay for each additional year of seniority.[95] This indemnity must be paid regardless of whether the discharged worker has attained substantially equivalent employment.[96]

---

86. *Id.* at 1789.

87. *Id.* at 1794.

88. LABOR CASES, *supra* note 10, at 387.

89. *See supra* notes 73-74 and accompanying text.

90. *See supra* notes 58-65 and accompanying text (explaining the procedures for union certification in Mexico).

91. *See supra* notes 70-72 and accompanying text (describing the legal obligation of the Mexican employer to conclude a collective bargaining agreement, and the ability of the FLC to set its terms).

92. 1970 Federal Labor Law, *supra* note 35, para. 48.

93. *Id.*

94. *See id.* para. 49. Reinstatement is not feasible where sufficient proof is given to the conciliation and arbitration board that the worker, because of the work he performs or the nature of his job, is in direct and permanent contact with the employer and the board is of the opinion, taking into account all the circumstances of the case, that a normal work relationship is impossible. *Id.*

95. *Id.* para. 50.

96. *Id.*

2. *Right to Strike*

The purpose of employee organization and selection of exclusive representatives is to "increase their bargaining power by substituting collective strength for individual weakness."[97] This "collective strength" of unionized employees is grounded in their ability to threaten and engage in strike activity. Thus, availability of the strike as an "economic weapon" is essential to equalize the positions of labor and management during contract negotiations, thereby giving meaning to the right to bargain collectively.[98]

In the United States, NLRA section 7 protects employee "concerted activities," including the right to strike.[99] The extent of this protection differs dramatically, however, depending on whether a strike is called or extended in response to employer unfair labor practices (an unfair labor practice strike), or is called in support of other employee concerted demands (an economic strike).[100]

The distinction between unfair labor practice and economic strikes becomes important when an unsuccessful strike is abandoned. Where a strike has been called or extended in response to employer unfair labor practices, the employer is required to reinstate returning strikers, even if this means displacing any replacement workers.[101] Economic strikers have no such job security.[102] Although they lose their right to demand immediate reinstatement, economic strikers who apply for unconditional return to work must be placed on preferential rehire lists.[103] Also, if future vacancies occur, the employer must recall the economic strikers before hiring persons never before employed by that company.[104]

In Mexico, article 123 of the constitution recognizes the right of workers to strike.[105] To be protected, a strike must be for a lawful purpose, including execution or revision of a collective bargaining agreement, seeking changes to established wages, or demanding compliance with profit-sharing rules.[106] The

---

97. LABOR CASES, *supra* note 10, at 13.
98. *Id.* at 487.
99. 29 U.S.C. § 157 (1993).
100. *See* NLRB v. Mackay Radio and Tel. Co., 304 U.S. 333, 345-46 (1938) (stating that an employer whose employees are engaged in an economic strike can permanently replace the strikers with new employees to carry on the business). *See also* Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956) (stating that the Mackay doctrine only applies to economic strikers, and that unfair labor practice strikers are entitled to unequivocal reinstatement and any replacements who took their place can be fired to reinstate them).
101. LABOR CASES, *supra* note 10, at 594.
102. *See supra* note 100 (discussing the Mackay doctrine of permanent replacement for economic strikers).
103. Laidlaw Corp., 171 N.L.R.B. 1366 (1968) (stating the rule that a permanently replaced striker remains an employee within the meaning of the NLRA until the employee attains substantially equivalent employment, and is entitled to full reinstatement if vacancies arise).
104. *Id.* at 1369.
105. MEX. CONST., *supra* note 28, art. 123. A strike is defined as "a temporary suspension of work by a coalition of workers." 1970 Federal Labor Law, *supra* note 35, para. 440.
106. 1970 Federal Labor Law, *supra* note 35, para. 450.

strike must also be "legally existent," meaning a majority of the workers in the unit voted to strike.[107] Finally, the strike must be called pursuant to strict procedural guidelines, including submission of a petition with the FLC and with the employer, announcement of the intent to strike, specific indication of the purpose of the strike, and the specific date that suspension of work will begin.[108]

Upon receipt of a union petition, the FLC will hold a hearing within five days to determine the legal existence or nonexistence of a strike.[109] In the interim, the employer may not hire strikebreakers or permit any of his employees to continue work.[110] Where a strike is determined to be legally nonexistent, the striking workers have twenty-four hours to return to their jobs.[111] Failure to return to work terminates the employment relationship.[112]

If the strike is declared legally existent, however, all employment contracts are suspended.[113] A legally existent strike also suspends FLC resolution of any economic disputes between the parties unless the workers or their union choose to submit the dispute to the court for arbitration.[114] Submission empowers the FLC "to increase or decrease the number of persons employed, the daily and weekly hours of work and wages, and, more generally, alter the conditions of employment in the enterprise or establishment."[115] Upon termination of the strike, all strikers who have not engaged in any illegal activity are entitled to return to work.[116]

III. PROBLEMS IN PRACTICAL APPLICATION

Both Mexican and U.S. statutory schemes attempt to establish comprehensive protections of the right of workers to organize and bargain collectively. In practical application, however, many of the broad guarantees and statements of policy found in the respective bodies of law are often subordinated to favor economic and governmental interests.

---

107. *Id.* para. 459.
108. *Id.* para. 920.
109. *Id.* para. 926.
110. MEYERS, *supra* note 29, at 22 n.4.
111. 1970 Federal Labor Law, *supra* note 35, para. 932.
112. *Id.*
113. *Id.* para. 447.
114. *Id.* para. 448.
115. *Id.* para. 919; In 1991, 693 collective bargaining conflicts were submitted to arbitration, and 614 of appeal demands were granted to the workers. *Fact Sheet*, *supra* note 69. In 1992, 773 disputes were submitted, and workers won 597. *Id.*
116. 1970 Federal Labor Law, *supra* note 35, para. 469. Illegal activities include "dishonest acts, violence, or threats, . . . except in the case of provocation or . . . self defense," as well as "intentionally caus[ing] material damage to . . . items related to work." *Id.* para. 47.

