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Lawrence Z. Lorber
National Association of Manufacturers

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Hot Topic

"Future Worker
Management"

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**TESTIMONY OF LAWRENCE Z. LORBER
PARTNER, VERNER, LIPFERT, BERNHARD,
MCPHERSON AND HAND
ON BEHALF OF THE
NATIONAL ASSOCIATION OF MANUFACTURERS
BEFORE THE
COMMISSION ON THE FUTURE OF
WORKER-MANAGEMENT RELATIONS**

SEPTEMBER 29, 1994

**MANUFACTURING
MAKES AMERICA STRONG**



Testimony of Lawrence Z. Lorber
Partner, Verner, Liipfert, Bernhard, McPherson and Hand
September 29, 1994

Members of the Commission:

We greatly appreciate this opportunity to engage in constructive dialogue regarding a critical issue impacting on all employees and employers in this country -- how to recommend an acceptable and fair mechanism to resolve workplace disputes. My name is Lawrence Lorber and I am testifying today on behalf of the National Association of Manufacturers as a member of NAM's Labor and Employment Law Advisory Committee. I am currently a partner in the law firm of Verner, Liipfert, Bernhard, McPherson & Hand in Washington. Previously, I served in several positions at the United States Department of Labor including that of Director of the Office of Federal Contract Compliance Programs (OFCCP), one of the federal government's major equal employment agencies.

The NAM is a voluntary Association of more than 12,500 companies, large and small, located in every state. Members range in size from the very large to more than 8,000 smaller manufacturing firms, each with fewer than 500 employees. The NAM is affiliated with an additional 158,000 businesses through its Association Council and the National Industry Council. NAM members employ 85 percent of all manufacturing workers and produce more than 80 percent of the nation's manufactured goods. NAM will proudly celebrate its centennial anniversary in 1995.

The issue of alternative dispute resolution mechanisms goes hand and hand with the reality of the pervasive nature of workplace regulation. The fact finding report catalogued the growth of workplace regulation during the previous thirty and then twenty years. Much of this regulation can be traced to the multiplying laws on the Federal, state and local levels which have established rights on the basis of status for much of the American workforce. Thus, from the enactment of the Fair Labor Standards Act in 1938 which governed wages and hours to the Equal Pay Act of 1963, the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, ERISA in 1974, The Rehabilitation Act of 1973, to the Americans with Disabilities Act of 1990 and the Civil Rights Act Amendments of 1991, the individual employees have been granted a host of legal rights, all of which are designed to be resolved by the Courts after varying degrees of administrative review. And of course the National Labor Relations Act regulates organizational and representation activities but also established individual rights. However, both the NLRA and OSHA establish, in the first instance, an administrative adjudication mechanism which changes the forum of dispute resolution from Article III courts to administrative tribunals, but which themselves experience the same degree of backlog and resolution delay. And finally on the federal level, the various programs which mandate affirmative action and non-discrimination for federal contractors sits side by side with their statutory siblings and which provide alternative administrative forum for dispute resolution. Exhibits IV-1 through IV-4 of the Fact Finding Report details even more graphically the scope of the coverage and the resulting explosion of litigation. To this we can add state and local statutes which mirror in coverage and requirement the federal requirements.

This listing of laws is not meant to denigrate any of them individually or to question the proposition that the American workplace must be free of barriers to full opportunity. In our multi-cultural society, where we have expended so much effort to avoid the stratification and lack of opportunity for full employment opportunities because of status found in so much of the rest of the world, our commitment to full opportunity should be envied. However, because of the vast array of laws, regulations, and forums for resolution we have created, we also must face the fact that for many of the designated beneficiaries, the promise of protection is an empty one. A right without a method of meaningful and quick resolution of disputes is a rather empty gesture. While passage of these laws is often greeted by celebration and self-congratulation, "feel-good" legislation quickly becomes yet another component of the growing cynicism pervading our public functions.

So too, for the employers who must attempt in their own fashion to understand these overlapping and often inconsistent or even contradictory legal requirements, and then face the same black-hole of administrative and adjudicatory delay, the response is one of bewilderment and disgust. It is difficult to understand why we have created a system which requires armies of lawyers and consultants to explain the basic proposition that employees should be treated fairly and considered on their merits. It becomes more difficult to understand why employers must commit a significant proportion of their resources to adjudicate issues in crowded courts which must allocate their priorities to resolution of societal issues such as resolution of criminal matters when most employment issues are factually unique and simply require resolution of disputes or differences which occur on the

factory floor or in the office. There is no benefit to an employer to have a Title VII or ADA charge languish for a year or more at the EEOC, and then, regardless of an administrative determination, face a multiyear litigation at tremendous cost. And during this time, the employee who lodged the grievance may still be employed, possibly working for the same supervisor against whom the grievance was first lodged, with the employer fearful of reviewing the employee on work performance because of the specter of a "retaliation" charge being added to the complaint and the employee obviously constrained by the fact that he or she believed that they were wronged in the first place. The lost productivity and wasted resources to such unproductive ends represents a serious loss to the American economy.