A. United States

In the United States, worker organizational activities have historically met powerful opposition from business interests.[117] The en masse dismissal of the striking air-traffic controllers by President Reagan in 1981 exemplified this hostility towards the labor movement.[118] As Professor David L. Gregory notes, "Ownership elites were quick studies of the new anti-labor tone egregiously set by the Reagan Administration. It became fashionable to resort to extra-legal means to frustrate workers' initial attempts at unionization."[119]

Such employer tactics are possible because of an inherent flaw in the practical application of the NLRA: Unfair labor practices can yield a net benefit to the employer regardless of whether employee claims are eventually upheld.[120] This benefit results from the chilling effect that the discriminatory discharge of union supporters has on initial organizational efforts.[121] U.S. employers have learned that summary discharge of union activists can effectively prevent the development of majority support requisite for union certification.[122] As a result, reported incidents of such unlawful employer conduct have soared, from approximately 3000 annually in the 1950s to nearly 18,000 annually in the 1980s.[123]

Where such charges are brought by the union, procedural delays averaging more than a year further dissipate union support.[124] Although the NLRB is likely to award reinstatement and back pay to a wrongfully discharged employee, only about ten percent of those employees actually return to work.[125] Further, if the discriminatory discharge is successful in preventing union certification, the back-pay penalties are offset by avoiding the pay increases associated with an initial collective bargaining agreement.[126] Thus, since the NLRA provides no compensatory or punitive damages, the costs to an employer deliberately engaging in unlawful wholesale terminations are negligible.[127]

---

117. *See* David L. Gregory, *Proposals to Harmonize Labor Law Jurisprudence and to Reconcile Political Tensions*, 65 NEB. L. REV. 75 (1986) (discussing the intense opposition to passage of the National Labor Relations Act and continuing antilabor animus in many business sectors).

118. Gregory, *supra* note 17, at 541.

119. *Id.*

120. Clyde Summers, *Unions Without Majority: A Black Hole?*, 66 CHI.-KENT L. REV. 531, 533 (1990).

121. *See* Weiler, *supra* note 52, at 1781. Odds are about 1 in 20 that a union supporter will be fired for exercising rights supposedly guaranteed by the NLRA. *Id.*

122. Paul Weiler, *Hard Times for Unions: Challenging Times for Scholars*, 58 U. CHI. L. REV. 1015, 1019 (1991).

123. *Id.*

124. Summers, *supra* note 120, at 533 n.8.

125. Weiler, *supra* note 52, at 1778.

126. *Id.*

127. Gregory, *supra* note 17, at 539.

While the NLRB does have authority to issue a bargaining order as a remedy for such unfair labor practices, this remedy may be illusory.[128] Since the NLRB places importance on the concept of majority rule, a bargaining order is unlikely to be granted where employer discriminatory discharges have weakened the union to the point where it no longer has majority approval among employees.[129]

Even where a union manages to survive the representation proceeding and become certified as majority representative, the process of producing an actual collective bargaining agreement in the United States involves further practical roadblocks.[130] Many of these problems stem from the availability of low-wage labor in foreign labor markets. Employers commonly use employee fear of losing their jobs to cheaper Third World laborers as a bargaining chip to win concessions from union negotiators.[131] Recently publicized examples of manufacturers relocating to Mexico are likely to increase the effectiveness of this tactic.[132]

The collective bargaining process is also stifled by the fact that the NLRB may not require the employer and union to enter into a binding agreement.[133] They are required simply to meet and confer in good faith on those subjects which the NLRB has deemed mandatory.[134] This rule creates a legal loophole for the employer with enough time and money to engage in prolonged and purposefully inconclusive negotiations known as "surface bargaining."[135] By masking this unlawful intent and bargaining a union to "impasse," an employer may satisfy the statutory duty to bargain, and gain a legal right to implement unilaterally work standards that the union was unwilling to accept.[136]

These deficiencies in the substantive law are a primary cause of the crisis facing the U.S. labor movement. From a record high of thirty-four percent of the

---

128. The award of a bargaining order, requiring the employer to negotiate a collective bargaining agreement with the aggrieved union, was approved by the Supreme Court in NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

129. Shillman, *supra* note 49, at 618. Current NLRB policy forbids the issuance of a nonmajority bargaining order. *Id.*

130. *See* LABOR CASES, *supra* note 10, at 386-423 (discussing the ability of employers to destroy the bargaining status of a union by going through the motions of negotiating a collective bargaining agreement).

131. James Zimmerman, *Laboring to Find a Solution to the U.S.-Mexico Face-Off*, LEGAL TIMES, July 19, 1993, at 11.

132. *See* Shaiken, *supra* note 8, at 28 (discussing the effects of manufacturing relocation on U.S. laborers). In 1987, Zenith workers in Springfield, Mo., accepted an 8% pay cut, among other concessions, to avoid losing their jobs to Mexican workers. *Id.* Despite these concessions, Zenith announced in late 1991 that it would move one thousand more jobs south upon the passage of NAFTA. *Id.*

133. 29 U.S.C. § 158(d) (1993).

134. *See supra* note 82 (defining "mandatory" subjects of bargaining under the NLRA).

135. NLRB v. Overnite Transp. Co., 138 LRRM 2018 (1991). "An employer engages in unlawful surface bargaining with a certified union when it merely goes through the motions of negotiating, without a good faith intention or real desire to come to agreement." *Id.*

136. *See generally* Cox, *supra* note 73. In deciding whether an impasse exists, factors to consider are "bargaining history, the good faith of the parties, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, and the contemporaneous understanding of the parties." Taft Broadcasting Co., 163 N.L.R.B. 475 (1967).

private sector work force unionized in 1954, under twelve percent of private sector work force employees are unionized today.[137] Correspondingly, real wages have steadily declined,[138] and poverty levels among U.S. laborers are at their highest since 1964.[139]

B. Mexico

In contrast to the inadequate worker protections inherent in substantive U.S. laws, modern application of Mexico's labor law is primarily frustrated by enforcement problems.[140] This is due in part to the relationship between Mexico's labor unions and the controlling Institutional Revolutionary Party (*Partido Revolucionario Instituciónal*, or PRI).[141] The PRI has dominated Mexican politics since 1928, bringing labor leaders into public office as a means of insuring a base of popular support.[142]

The result of this process has been the evolution of labor unions more responsive to the dictates of the PRI than to the workers they are authorized to represent.[143] According to Jerome I. Levinson of the Economic Policy Institute, "It is true that Mexico's labor legislation, on paper, is highly progressive. However, the legislation bears no relationship to the reality. The principal issue

---

137. David L. Gregory, *The Right to Unionize as a Fundamental Human and Civil Right*, 9 MISS. C. L. REV. 135 (1988).

138. Steven Greenhouse, *Income Data Show Years of Erosion for U.S. Workers*, N.Y. TIMES, Sept. 7, 1992, at A1. The Congressional Joint Economic Committee reported in September 1992 that a 30-year-old male with a high school education earned $3500 less in 1991 real dollars than he earned in 1979. *Id.* The Census Bureau reported that the median household income fell 5%, after adjustment for inflation, from 1989-91. *Id.*

139. Robert Pear, *Ranks of U.S. Poor Reach 35.7 Million, The Most Since 1964*, N.Y. TIMES, Sept. 4, 1992, at A1. The Census Bureau reported 35.7 million people live in poverty in the United States, up by 2.1 million in 1991 alone. *Id.* This is the highest poverty rate since 1964. *Id.*

140. *See infra* notes 143-57 and accompanying text (explaining the enforcement problems created by the relationship between Mexican labor unions, government, and foreign investors).

141. *See* Jeff Silverstein, *Laissez-Faire Economics: Union Leaders (and Members) Want to Keep Their Jobs*, BUS. MEX., Dec. 1992 (explaining that the PRI uses official unions to maintain low-wage foreign investment policies); Zimmerman, *supra* note 131, at 11 (stating that the relationship between unions and government is a primary cause of the lack of union democracy in Mexico); *The Great NAFTA Debate*, WASH. POST, Oct. 3, 1993, at C3 [hereinafter *Debate*] (recounting the argument that the PRI uniformly denies worker rights by suppressing independent unions).

142. *See* Peters, *supra* note 4, at 226 (describing the process of co-optation, through which influential Mexican labor leaders have integrated into the PRI party structure). *See also Dispute Over Minimum Wage Reveals Government-Labor Tension*, Notimex Mexican News Serv., Jan. 22, 1993, *available in* LEXIS, News Library, Notimx File (describing this historical relationship, and noting the tension developing between the PRI and official unions over declining real wages).

143. *See* Amy H. Goldin, Comment, *Collective Bargaining in Mexico: Stifled by the Lack of Democracy in Trade Unions*, 11 COMP. LAB. L.J. 203, 206 (1990) (arguing that meaningful collective bargaining in Mexico is not possible where unions maintain a close relationship with the PRI).

is the Mexican government's policy of assuring a low-wage, stable labor environment, enforced by strong-arm tactics and . . . union affiliations."[144]

Typically, "official" unions (unions associated with the PRI) will not organize strikes to support worker demands.[145] These unions also tend to be conciliatory towards employers in the collective bargaining process, reflecting the PRI's policy of maintaining low wages to attract foreign investment.[146] As a representative of the largest official union, the *Confederación de Trabajadores Mexicanos* (CTM) stated, union leaders "don't want to puncture the tire of the Mexican car, so we lose the race against other countries."[147] Currently, these official unions represent about ninety percent of all unionized workers in the country.[148]

Since 1988, the official unions, most notably the CTM, have signed on to Mexico's pact for stability, competitiveness, and employment.[149] Among the provisions of "El Pacto," as the agreement is popularly known, is a provision prohibiting official unions from attaining wage increases of more than ten percent.[150] Thus, the CTM and other official unions have voluntarily given up their right to negotiate wage increases vigorously, defeating a central purpose of the collective bargaining process. Many labor analysts believe that El Pacto is responsible for a forty percent decline in real wages over the past decade, despite an annual economic growth rate in Mexico of approximately three percent.[151]

In the *maquiladora* industry, U.S. management and the Mexican government have joined forces to insure that those manufacturing plants which become unionized are represented by these complacent official unions.[152] In fact, the PRI has even sponsored advertisements in U.S. business magazines aimed at luring "manufacturers with promises of cheap, docile workers and a high standard of living."[153] The Ministry of Labor reportedly refuses to register "independent" unions (unions not affiliated with the PRI), thereby preventing such unions from

144. Jerome I. Levinson, *Give Mexican Workers Their Due: U.S. Firms Are Already Taking Advantage of Poor Labor Protections*, L.A. TIMES, Sept. 29, 1992, at A15.

145. *See* Silverstein, *supra* note 141, at 31 (noting that the *Confederación de Trabajadores Mexicanos* (CTM), Mexico's largest official union, has not called a general strike in more than 25 years).

146. *Id.*

147. Linda Robinson & Andrea Dabrowski, *Reaching to the South*, U.S. NEWS & WORLD REP., Mar. 1, 1993, at 43.

148. *Id.*

149. *Salinas Says New Pact Will Raise Mexican Wages*, Int'l Trade Rep. (BNA) (Oct. 6, 1993) (News Highlights: Labor) [hereinafter *New Pact*].

150. Goldin, *supra* note 143, at 223.

151. Geri Smith, *Congratulations Mexico, You're Due for a Raise*, BUS. WK., Sept. 27, 1993, at 58; *See also* Shaiken, *supra* note 8 (arguing that this decline in real wages in the face of increasing productivity will spur further U.S. manufacturers to relocate to Mexico).

152. Wyatt Hogan et al., *NAFTA Bodes Ill for Poor Workers of Mexico*, HOUS. CHRON., Aug. 3, 1993, at A15; *see* Peters, *supra* note 4, at 226 (discussing the close relationship between U.S.-owned *maquiladoras* and the PRI).