While these observations may be self-evident, they form a necessary backdrop to an examination of how we begin to resolve this serious problem. The Fact-Finding Report listed several points of summation and then posed six questions for further discussion. I would like to address some of the conclusions and then attempt to respond to the questions posed for further discussion. First, I would suggest that while the Report clearly illuminates the dispute resolution problem, it summarizes the problem in a constrained manner. Two points may illustrate this observation. Summary 5 states that the private institutions Americans have traditionally relied upon to resolve issues without resort to government regulation or litigation, namely, collective bargaining grievance arbitration, declined in coverage and were limited in their finality by court decisions. However true in fact, this observation is basically irrelevant to the problems noted above. As I pointed out in this testimony, the laws enumerated above are primarily designed to ensure individual rights

based on individual status. There is no adjudicatory predicate for someone to be covered by the Americans with Disabilities Act, you either have a recognized disability or you do not. Collective bargaining grievance resolution requires that the individual be part of a collective bargaining unit, which is recognized by the employer, which has a collective bargaining agreement and which, in turn, contains a mechanism for disputes arising **under the Agreement**. While it is the individual whose grievance is processed, it is the recognized representative which determines whether it will pursue the grievance which is contained within the four corners of the contract. I would submit that there is simply no analogy between the two and reference to collective bargaining experiences may provide little assistance to understanding the massive employment law gridlock we are in.

Second, the Report notes that the United States relies on civil court resolution while many other countries rely on tripartite employment courts. This is a commonly raised solution, but is one which must be seriously examined. First, we are unique in the scope of individual status rights we have created. While the European Union has an extensive labor code, it does not come close to the level of coverage our federal structure provides. Too, the degree of diversity in our workplace is not matched in other societies. Thus, the complexities of the problems we face are not experienced in other societies. But perhaps most important to a fair analysis of this issue is the fact that much of the backlog is procedurally driven. That is, whether a matter is resolved by an Article III court or a hybrid adjudicatory body or before an administrative forum, we have a body of administrative requirements which would impact on the ability of a workplace tribunal to move with any

greater speed in dispute resolution. Two examples may illuminate this point. The EEOC just announced that its charge backlog now exceeds 92,000 cases. If the Commission takes in no other charges, it will take over 17 months to simply process what it has before it now. How many tribunals would be needed to resolves 92,000 charges? So too, the NLRB has been cited as an agency which works well. Its mandate is much more limited than that of the EEOC, it is a mature agency with a long institutional history and has a trained cadre of ALJ's. It's backlog is almost a year and it has nothing like the caseload faced by the EEOC.

Thus, it would be helpful if examples cited as possible resolution of the problem or adjudicatory gridlock might address the peculiar aspects of the underlying problem. To ignore the distinctive nature of our problem doesn't move the discussion to a meaningful resolution.

I would like to turn this testimony to the six questions posed by the Commission for further discussion:

1. What changes in current labor and employment arbitration procedures are needed to deal with the broader range of issues and individuals involved in contemporary employment disputes?

2. What is the appropriate relationship between private and public dispute resolution procedures?

The problem with these questions is that they presume an adjudicated resolution for every issue. In fact, fair mediation, perhaps accompanied by neutral fact finding may go a longer way to resolving this problem than different arbitration procedures. Thus, this Commission might profitably recommend alternative mediation techniques as a required first step before any adjudication. Many workplace disputes involve misunderstandings or divergent factual beliefs. If there were a neutral fact finding process, which would establish facts without reaching judgment, and thereby not be subject to adversarial contest, many of the disputes now pending should be resolved. Fact finding accompanied by mediation should be a first step to any adjudication. If the parties are unable to reach concord, then a private arbitration, which would be binding on both parties could resolve most issues. Recognizing that the administrative agencies charged with interpreting and enforcing statutory rights will not dissolve, they could play a constructive role by issuing interpretations or letter rulings, perhaps along the IRS model, to establish the legal framework for dispute resolution. Too, to the extent that a charge poses a novel or important question which might have to be resolved in a judicial forum, that charge can be certified for judicial resolution which would take the place of final private arbitration. If there is adequate fact finding, accompanied where necessary by timely legal interpretations, then the mediation-arbitration process could work. Thus, the agencies can serve, in most instances, an interpretation and gatekeeper function, while private mediation and fact-finding can take the place of the administrative review and where, necessary, arbitration can undertake the resolution of the vast number of surviving cases. Employers would probably have to bear a good portion of the costs of such a system, but the savings compared to the current morass would be significant. However,

the public savings would be significant as well. It's much cheaper to employ a fact finder than a judge. Thus, the total budget devoted to the administrative agencies might be examined to determine where reprogramming might provide the suggested services.