153. John Maggs et al., *Child Labor Rampant in Mexico, Senator Claims: Hollings Says Yucatan Tried to Lure U.S. Firms with Promise of Docile Workers*, BUFFALO NEWS, May 24, 1993, at B7.

attending arbitration hearings or negotiating collective bargaining agreements.[154] It is also widely asserted, although no clear evidence is available, that the government uses illegal tactics, such as beatings, kidnappings, and even murder to suppress workers in the exercise of their constitutional right to strike.[155]

U.S.-owned companies, for their part, discourage the organizational efforts of independent unions in Mexico through the use of article 923 of the 1970 Federal Labor Law.[156] This provision provides that if a collective bargaining agreement has been deposited with the FLC, the court will not accept the petition of a rival union for a strike call related to negotiation of a collective bargaining agreement.[157] Article 923 thus allows employers to negotiate labor agreements with official unions before independent unions are able to gather support.[158] Thereafter, even if employees with whom the original agreement was signed leave the employ of the company, no other union can file a strike call against the employer as long as the agreement is kept current in wages and fringe benefits.[159]

Of course, such tactics are only necessary where employers are unable to avoid collective bargaining altogether. In the *maquiladora* regions, where "a wealth of newsletters exist to provide managers with tips for avoiding unionization," many plants have done just that.[160] While the U.S. Commerce Department estimates that as much as ninety percent of Mexican industrial workers are organized, some *maquiladora* regions boast unionization rates of only fifteen percent.[161] Still, on average, sixty-four percent of U.S. companies in Mexico negotiate with a labor union.[162]

IV. PROSPECTS FOR THE FUTURE OF LABOR RELATIONS IN THE UNITED STATES AND MEXICO

The above comparison illustrates the point that both U.S. and Mexican labor laws have failed in practical application to adequately insure the rights of workers to organize and bargain collectively. Future protection of these rights is dependent

---

154. LEVINSON, *supra* note 1, at 6-7.

155. *See* Zimmerman, *supra* note 131, at 6 (discussing alleged beatings, killings, and kidnappings attributed to the PRI); *Debate, supra* note 141, at C3 (discussing brutal tactics allegedly used by PRI); *Mexico's Disregard for Worker Rights Explored at Congressional Hearing*, Int'l Trade Rep. (BNA) (July 21, 1993) (Legal Action: Mexico) (relating allegations by Mexican workers that attempts to organize independent unions may result in discharge, blacklisting, and even murder).

156. LEVINSON, *supra* note 1, at 7.

157. 1970 Federal Labor Law, *supra* note 35, para. 923.

158. Levinson, *supra* note 1, at 7.

159. *Id.*

160. Peters, *supra* note 4, at 240. *See also* Robberson, supra note 2, at A31 (citing the head of a border *maquiladora* association confirming that owners and managers in the region work together to block independent unions from forming).

161. Peters, *supra* note 4, at 239-40.

162. Laura Kelso, *Employment by the Numbers; Survey Examines Labor Practices*, BUS. MEX., June 1992.

on the extent to which social and political pressures within both countries can harmonize official labor policy with the current reality of labor-management relations.

A. Legislative Reform Efforts in the United States

Most labor analysts agree that the NLRA is in need of substantive reform if it is to maintain vitality as a protection of worker rights.[163] With the election of President Clinton in 1992, and his subsequent appointment of several liberal labor activists to cabinet positions, advocates of labor reform may finally be successful with reform legislation in Congress.[164]

1. The Workplace Fairness Act

On June 15, 1993, the Cesar Chávez Workplace Fairness Act (WFA) was passed in the House of Representatives.[165] The WFA would amend section 8(a) of the NLRA to make permanent replacement of workers involved in a labor dispute an unfair labor practice.[166]

Passage of the WFA would eliminate one of the key areas of employer advantage in U.S. labor relations.[167] Banning permanent replacement of economic strikers is a critical first step toward reforming the law to strengthen labor's position at the bargaining table and its ability to recruit new members.[168] Without the fear of permanently losing their jobs, workers are more willing to threaten and engage in economic strikes in support of their bargaining demands.

Proponents of the WFA in the Senate thus far have been unable to obtain commitments from enough senators to overcome a threatened Republican filibuster.[169] But according to Senator Howard M. Metzenbaum, the legislation is still expected to be approved by the Senate and sent to the White House

---

163. *See, e.g.*, PAUL WEILER, GOVERNING THE WORKPLACE (1990) (advocating change in laws which cause procedural delays in the representation proceeding); THOMAS GEOGHEGAN, WHICH SIDE ARE YOU ON? TRYING TO BE FOR LABOR WHEN IT'S FLAT ON ITS BACK (1991) (arguing that the right to unionize has been subverted by contemporary pro-business politics).

164. Harry Bernstein, *How Unions Might Revive Under Clinton*, L.A. TIMES, Dec. 22, 1992, at D3. Labor Secretary Robert Reich, Chairperson of the White House Council of Economic Advisors Laura D'Andrea Tyson, and top Clinton advisor Ira Magaziner are all active members of the Economic Policy Institute, one of the nation's most liberal, pro-labor think tanks. *Id.*

165. H.R. 5, 103rd Cong., 1st Sess. (1993)

166. *Id.*

167. Gregory, *supra* note 17, at 539. *See also Permanent Replacements Cut Reinstated Strikers*, 144 Lab. Rel. Rep. (BNA) 257 (Nov. 1, 1993) (News & Background Info.) (noting that the hiring of permanent replacements for striking workers significantly decreases the percentage of strikers who are reinstated).

168. *Much Labor Law Reform Debate Expected in 1994*, 144 Lab. Rel. Rep. (BNA) 481 (Dec. 20, 1993) (News & Background Info.) [hereinafter *Reform Debate*].

169. *Interest in Labor Law Reform Is Gaining on Capitol Hill*, 144 Lab. Rel. Rep. (BNA) 481 (Dec. 20, 1993) (News & Background Info.).

sometime in 1994.[170] President Clinton has promised to sign the WFA if it passes both houses.[171]

2. *The Dunlop Commission*

In addition to supporting the Workplace Fairness Act, Labor Secretary Robert Reich has appointed a commission on the Future of Worker Management Relations to look into ways to encourage workplace productivity through greater labor-management cooperation.[172] Headed by Harvard Professor John Dunlop, the commission is charged with recommending ways to change the legal framework for collective bargaining.[173] These recommendations are expected to be released in the middle of 1994.[174]

As a precursor to the commission report, Senator Paul Simon has introduced a series of labor law reform bills, in an effort "to help shape the debate which will come."[175] For example, the Federal Contracts Debarment Act would prohibit employers found guilty of a "clear pattern and practice" of labor law violation from holding federal government contracts for a period of three years.[176] The National Labor Relations Penalty Act would authorize the Labor Secretary to fine consulting or legal firms up to ten thousand dollars for advising clients to violate the NLRA.[177]

Perhaps more interesting are two bills which would bring the NLRA in line with the broad worker protections available under Mexican law. The Labor Relations Remedies Act proposes to authorize the NLRB to award workers wrongfully discharged for union activities, back pay equal to three times the employee's wage rate.[178] This is comparable to the three-month-wage remedy available to workers wrongfully discharged in Mexico.[179] Similarly, the Labor Relations First Contract Negotiations Act would permit an employer or union to submit initial contract disputes to the Federal Mediation and Conciliation Service for binding arbitration.[180] This involuntary arbitration process mirrors procedures

---

170. *Reform Debate*, *supra* note 168.

171. Ronald Brownstein, *What the Fuss Will Be About*, L.A. TIMES, Jan. 11, 1993, at A1; Bruce D. Butterfield, *Union Leaders Endorse Clinton's Choice for Labor Secretary*, BOSTON GLOBE, Dec. 12, 1992, at 6.

172. *Reform Debate*, *supra* note 168.

173. *Business, Labor Differ On Worker-Management Plans, Business Wants Less Regulation, Labor Wants Freedom to Associate*, 144 Lab. Rel. Rep. (BNA) 321 (Nov. 15, 1993) (News & Background Info.).

174. *Labor Law Reform Commission Meets*, 145 Lab. Rel. Rep. (BNA) 33 (Jan. 17, 1994) (News & Background Info.).

175. *Reform Debate*, *supra* note 168.

176. S. 1530, 103rd Cong., 1st Sess. (1993).

177. S. 1531, 103rd Cong., 1st Sess. (1993).

178. S. 1553, 104rd Cong., 1st Sess. (1993).

179. 1970 Federal Labor Law, *supra* note 35, para. 48.

180. S. 1554, 103rd Cong., 1st Sess. (1993).

under Mexican law and would virtually eliminate employer use of surface bargaining techniques.[181] This is because both parties would have an incentive to engage in meaningful negotiations to avoid having contract terms dictated by an arbitration board.

When the Dunlop commission releases its report in 1994, the Clinton administration is expected to push to get these and other dramatic reform measures passed.[182] It is worth noting, however, that former U.S. President Jimmy Carter backed similar reform legislation in 1977 that was defeated by a nineteen-day filibuster in the Senate.[183] Given the strong influence of business interests in modern U.S. politics, and the opposition of business to change in the NLRA, the coming reform efforts are likely to meet the same fate.

B. Rise of Union Democracy in Mexico

In contrast to the United States, the impetus for change in Mexico must come from within the labor movement itself. Official unions, such as the CTM, have lost their legitimacy by supporting PRI policies designed to keep wages low and prevent strike activity.[184] To protect the right of workers to organize and bargain collectively, Mexico must develop a democratic labor movement, supported by enforcement mechanisms that give meaning to Mexico's official labor policy.

1. Potential for Reform from Within the Official Labor Unions

There is at least some hope that union democracy might evolve from within the official labor unions. In response to the dramatic decrease in real wages over recent years, official union leaders are growing dissatisfied with their close governmental relationship.[185] The PRI views labor as "the foot soldiers expected to march the country into the global marketplace," and has used its union affiliations as a means of social control as wages spiral downward.[186] As a result, CTM leader Fidel Velazquez Sanchez has openly criticized the PRI government, stating that his union "has stopped asking for the participation of the

181. *See supra* notes 133-36 and accompanying text (defining surface bargaining and discussing its significance in the collective bargaining process).

182. Harry Bernstein, *How Unions Might Revive Under Clinton*, L.A. TIMES, Dec. 22, 1992, at D3.

183. *See* H.R. 8410, 95th Cong., 1st Sess. (1977); S. 2467, 95th Cong., 2d Sess. (1978).

184. *See* Peters, *supra* note 4, at 226. (discussing the PRI's use of strong labor ties to suppress the rights of workers in the *maquiladora* industry).

185. *Rivalry Heats Up Between Trade Union Leaders*, Notimex Mex. News Serv., Feb. 27, 1993, *available in* LEXIS, News Library, Notimx File; *See New Pact, supra* note 149 (discussing official union dissatisfaction with PRI failure to link productivity increases to specific wage increases in the newly renegotiated Pact); Juan Forero, *Labor Rally in Tijuana Hits Foreign Companies*, SAN DIEGO TRIB., Oct. 6, 1993, at B3 (quoting a Mexican labor activist as stating that workers are demanding unions to defend their rights).

186. Diane Lindquist, *A Big Deal for Mexico: Diversity of Its Workplace Is Factor in NAFTA*, SAN DIEGO UNION TRIB., Sept. 17, 1993, at A1.

Labor Ministry because the representatives of the ministry have limited the growth of workers' salaries."[187] Vilazquez has also called for U.S., Canadian, and Mexican labor unions to establish a "trinational front" to defend labor rights.[188]

This protest, however, has been more symbolic than substantive. The CTM has not called a general strike in nearly twenty-five years.[189] Indeed, the official unions appear to have little practical existence beyond their role as an arm of the government, inhibiting the formation of a democratic labor movement. Rather than becoming more assertive of employee rights, the net effect of the CTM protest has been a reduction of labor's political influence within the PRI.[190] In the 1991 congressional elections, the official unions received fifty-three percent fewer candidacies in the party.[191]

2. *The "Americanization" of Mexico's Independent Unions*

As the official labor unions in Mexico lose their political strength, and thus their means of control over Mexican laborers, there has been a marked increase in the role of independent unions in the labor market.[192] Independent unions are particularly prevalent among U.S.-owned *maquiladoras*, where workers are beginning to take jealous glances across the border at U.S. wage rates more than ten times their own.[193] In the words of one Mexican labor consultant, "This is the beginning of a process of comparison. If businesses are going to insist that workers become as productive in quality and output as those in the United States because we need to cooperate, workers are going to demand competitive wages as well."[194]

U.S. labor unions, fearing the exodus of U.S. manufacturing to exploit cheap Mexican labor, are beginning to offer their assistance to these independent Mexican unions.[195] The resultant "Americanization" of Mexico's labor

187. *Labor Movement Rejects Any Changes in the Labor Laws*, Notimex Mex. News Serv., Apr. 11, 1992, *available in* LEXIS, News library, Notimx File.