3. What role, if any, should employees have in the design and oversight of workplace dispute resolution systems that involve issues of public law?

The issue is perceived and actual fairness. It would not be inappropriate for either an agency with dispute resolution expertise such as the Mediation Service, acting in concert with the particular agencies charged with interpreting specific laws, such as the Department of Labor or the EEOC, to issue guidelines for dispute resolution mechanisms as long as they do not simply replicate in administrative guise the judicial gridlock we now have. If there is a fair mechanism, perceived as such, it should gain acceptability. While employee involvement in dispute resolution design sounds fair, it too reflects a dated picture of the workplace. Employee involvement is helpful, but the issues are so complex that expertise in the substance may be a more valuable input. Too, this commission has documented, and serious observers such as Secretary Reich have noted that our workforce is more transient. Secretary Reich wrote in his book, The Work of Nations, that workers can expect to have as many seven different jobs during their worklife. Thus, the attachment of a worker to a single employer is much less of a factor. It would thus make less sense to design a system which requires the formal input of a group of employees who may only represent a snapshot of a workforce continuum and who may be with another employer when the system is implemented. Whether they think the system is fair is less important than whether the

system itself is inherently fair. To achieve that end, the burden should rest primarily on the employer relying on appropriate guidance from relevant government agencies.

4. How can worker-management committees or other forms of employee involvement be used to internalize responsibility for or resolve problems of occupational safety and health or other workplace matters regulated by public law?

As noted in my response to question 3, the issue with respect to these technically complicated areas involves expertise and fairness. Employee involvement is a critically important aspect of sound and effective safety programs. Indeed, in the August 10 hearings, this Commission devoted extensive time to that subject. At that time, Rosemary Collyer, a former general counsel of the NLRB and who also had adjudicative responsibility under the Mine Safety and Health Act testified as to the value of employee involvement and the need to remove statutory barriers. However, to formalize such involvement, through mechanisms of required worker-management committees would not seem to be a productive outcome. The question supposes a dichotomy between the interests of management and employees in this regard so as to formalize their different positions. It is not the experience of many employers today, and most certainly many manufacturing employers, that they stand at a different position with their employees with respect to safety. Thus, it would seem most productive to encourage employee involvement without proscribing with rigid formality their shape, composition or mandate.

5. Should the U.S. government integrate and combine different agencies responsible for administering and enforcing employment laws and regulations?

I believe that this would be an extremely welcome development. My own experience at the Labor Department, both in administering one agency but previously serving as Executive Assistant to the Solicitor where I had an opportunity to see the interplay between several regulatory programs convinced me that a single purpose agencies are not productive. Merely listing the contradictions and overlap between the workplace laws listed in this statement could fill a volume of testimony. Single purpose agencies have neither the mandate nor the institutional incentive to cooperate. Employers and employees have the constant frustration of duplicative investigations of the same occurrence. The conflict between agencies, such as the inability of the EEOC and NLRB to come to a common understanding of the interplay between the ADA and the NLRA is extremely frustrating. However, a common agency is not a panacea unless that agency can establish a mechanism to resolve conflicts. For example, the Wage and Hour Division at the Labor Department has issued an interpretation of the Family and Medical Leave Act with respect to alternative employment which, it admits, conflicts with the ADA and the Rehabilitation Act's requirement for reasonable accommodation. Of course for employers, §503 of the Rehabilitation Act which deals with employees with disabilities who work for government contractors is also administered by the Labor Department. Notwithstanding internal bureaucratic rivalries, common sense and experience over the last twenty years suggests that

uniformity of interpretation and procedure is something to be desired. If one-stop shopping is good for training, it is certainly appropriate for regulation.

6. Should the U.S. consider establishing a specialized branch of the judiciary to deal with employment cases?

This was addressed previously. The issue is resolution, not adjudication. If the Congress would authorize the 500 or 1000 special judges which would be necessary, and which of course would never happen because of the cost, it should instead investigate means to encourage private dispute resolution, and keep the cases out of court.

We appreciate the opportunity to present these views and commend the Commission for addressing a critically important issue involving workplace fairness and productivity.