188. *Labor Confederation Proposes Common Front with U.S., Canadian Unions*, Notimex Mex. News Serv., Jan. 13, 1993, *available in* LEXIS, News Library, Notimx File.

189. Silverstein, *supra* note 141, at 31.

190. *Id.*

191. *Id.*

192. Goldin, *supra* note 143, at 217. In February 1989, 49 unions in one region of the country left the CTM because of the corruptness among the CTM leaders. *Id.*; *see Fact Sheet*, *supra* note 69 (stating that with the growth of free market reforms, labor ties to the PRI are rapidly weakening because market conditions rather than politics increasingly determine the outcome of labor issues).

193. Juanita Darling, *Mexican Auto Strikers Look North*, TOR. STAR, Mar. 17, 1993, at A19.

194. *Id.*

195. David Bacon, *Unions Target U.S. Plants South of Border*, TOR. STAR, Jan. 16, 1994, at E4.

movement is already affecting U.S. owners and managers in the *maquiladoras*.[196]

The most publicized example of U.S. labor unions assisting independent Mexican unions occurred at *Plásticos Bajacal Co.* (*Plásticos*), a U.S.-owned *maquiladora*, which manufactures clothes hangers in Tijuana.[197] Unions of the United States targeted the plant when U.S. union officials touring the *maquiladora* region were detained outside the plant by Mexican authorities.[198] The union officials were accused of "illegal" behavior before being allowed to return to the United States.[199]

Thereafter, in the spring of 1993, thirteen *Plásticos* workers were fired for union activities.[200] U.S. unions raised enough money to pay for three of the workers to continue organizing.[201] As a result of their efforts, a union election was held at *Plásticos* for the first time in thirteen years.[202]

The *Plásticos* effort was not an isolated occurrence. Since the passage of NAFTA, coalitions of unions from the United States and Mexico have launched organizing campaigns at U.S.-owned factories in several Mexican cities.[203] In Juarez, the United Electrical Workers (UEW) and the Teamsters Union are funding organizational activities by workers at General Electric's Compañia Armadora plant.[204] Similarly, in Chihuaha, UEW and Teamsters activists are assisting workers at an electrical controls plant owned by Honeywell.[205] Successful outcomes in these plants could eventually lead to full-scale Americanization of labor unions within the *maquiladora* region.

C. NAFTA and the Side Accords on Labor

The problems facing labor in both Mexico and the United States were central to the debate over the passage of NAFTA.[206] Labor leaders who had vigorously campaigned for the election of President Clinton decried the relocation of U.S. manufacturers to Mexico to exploit Mexican workers.[207] The President respond-

196. *See* Bacon, *supra* note 195 (discussing the impact of U.S. unions on Mexican *maquiladoras*).
197. Rotella, *supra* note 58, at B14.
198. *Keep Out*, SEATTLE TIMES, Oct. 4, 1993, at E1.
199. *Id.*
200. Bacon, *supra* note 195, at E4.
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *See Hearing Before Senate Finance Committee on the North American Free Trade Agreement*, 102th Cong., 1st Sess. 114 (1991) [hereinafter *Senate Hearing*] (statement of Thomas R. Donahue, Chairman Labor Advisory Committee on Trade Negotiations and Trade Policy discussing the centrality of labor issues to free trade under NAFTA).
207. *Labor Leaders See Scant Benefit to U.S. from Free Trade Agreement with Mexico*, Int'l Trade Rep. (BNA) 250 (Feb. 13, 1991).

ed by calling for the establishment of an independent trinational NAFTA commission to deal with workers rights, which "should have extensive powers to educate, train, develop minimum standards and have . . . dispute resolution powers and remedies."[208] As a result, the signatory countries negotiated the North American Agreement on Labor Cooperation (Supplemental Agreement), as a supplement to NAFTA.[209]

1. Dispute Resolution Process

The Supplemental Agreement requires each of the NAFTA countries to promote compliance with, and enforcement of, its own labor laws.[210] Toward this end, each country must establish a National Administrative Office (NAO), authorized to submit labor complaints to the trinational Commission for Labor Cooperation for resolution or dispute settlement.[211] The commission is governed by a ministerial council, consisting of the highest ranking labor official from each country.[212] The council is assisted by the International Coordinating Secretariat, an independent international agency created to prepare reports and examine labor matters as requested by the council.[213]

Although the Supplemental Agreement nominally seeks to promote information exchange and the development of technical assistance programs between the NAFTA countries,[214] the heart of the agreement is its dispute resolution process. The Supplemental Agreement creates a four-tier procedure for handling complaints.[215]

First, a complaint can be brought to the ministerial council by a NAO against another party alleging "a persistent pattern of failure by that other party to effectively enforce [labor] standards."[216] Once a complaint is brought, representatives from the three countries at the ministerial council level must try to resolve the matter by negotiating among themselves.[217] If the alleged violations relate

---

208. LEVINSON, *supra* note 1, at 1.

209. Supplemental Agreement, *supra* note 12. This comment attempts to identify the effect of the Supplemental Agreement on organizational and collective bargaining rights only. For an in-depth analysis of the Supplemental Agreement and its effect on worker rights in Mexico, see Elizabeth C. Crandall, Comment, *Will NAFTA's North American Agreement on Labor Cooperation Improve Enforcement of Mexican Labor Laws?*, 7 TRANSNAT'L LAW. 165 (1994).

210. Supplemental Agreement, *supra* note 12, art. 3.

211. *Id.* arts. 15, 22. Article 15 requires each party to establish an NAO to serve as a point of contact between governmental agencies of the parties. *Id.* art. 15. Article 22 allows any party, through an NAO as a part of contact, to request in writing consultation with another party at the ministerial level. *Id.* art. 22.

212. *Id.* art. 9.

213. *Id.* art. 14.

214. *Id.* art. 1.

215. *Id.* arts. 27-40.

216. *Id.* art. 27.

217. *Id.*

to the right to organize and bargain collectively, among other fundamental worker rights, the dispute resolution process can go no further than negotiation.[218]

As applied to other mutually recognized worker rights,[219] however, failure to negotiate a satisfactory agreement will result in the appointment of an independent Evaluation Committee of Experts (ECE) to make a report and recommendation.[220] The ECE may make recommendations that assist parties in resolving disputes.[221]

If the offending country does not voluntarily comply with an ECE recommendation, the complaining country may request an arbitral panel.[222] If the ministerial council convenes an arbitral panel, and the panel determines that the dispute is trade related and covered by mutually recognized labor laws, the panel is authorized to make a "monetary enforcement assessment" or fine against the offending country up to a maximum of $20 million against the United States in the first year.[223]

Finally, Mexican or U.S. refusal to pay the monetary enforcement assessment and correct the problem may result in refusal of NAFTA tariff benefits to the offending country.[224] The amount of benefits denied would be measured by the amount of the unpaid monetary enforcement assessment.[225]

2. *Effect on Organizational and Collective Bargaining Rights*

The most striking feature of the Supplemental Agreement is that the rights of workers to organize and bargain collectively are excluded from the enforcement process. Although failure of a signatory country to enforce health and safety standards or minimum wage laws can result in monetary assessments, and eventually, denial of NAFTA trade benefits, complaints alleging persistent violation of employee organizational rights can be taken no further than consultation at the ministerial level.[226] Annex 1 to the Supplemental Agreement attempts to explain this omission:

> [Employee organizational rights] are guiding principles that the Parties are committed to promote, subject to each Party's domestic law, but do not

218. *Id.* NAFTA's monetary enforcement assessment and denial of trade benefit sanctions may be applied for a party's persistent failure to enforce occupational safety and health, child labor, or minimum wage labor standards. *Id.*

219. *Id.*

220. *Id.* art. 23.

221. *Id.* art. 25.

222. *Id.* art. 29.

223. *Id.* art. 39. The $20 million maximum penalty applies to the first year for which NAFTA is effective. *Id.* Thereafter, the maximum penalty is 0.007% of the total trade in goods between the parties. *Id.*

224. *Id.* art. 41.

225. *Id.*

226. *Id.* art. 27.

> establish common minimum standards for their domestic law. They indicate broad areas of concern where the Parties have developed, each in its own way, laws, regulations, procedures and practices that protect the rights and interests of their respective workforces.[227]

NAFTA countries do not wish to have their internal labor relations policies scrutinized in a multinational forum. This is not surprising, considering the extent to which U.S. and Mexican labor laws have failed in practical application to protect internationally recognized worker rights.[228] Thus, by negotiating the Supplemental Agreement excluding employee organizational and collective bargaining rights from its enforcement mechanisms, the United States has effectively defeated the intended purpose of the Supplemental Agreement.[229] The agreement does nothing to promote the growth of an independent labor movement in Mexico, and therefore does not address the primary cause of the high-productivity, low-wage Mexican labor market luring U.S. companies into the *maquiladora* program.[230]

The effect of NAFTA on the organizational rights of U.S. and Mexican workers cannot be measured by the Supplemental Agreement. Rather, its impact on these rights lies in the nature of free trade itself. The increasing economic integration of the United States and Mexico, with nearly equivalent worker productivity levels and great disparity in labor costs, necessarily creates an incentive for labor intensive U.S. manufacturers to relocate.[231] The threat of such relocation will inhibit U.S. worker efforts to organize and engage in meaningful collective bargaining with their employers. Where workers are already unionized, the collective bargaining process will likely be reduced to union

227. *Id.* annex 1.

228. *See supra* notes 117-62 and accompanying text (describing the practical inadequacies of both Mexican and U.S. protections of employer organizational and collective bargaining rights). The International Labor Organization (ILO) since 1919 has provided an international model for labor standards. Gregory, *supra* note 17, at 542. ILO Convention No. 89 provides that workers have the right to establish and join unions of their own choosing, without state or employer interference. NICOLAS VALTICOS, INTERNATIONAL LABOR LAW 86 (1979). Convention No. 98 protects workers from anti-union discrimination and from union domination by employers. *Id.*

229. *See* LEVINSON, *supra* note 1, at 11 (stating that by limiting remedies for the violation of industrial relation laws to consultation at the ministerial level, the Supplemental Agreement implicitly endorses each countries abusive labor practices).

230. *Id.*

231. *See* Shaiken, *supra* note 8, at 29 (estimating a potential loss of 500,000 U.S. manufacturing jobs to Mexico by the year 2000). *See also The Maquiladora Industry and U.S. Employment*, 3 Mex. Trade & L. Rep. (Int'l Trade Info. Corp.) No. 9 (Sept. 1993) (reporting that the cumulative stock of U.S. direct foreign investment in Mexico has more than doubled between 1985 and 1991, rising from $5.1 billion to $11.6 billion). The number of *maquiladoras* has tripled since 1985, and the Mexican government estimates that about half of the 2522 *maquiladoras* registered with the Mexican government through January 1992 were either wholly or majority owned by U.S. firms. *Id.*

acceptance of less than favorable management offers which guarantee that workers will not lose their jobs.[232]

The increased manufacturing activity in Mexico, expected under NAFTA, should increase the demand for labor, thus strengthening the bargaining position of Mexican workers.[233] As independent unions begin to win large concessions from U.S. employers, the official unions and the PRI will be unable to continue their current low-wage policies.[234] Thus, with the able assistance of U.S. unions, Mexican workers can be expected to organize vigorously, negotiate, and strike for more favorable collective bargaining agreements until Mexico's comparative advantage in labor costs is obviated.[235]

V. CONCLUSION

The debate over NAFTA has depicted Mexico as an oppressive, authoritarian country, with little respect for the fundamental rights of its workers.[236] The failure of the PRI to protect adequately the right of workers to organize and bargain collectively has been a source of constant criticism by labor leaders opposed to the creation of an integrated North American marketplace.[237]

---

232. *See* Shaiken, *supra* note 8 (stating that weakened U.S. unions will be unable to bargain effectively with employers over the issue of relocation to Mexico). *See also* Paul Orbuch, *Integrating Labor and Environmental Concerns into the North American Free Trade Agreement: A Look Back and a Look Ahead*, 8 AM. U. J. INT'L L. & POL'Y 719, 727 (noting U.S. labor concerns that, through competitive wage pricing undertaken to keep companies from relocating to Mexico, NAFTA will cause wages in the United States to decline).

233. *See Shakedown on the Border*, 2 Mex. Trade & L. Rep. (Int'l Trade Info. Corp.) No. 7 (July 1992) [hereinafter *Shakedown*] (suggesting that wages and benefits are already on an upward curve in the *maquiladora* industry generally, driven by the expanding Mexican economy and that such expansion should continue in the wake of NAFTA).

234. *See generally* Damian Fraser, *Uprising May End Up Altering Mexican Policy*, FIN. POST, Jan. 6, 1994, at 7 (stating that the PRI may have to make social development rather than economic reform the key element of its political platform).

235. *See generally supra* notes 195-205 and accompanying text (describing the efforts of U.S. labor unions to unionize the *maquiladoras*); William Cunningham & Segundo Mercado-Llorens, *The North American Free Trade Agreement: The Sale of U.S. Industry to the Lowest Bidder*, 10 HOFSTRA LAB. L.J. 413, 449 (arguing that by promoting economic growth in Mexico, free trade would generate greater prosperity and resources that Mexico could devote to improving the situation of workers, and that closer U.S.-Mexico economic cooperation would create opportunities for cooperation on labor matters as well).

236. *See, e.g., Mexico's Disregard for Worker Rights Explored at Congressional Hearing*, Int'l Trade Rep. (BNA) 1203 (July 21, 1993) [hereinafter *Hearing*] (relating testimony of Mexican workers to the effect that rights to associate freely, to elect representatives, and to promote improved working conditions are consistently violated in Mexico). *But see Shakedown*, *supra* note 233 (stating that the popular image of *maquiladoras* as sweatshops, with laborers toiling under bare bulbs hanging from the ceiling, turning out cheap shoes and the like, is inconsistent with the reality of Mexican working conditions).

237. *See Hearing*, *supra* note 236. One U.S.-based labor activist group has even petitioned President Clinton to exclude Mexico from the Generalized System of Preferences (GSP). *Mexican Workers' Rights Abuse Denounced in U.S.*, Reuters, July 15, 1993, *available in* LEXIS, News Library, Curnws File. The GSP allows the President to withdraw preferential trade status from Mexico where Mexico has "not taken or is not taking steps to afford internationally recognized worker rights to [its] workers." 19 U.S.C. § 2462(b)(7) (1993). Other

Conspicuously absent from the NAFTA debate has been any discussion of the glaring deficiencies in U.S. labor laws. The NLRA is replete with loopholes that allow management to stifle worker organizational and collective bargaining efforts. Discriminatory discharge is an accepted practice,[238] the permanent replacement doctrine inhibits strike activity,[239] and surface bargaining techniques destroy the bargaining status of representative unions.[240] Union membership is at a historic low, yet U.S. attempts at labor law reform have consistently met powerful opposition.[241]

In contrast, the rights of workers in Mexico appear to be expanding. The 1970 Federal Labor Law provides comprehensive protection of the organizational and collective bargaining rights of Mexican workers. As the demand for labor rises in the *maquiladora* industry, and information exchange with U.S. unions increases, Mexican unions are becoming more aggressive in asserting these fundamental rights.[242] Admittedly, this trend creates tension between labor and the PRI government, which has displayed its willingness to suppress dissident activities by force.[243] However, the fact that the PRI has not tried to prevent U.S. unions from assisting Mexican independent unions in their organizational efforts indicates that future suppression is unlikely.

Thus, while *maquiladora* operation presently offers the U.S. manufacturer an abundant supply of productive, low-wage labor, the long-term advantages of Mexican manufacturing are much less certain. *Maquiladora* workers are anxious to attain the standard of living of their U.S. counterparts. Independent labor

---

commentators have noted the availability of section 301 of the Omnibus Trade and Competitiveness Act (OTCA), which authorizes the President to take "appropriate and feasible action" against "unreasonable or discriminatory" acts, policies, or practices that "burden or restrict United States commerce." *Id.* § 2411(b) (1993). *See Hearing of the Senate Finance Committee: Labor Issues Associated with NAFTA*, 102d Cong., 2d Sess. 215 (1993) (statement of Senator Max Baucus).

238. *See supra* notes 120-27 and accompanying text (describing employer use of discriminatory discharge to inhibit unionization).

239. *See supra* notes 99-104 and accompanying text (describing the *Mackay* permanent replacement doctrine). A 1992 survey of employers showed that nearly 50% would consider hiring permanent replacements as a means of achieving their bargaining goals. Robert L. Rose, *Caterpillar's Success in Ending Strike May Curtail Union Use of Walkout*, WALL ST. J., Apr. 20, 1992, at A3.

240. *See supra* notes 133-36 and accompanying text (describing the technique of surface bargaining and its effect on the collective bargaining process).

241. *See supra* note 183 and accompanying text (describing the defeat of the Labor Reform Act of 1977).

242. *See supra* notes 192-205 and accompanying text. (describing the rise of union democracy in Mexico). *See also* Todd Robberson, *Mexican Labor Shows Who's Boss: Workers Win Suit, Now Own Factory*, WASH. POST, Nov. 16, 1993, at A24 (describing a labor court ruling ordering the seizure of the U.S.-owned *Maquilas Internacionales* clothing factory, allowing workers to sell off $700,000 worth of property and improvements to recoup unpaid wages).

243. *See Human Rights in Mexico: Testimony of Mexican Labor Lawyer Manuel Fuentes Muniz Before the Subcommittee of International Security, International Organizations and Human Rights*, 102d Cong., 1st Sess. 32 (1993) (statement that 250 opposition party adherents were killed during the first 1000 days of the Salinas presidency, and that dozens of journalists have been physically attacked or intimidated for treatment of issues in a manner adverse to the government's interests).

unions are gaining popular support, and are beginning to demand enforcement of Mexico's markedly pro-labor laws.[244] As a result, the notion of *maquiladora* operation as a means of accessing an unlimited source of cheap and docile workers may well be inconsistent with the developing labor climate of modern Mexico.

Charles W. Nugent

---

244. *Id.*